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<i>Presumptions</i> ,	<div style="display: flex; align-items: center;"> <div style="font-size: 3em; margin-right: 10px;">{</div> <div> GEORGE STUART PATTERSON, of the Philadelphia Bar. WILLIAM DRAPER LEWIS, of the Phil- adelphia Bar. </div> </div>
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TABLE OF TITLES AND DEFINITIONS.

See index for numerous sub-titles and definitions contained in the notes.

- Practicable—Practicably 1
 Practical, 1
 Practice, 1
 Practicing, 2
PRAYER (IN EQUITY). See Equity
 Pleading, 2
 Precarious, 2
PRECATORY. See Powers; Trusts;
 Wills, 2
 Precept, 2
 Precincts, 2
 Precise, 3
 Predominant, 3
PRE-EMPTION. See Public Lands, 3
 Pre-existing, 3
 Prefer; Preferred; Preference, 3
 Pregnant, 3
 Prejudice, 4
PREMEDITATION; PREMEDITATED, ETC.
 See Homicide; Deliberate, 4
 Premises, 4
 Premium, 6
 Prerogative, 6
PRESCRIPTION, 6
 Presence, 31
 Present, 32
 Presentation, 32
 Presentment, 32
 Preside; Presiding, 32
PRESIDENT OF THE UNITED STATES, 32
 Presume, 36
PRESUMPTIONS, 36
PRETENSE. See False Pretenses, 82
PRETERMITTED. See Legacies and
 Devises; Statutes of Descent and
 Distribution, 82
 Pretext, 82
 Prevailing Party, 82
 Prevent, 82
 Previous, 82
 Price, 82
 Prima Facie Case or Evidence, 83
 Primage, 83
 Primary Election, 83
 Prime, 83
PRINCIPAL AND ACCESSORY. See Ac-
 cessory, 83
PRINCIPAL AND AGENT. See Agency, 83
PRINCIPAL AND SURETY. See Surety-
 ship, 83
 Principles, 83
 Print; Printer, etc., 84
PRINTS AND LABELS. See Labels;
 Trademark, 84
 Priority, 84
PRISONS, 85
 Private, 94
PRIVATE WAYS, 95
 Privilege, 120
PRIVILEGED COMMUNICATIONS, 12
 Privies; Privity, 156
 Prize, 157
 Prize-fight, 157
 Probability, 161
PROBABLE CAUSE. See Malicious Pros-
 ecution; Cause; Searches and Seiz-
 ures, 161
PROBATE AND LETTERS OF ADMINIS-
TRATION, 161
 Procedendo, 218
 Procedure, 219
 Proceeding, 220
 Proceed, 221
 Proceeds, 221
PROCESE, 221
 Processioning, 225
 Process Verbal, 225
 Proclamation, 225
 Procure, 226
 Produce; Products, 226
 Production, 227
PRODUCTION OF DOCUMENTS, 227
PROFANITY. See Blasphemy, 257
 Profession; Professional, 257
 Profits, 257
PROFITS A PRENDRE, 259
PROHIBITION, 263
 Promise, 282

TABLE OF TITLES AND DEFINITIONS.

- PROMISSORY NOTE.** See Bills and Notes, 283
- PROMOTERS.** See Corporations, 283
- Prompt, 283
- Proof, 283
- Proper, 283
- Property, 283
- Proposal, 289
- Proprietary, 289
- Proprietor, 289
- Propriety, 290
- Pro Rata, 290
- Prosecute, 290
- PROSECUTING ATTORNEY.** See District Attorney; Public Officers, 290
- Prosecution, 290
- Prosecuting Witness, 291
- Prostitute; Prostitution, 291
- Protect, 292
- PROTEST.** 292
- Protestant, 298
- Protestation, 298
- Provided; Proviso, 298
- Provisional, 299
- Provisional Remedy, 299
- Provisions, 299
- PROVISO.** See Provided, 299
- Provoke, 300
- Proximate and Remote Cause, 300
- PROXY.** See Stockholders, 302
- Prudential, 302
- Public, 302
- Public Administration — Administrator, 305.
- PUBLIC DOCUMENTS.** See Books as Evidence; Documents; Elections; Judicial Notice; Records, 305
- Public House, 305
- PUBLIC LANDS.** 305
- PUBLIC OFFICERS.** 378
- Public Peace, 563
- Public Place, 563
- Public Policy, 565
- PUBLIC PROSECUTOR.** See District Attorney; Public Officers, 566
- PUBLIC RECORDS.** See Records, 566
- Publication—Publish, 567
- Publisher, 568
- Pueblo, 568
- PUFFER.** See Auctions and Auctioneers; Fraudulent Sales, 568
- PUNCTUATION.** See Interpretation; Statutes; Wills, 568
- Punishable, 568
- Punishment, 569
- PUNITIVE DAMAGES.** See Damages; Exemplary Damages, 570
- PUPIL.** See Education; Parent and Child; School, 570
- Purchase, 571
- Purchase Money, 573
- PURCHASE MONEY MORTGAGES.** 574
- Purport, 590
- Purposely, 591
- PURPRESTURE.** See Nuisances; Interjunctions, 591
- Pursuance, 591
- PUTTING IN FEAR.** See Robbery, 591
- PUTS (IN CONTRACTS).** See Gambling Contracts, 591
- Qualification, 592
- Qualified, 592
- Qualify, 592
- QUALITY.** See Implied Warranty; Indictment; Pleading; Representations; Warranty, 593
- Quando Acciderint, 593
- Quanti Minoris, 593
- QUANTITY.** See Indictment; Pleading, 593
- Quantum Damnificatus, 593
- Quantum Meruit, 593
- QUANTUM VALEBAT.** See Assumpsit, 593
- Quarantine, 594
- QUAKE CLAUDUM FREGIT.** See Trespass, 595
- Quarrel, 595
- Quarry, 595
- Quash, 596
- Quasi, 596
- QUASI CORPORATIONS; QUASI MUNICIPAL CORPORATIONS.** See Corporations; Franchises; Counties; Municipal Corporations; Municipal Securities; Schools; Township, 596
- Quasi Crimes, 597
- QUASI DEPOSIT.** See Deposit, 597
- Quasi Derelict, 597
- QUASI PUBLIC RECORDS.** See Records, 597
- Quay, 597
- Question, 597
- QUESTIONS OF LAW AND FACT.** 598
- QUIA TIMET.** See Bills Quia Timet, 659
- QUICK DISPATCH.** See Demurrage; Lay Days, 659
- QUICK WITH CHILD.** See Abortion; Big; Child; Medical Jurisprudence; Pregnant, 659
- QUIET ENJOYMENT.** See Covenant; Implied Covenant; Lease; Real Covenants, 659
- QUIETING TITLE.** See Bill to Remove Clouds, 659
- QUI TAM ACTIONS.** See Penalties, 660
- Quota, 660
- QUO WARRANTO.** 660
- RACING.** See Gaming, 686
- Radius, 686
- RAILROAD COMMISSIONERS.** 686
- RAILROAD POOLS.** 691
- RAILROAD SECURITIES.** 694
- RAILROADS.** 775
- RAIN-WATER.** See Surface Water, 945

TABLE OF TITLES AND DEFINITIONS.

Raise, 945	Realize, 1027
Rank, 945	REAL PROPERTY , 1028
Ransom, 946	Rear, 1076
RAPE , 946	Reasonable, 1077
RASURE . See Alteration of Instru-	Reasonable Care, 1078
ments, 969	Reasonable Cause, 1079
Rate, 970	REASONABLE DOUBT , 1079
Ratification, 970	Reasonable Time, 1089
Ravine, 970	Rebuttal—Rebutting Evidence, 1093
Read, 970	Rebutter, 1093
Ready, 971	RECAPTION , 1093
Real, 971	RECAPTURE . See Capture; Interna-
Real Actions, 971	tional Law, 1111
REAL COVENANTS , 973	Receptor, 1111
REAL EFFECTS . See Effects, 1027	RECEIPTS , 1111
REAL ESTATE BROKERS . See Brokers,	Receive, 1131
1027	

THE AMERICAN AND ENGLISH. ENCYCLOPÆDIA OF LAW.

PRACTICABLE — PRACTICABLY.—The word “practicable” means that which may be done, practiced, or accomplished—that which is performable, feasible, possible; and the adverb “practicably” means in a practicable manner.¹

PRACTICAL.—See note 2.

PRACTICE.—The form, manner and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law and the rules laid down by the respective courts.³ It may include pleading, but is usually employed as excluding both pleading and evidence, and to designate all the incidental acts and steps in the course of bring-

1. *Streeter v. Streeter*, 43 Ill. 157.
See also *State v. Milwaukee Co.*, 25 Wis. 339; *Nast v. Jewett*, 61 Vt. 501.
See also NEAREST; POSSIBLE.

Reasonably Practicable.—A direction that a set of affirmative and negative rules shall be observed “so far as is reasonably practicable,” will not, unless under very exceptional circumstances indeed, apply to the negative rules. “It is always possible not to do that which you are forbidden to do.” *Wales v. Thomas*, 16 Q. B. D. 340; 2 Times Rep. 53; and it was accordingly held in that case that the rule in § 51, English Coal Mines Regulation Act, 1872, 35 & 36 Vict. ch. 76, prohibiting firing a shot in a mine until the men are out of it, is unqualified by the words at the commencement of the section that the rules thereby laid down “shall be observed so far as is reasonably practicable.”

All Practicable Speed.—An English statute provides that every person having in his possession or under his charge an animal affected with

a contagious disease shall with “all practicable speed” give notice to the police of the fact. *Held*, that under any reasonable construction of the words “all practicable speed,” it is necessary that the person shall have knowledge of the animal’s being diseased before it can be said that he neglects to give such notice. *Nichols v. Hall*, L. R., 8 C. P. 322; 5 Moak’s Eng. Rep. 300.

2. **“Practical Location”** of a division line is identical in meaning with actual location. Both call for a mutual acquiescence in a known line, and for a long period of time. *Hubbell v. McCulloch*, 47 Barb. (N. Y.) 287. See also ADVERSE POSSESSION, vol. 1, p. 248.

A **“Practical Construction”** of a constitution refers to practice sanctioned by general consent. *Farmers’ etc. Bank v. Smith*, 3 S. & R. (Pa.) 69.

3. *Bouvier’s Law Dict.*; *Burrill’s Law Dict.*; *Abbott’s Law Dict.*; *Whart. Law Lexicon*; *Bowling v. Brier*, 87 Ind. 395.

ing matters pleaded, to trial and proof, and procuring and entering judgment on them.¹

PRACTICING.—See note 2.

PRAYER (in Equity).—See EQUITY PLEADING, vol. 6, p. 70.

PRECARIOUS.—See note 3.

PRECATORY.—See POWERS; TRUSTS; WILLS.

PRECEPT.—A command or mandate in writing of equal im with writ or process.⁴

PRECINCTS.—Precinct is a general word and not a technical and indicates any district marked out and defined.⁵

1. Abbott's Law Dict.

The rules adopted by a court to facilitate the transaction of business before it in a proper and orderly manner. Anderson's Law Dict., citing *Butler v. Young*, 1 Flip. (U. S.) 279; *Bowlies v. Brier*, 87 Ind. 395.

Practice, in the larger sense, is the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or declares the right, sometimes convertible with procedure. *Payson v. Minors*, L. R., 7 Q. B. Div. 333.

2. **Practicing Law.**—In *McCargo v. State* (Miss. 1887), 1 So. Rep. 161, it was held that a retired lawyer who tries a single case for a neighbor gratuitously is not a practicing lawyer, liable to a penalty for practicing without having paid the privilege license tax. The court said: "It is only the practicing lawyer who is required by the statute to pay a privilege tax. The term practicing, as used in the statute, implies something more than a single act or effort. Webst. Dict. A retired lawyer who conducts but one suit in court for a friend or neighbor, without fee or reward, is not thereby brought in the classification of a practicing lawyer; and for him to do so without a privilege tax license is no more a violation of law than it would be for a retired dentist to extract gratuitously a tooth for another without first obtaining a privilege tax license, as practicing dentists are required to do."

In *State v. Bryan*, 98 N. Car. 644, it was held that to constitute a practicing of law within the prohibition of the statute, it is necessary that the person charged with its violation shall have customarily or habitually held himself out to the public as a lawyer,

or that he demanded compensation for his services as such; and that that a person on one occasion act as an attorney for a party to an action where there was no evidence that he did so in other cases, or that he received or demanded compensation for his services, is not sufficient evidence to go to the jury to be considered in determining whether he practiced law in the meaning of the statute, but it is not conclusive of fact.

3. The circumstances of an exception are "precarious" only when his conduct and character present evidence of improvidence or recklessness in the management of the estate, or of his own, as, in the opinion of prudent and discreet men, endangers its security. *Shields v. Shields*, 1 Barb. (N. Y.) 56. See also EXECUTORS AND ADMINISTRATORS, vol. 7, p. 1.

4. *Adams v. Vose*, 1 Gray (N. H.) 58.

5. *Union Pac. R. Co. v. Chey*, 113 U. S. 516, 524; and in that case it was held that in the connection in which it stood, it signified a district inferior to a county and superior to a township.

The word "precinct," as used in the officer's return, means the territory within which the officer may be discharged the duties of his office cannot fairly be interpreted as meaning the whole State. *Brooks v. N. H.*, 124 Mass. 172.

Under a *Kentucky* statute relating to the taxing of railroads, which provides that the rolling stock and estate shall be taxed for the purpose of each county, city, town, or precinct in which any part of the railroad is located, it was held that the "precinct" cannot be construed to mean a common school district.

PRECISE.—See note 1.

PREDOMINANT is understood to be something greater or superior in power and influence to others, with which it is connected or compared.²

PRE-EMPTION.—See PUBLIC LANDS.

PRE-EXISTING.—See note 3.

PREFER, PREFERRED, PREFERENCE.—(See also ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 560; COMPOSITION WITH CREDITORS, vol. 3, p. 398; DEBTOR AND CREDITOR, vol. 5, p. 184; DIVIDENDS, vol. 5, p. 743; INSOLVENCY, vol. 11, p. 212; STOCK).—"Preferred" means that the thing to which it is attached has some advantage over another thing of the same character, which but for this advantage would be like the other.⁴

PREGNANT.—See note 5. (See also ABORTION, vol. 1, p. 30; ASSAULT, vol. 1, p. 821; BASTARDY, vol. 2, p. 137; BIG, vol. 2, p. 191; BILL DE BENE ESSE, vol. 2, p. 289; CHILD, vol. 3, pp. 229, 233; MEDICAL JURISPRUDENCE, vol. 15, p. 211.)

Louisville etc. R. Co. v. Johnson (Ky. 1889), 11 S. W. Rep. 666.

The term "precinct," as used in article IV, § 4, Const. of *Wisconsin*, which provides that the legislature shall organize assembly districts "consisting of contiguous territory and bounded by county, precinct, town, or ward lines," has reference only to certain districts having similar functions to those of towns in territorial times, and which passed away under the formation of the first legislative districts, after the admission of the State, and the term is no longer used, except, perhaps occasionally interchangeably with election districts. Chicago etc. R. Co. v. Oconto, 50 Wis. 196.

By statute provision the warden and deputy warden of the State prison may serve legal processes within the "precincts" of the prison. The "precincts" embrace not only the prison building, but the grounds connected therewith. Hix v. Sumner, 50 Me. 290.

Precinct and Village Distinguished.—A village is a municipal corporation created for the purpose of local government, and may sue and be sued; a precinct is a political subdivision of a county, possessing no corporate powers. Accordingly, it was held that illegal voting at a village election was not punishable under §§ 181, 185, of the Crim. Code of *Nebraska*, which prohibits illegal voting at a "precinct."

State v. Chichester (Neb. 1891), 47 N. W. Rep. 934.

1. When such terms as "clear, precise, explicit, unequivocal and indubitable," are used by the courts in defining the requisite proof of a particular fact to be made out by verbal testimony, it is meant that a conviction shall be fastened in the minds of jurors as strong as verbal testimony is able to convey. It is meant that the witnesses shall be found to be credible; that the facts to which they testify are distinctly remembered; that details are narrated exactly and in due order, and that their statements are true. Absolute certainty is, of course, out of the question. Spencer v. Colt, 89 Pa. St. 314.

2. Shaw, C. J., in *Matthews v. Bliss*, 22 Pick. (Mass.) 48.

3. The words "pre-existing debt," in their natural meaning, include all debts, previously contracted, whether they have become payable or not. Fletcher, appellant, 136 Mass. 340.

4. State v. Cheraw etc. R. Co., 16 S. Car. 530.

5. In an indictment, for administering a medicine to a woman with intent to produce a miscarriage, the words "woman with child" are equivalent to "pregnant woman." Eckhardt v. People, 83 N. Y. 462; 38 Am. Rep. 462.

A woman is "pregnant with a quick child" when the child has become

PREJUDICE—(See also BIAS, vol. 2, p. 190, n; JURY AND JURY TRIAL, vol. 12, p. 352; CHANGE OF VENUE, vol. 3, p. 96; JUDGE vol. 12, p. 52; LOCAL, vol. 13, p. 987; REMOVAL OF CAUSES).—I must mean an opinion or judgment in regard to the case, formed beforehand, without examination, or a prepossession.¹

PREMEDITATION, PREMEDITATED, etc.—See HOMICIDE, vol. 9, p. 529; DELIBERATE, vol. 5, p. 520.

PREMISES—(See also DEED, vol. 5, p. 454).—The term premise is, in common parlance, used to signify the land with its appurtenances, but its usual and appropriate meaning in conveyance is the thing devised or granted by the deed.²

quicken in the womb. *Evans v. People*, 49 N. Y. 89.

Pretended or Alleged Pregnancy.—The uncertainty in point of fact of the precise period of gestation, gives occasion to a proceeding at common law, when a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate. In this case at common law, the heir, or other person interested, immediately or contingently, may have a writ *de ventre inspiciendo*, to examine whether she be with child or not; and if she be, to keep her under proper restraint till delivered; which is also entirely conformable to the practice of the civil law; but if the widow be proved not pregnant, the presumptive heir or successor to the estate shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within the legal period.

The writ *de ventre inspiciendo*, which is said to be of common right, and not in the discretion of the court, directs the sheriff or sergeant to summon a jury of twelve men, and as many women, by whom the female is to be examined (*tractari per ubera et ventrem*), in the presence of the men, the exigency of the case dispensing at once with common decency and respectful deference to the sex. If this mandate were strictly observed, according to its terms, it would be, as Mr. Hargrave justly observes, an intolerable grievance. It seems, however, that the courts have, sometimes at least, winked at the men's withdrawing themselves during the search. It appears from some of the reports that it was so managed in Willoughby's case, 2 Cro. (Eliz.) 566; although according to Croke, the writ was literally complied with. At all events, for

more than a century past, the court have been accustomed to make a previous order that the writ should issue unless by a designated time, and from time to time afterwards, the female shall submit to a satisfactory examination by women of skill, who may report her condition to the court; and that the actual employment of the writ seems to have been avoided. 1 Mino Inst. 409, citing Reg. Brev. Orig. 227 1 Th. Co. Lit. 143-44 and n. (7); 1 Abr. *Ventre Inspicio* (A); Willoughby's Case, 2 Cro. (Eliz.) 566; Theake Case, 3 Cro. (Jac.) 685; Aiscough Case, 2 P. Wms. 591; *Ex parte Willoughby*, 4 Bro. C. C. 90.

There is yet another instance of common law which occasions an examination as to a woman's alleged pregnancy. When capitally convicted a woman might plead her pregnancy. The judge directed that a jury of twelve matrons should inquire into the fact; and, if she was found to be pregnant, execution was stayed until she delivered. 4 Bl. Com. 394. In *S v. Arden*, 1 Bay (S. Car.) 489, the jury found the prisoner not pregnant. The plea was held inadmissible. *Holman v. State*, 13 Ark. 105, where the prisoner had been sentenced to the penitentiary for a year.

For an interesting account of such an examination, see 9 Cent. L. J. 94. Also JURY AND JURY TRIAL, vol. 12, p. 321.

1. *Hungerford v. Cushing*, 2405.

2. *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 15 N. J. Eq. 418.

Construed in a city charter requiring owners to keep their premises in repair, etc., as not applying to

Definition.**PREMISES.****Definition.**

adjacent sidewalk and street. *Amos v. Fond du Lac*, 46 Wis. 695.

The word never describes personalty. *Carr v. Fire Assoc.*, 60 N. H. 520.

The word "premises," as used in an *Ohio* act regulating the sale of liquor, was held to include both land and tenements. *Bowers v. Pomeroy*, 21 Ohio St. 188.

In the redelivery covenant of a lease of a factory building and land, the word was held not to include a portable wood cutting machine worked by a belt attached to the factory. *Holbrook v. Chamberlin*, 116 Mass. 155.

In *Fuller v. Davis*, 4 Duer (N. Y.) 187, the plaintiff had agreed to rent of the defendant the floor and basement of a building at a certain price, in consideration of which, the defendant agreed that the premises and fixtures should be finished in the same way as the store of "B" in the same street. It was held, that premises, as used in the lease, included the buildings as well as the land, and that the defendant was bound to make the roof of the leased property as good as that of "B."

Intoxicating Liquors.—It has been held that within the meaning of an *Illinois* statute, prohibiting the sale of liquor to be drank upon premises adjacent to the place of sale, a public street or alley fronting the place is included in the word "premises." *Bandalow v. People*, 90 Ill. 219.

A *Kentucky* statute permitted distillers to sell spirits at their residences, provided that the residences were "located upon the distillery premises or premises adjacent." A distiller rented at a nominal rent two or three narrow strips of land, connecting his distillery with his residence, a mile and a half distant. *Held*, that the residence was not upon the "distillery premises or premises adjacent." *Creekmore v. Commonwealth* (Ky. 1889), 12 S. W. Rep. 628.

Insurance Policy.—In a policy of insurance upon a vessel, and in a clause which read, "If the premises should be vacated in whole or in part, etc.," the word "premises" means the insured property; in that case the vessel. *Reid v. Lancaster F. Ins. Co.*, 19 Hun (N. Y.) 284.

"Premises" in a policy upon a habitation covers the whole property insured, dwellings, outhouses and appurtenances, which together compose the

establishment. *Heerman v. Adriatic F. Ins. Co.*, 45 N. Y. Super. Ct. 394.

A fire insurance policy, on a specifically described steam flour mill and machinery, prohibited the keeping of petroleum on "the premises." The insured kept a barrel of petroleum in the engine house adjoining, but not included in the specific description of the premises. The fire originated in the main building. *Held*, that the petroleum was not on "the premises," and that, even if it were, the insured had a right to keep petroleum on the premises for the purpose of lubricating the insured machinery. *Carlin v. Western Assur. Co.*, 57 Md. 515; 40 Am. Rep. 440.

And to the same effect see *Northwestern Mut. L. Ins. Co. v. Germania F. Ins. Co.*, 40 Wis. 446; *Allemania F. Ins. Co. v. Pittsburg Exposition Society* (Pa.), 11 Atl. Rep. 572.

See generally *FIRE INSURANCE*, vol. 7, p. 1032.

In Wills.—Where a testator gave permission to A to occupy a "mansion, house, garden and premises" rent free, it was held that the word "premises" meant "premises in immediate connection with the mansion and without the occupation of which the mansion could not be conveniently occupied and enjoyed" (per *Turner, L. J.*, *Lethbridge v. Lethbridge* 31 L. J. Ch. 741; 4 De G. F. & J., 352.) A park of 100 acres adjoining the mansion-house was accordingly in that case, held to be included in the word "premises." *Lethbridge v. Lethbridge*, 30 L. J. Ch. 388; *secus*, as regards the home farm, though it was contiguous to the mansion-house, and was in hand at the death of the testator. *Lethbridge v. Lethbridge*, 31 L. J. Ch. 737. In such a connection "premises" is as nearly as possible synonymous with appurtenances. *Read v. Read*, W. N. (66) 386; 15 W. R. 165. See further *Doe d. Hemming v. Willets*, 7 C. B. 709.

The word "premises" means "lands and tenements." *State v. French*, 120 Ind. 229. See also *Winlock v. State* (Ind.), 23 N. E. Rep. 15; *Hilton's Appeal*, 116 Pa. St. 351.

In Deeds.—The word premises in the *habendum* in a deed may refer to the title and interest intended to be conveyed as well as to the land itself. *Cummings v. Dearborn*, 56 Vt. 441. See also *Holbrook v. Debo*, 99 Ill. 372; *Trull v. Eastman*, 3 Met. (Mass.) 121.

PREMIUM.—See note 1.

PREROGATIVE.—This word can hardly be said to have a place in American law. When found in our judicial opinions, it is used generally, not in its accepted legal sense as understood in *England*, but rather as indicating a legislative or executive power conferred by or claimed under a constitution. Those powers reserved in the prerogative of the monarch in *England*, and which have caused so much discussion in the English books concerning its scope, extent and limitations, are distributed in the *United States* between the executive and legislative branches of the government either by express constitutional provisions, or by those implied, as, for example, the granting of corporate franchises, which formerly in *England* was a prerogative of the king, but which now there is now vested in the legislature, has been always under the constitutions of the States of the Union, a legislative power. The law appertaining to those powers which, under our system, correspond to the king's prerogative, is to be found under the various titles of this work within which it naturally falls.²

PRESCRIPTION.—(See also ADVERSE POSSESSION, vol. 1, p. 2; EASEMENTS, vol. 4, p. 971; EASEMENTS, vol. 6, p. 139; FERRIES, vol. 7, p. 941; FISH AND FISHERIES, vol. 8, p. 23; HIGHWAYS, vol. 9, p. 362; LATERAL AND SUBJACENT SUPPORT, vol. 12, p. 9; LIMITATION OF ACTIONS, vol. 13, p. 667; WATER AND WATER COURSES; WAYS.)

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|---|---|
| I. Definition, 7. | 5. Peaceable, 22. |
| II. Presumption of Grant, 7. | 6. Acquiescence and Knowledge of the Owner, 23. |
| III. Distinction Between Prescription and Custom, 10. | 7. Extent of User, 24. |
| IV. Character of the Adverse User, 11. | V. Of What a Prescription May Be Gained, 24. |
| 1. Long Continued, 11. | 1. Pasturage, 25. |
| 2. Adverse, 12. | 2. Fisheries, 25. |
| 3. Exclusive, 17. | 3. Private Ways, 25. |
| 4. Continuous, 18. | |

The premises of a deed are all the foreparts of the deed before the *habendum* (Touch. 75). See also *Berry v. Billings*, 47 Me. 416. The word "premises" in fact signifies what has gone before; and therefore may with propriety be used in relation to any preceding subject or subjects. Thus where a testator devised a certain messuage and the furniture in it to A for life, and after his decease he gave "the said messuage and premises" to B, the latter devise was held to carry the furniture as well as the messuage. *Sanford v. Irby*, 4 L. J., O. S. Ch. 23. See also *Doe v. Meakin*, 2 East 456; *Fitzgerald v. Field*, 1 Russ. 427.

1. Premium Distinguished from Wager.—To a "wager" or "bet" there are two parties, to a "premium" or reward there is but one party, until the thing or purpose for which it is offered has been accomplished. A "premium" is a reward or recompense for some act done; a "wager" is a stake upon an uncertain event. In a "premium" it is known who is to give before the event in a "wager" it is not known until after the event. *Alvord v. Smith*, 63 Ir. 62.

For "premium of insurance" see the various titles on INSURANCE.

2. See 1 Bl. Com., ch. 7, and note thereto in Cooley's edition.

4. *Highways*, 25.
5. *Right of Way Over Railroad*, 26.
6. *Waters*, 27.
7. *Light and Air*, 27.
8. *Lateral Support*, 28.
9. *Offices*, 29.

10. *Corporate Franchises*, 29.
11. *Markets*, 29.
12. *Ferries*, 29.
13. *Miscellaneous*, 29.
- VI. What May Not be Prescribed for, 30.
- VII. Pleading and Evidence, 30.

I. DEFINITION.—Prescription is a mode of acquiring title to incorporeal hereditaments by immemorial or long-continued use.¹

II. PRESUMPTION OF GRANT.—Anciently a technical prescription was required to be established by proof of use and enjoyment beyond the memory of man. If the beginning of the use was shown, the prescription was defeated.² To obviate the uncertainty as to time, the English courts, in the eighteenth century, adopted the fiction of presuming a grant from twenty years possession or use.³ The presumption of a grant from adverse use differs from the ancient technical prescription, in the fact that it is not conclusive to establish title, but may be rebutted by other evidence.⁴ Thus in an English case where lights have been en-

1. Prescription is where a man claims anything because he, his ancestors or predecessors, or they whose estate he hath, have had or used it all the time whereof no memory is to the contrary. *Terms de la Ley*, p. 487.

The term prescription is sometimes applied to corporeal hereditaments as well as to incorporeal hereditaments. In *Campbell v. Holt*, 115 U. S. 620, the court by Miller, J., said: "By the long and undisturbed possession of tangible property, real or personal, one may acquire a title to it, or ownership, superior in law to that of another, who may be able to prove an antecedent and, at one time, paramount title. This superior or antecedent title has been lost by the laches of the person holding it, in failing within a reasonable time to assert it effectively; as, by resuming the possession to which he was entitled, or asserting his right by suit in the proper court. What the primary owner has lost by his laches, the other party has gained by continued possession, without question of his right. This is the foundation of the doctrine of prescription—a doctrine which, in the English law, is mainly applied to incorporeal hereditaments, but which, in the Roman law, and the codes founded on it, is applied to property of all kinds."

Mr. Angell, in his work on Limitations of Actions, says that the word limitation is used in reference to the time which is prescribed by the authority of the law (*ab auctoritate legis*, 1

Co. Litt. 113) during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment, or the time at the end of which no action at law or suit in equity can be maintained; and in the Roman law it is called *prescriptio*.

"Prescription therefore," he says, "is of two kinds—that is, it is either an instrument for the acquisition of property, or an instrument of an exemption only from the servitude of judicial process." Angell on Limitations, §§ 1, 2.

In *Caldwell v. Copeland*, 37 Pa. 427; 78 Am. Dec. 436, the term prescription was restricted to incorporeal hereditaments only. Woodward, J., in commenting upon the effect of a severance of minerals from the surface said: "So entirely is a mineral-right, after severance, a claim to land, and therefore not an incorporeal hereditament, that title to it cannot be acquired by prescription. Prescription lies only for incorporeal rights, not for land. It may confer a right to work a particular mine, as it may confer a right of way across another's estate or a right to fish in another's waters; but the title to the mine itself, like title to land, must be made out by documentary evidence, or under the Statute of Limitations."

2. Washburn's Easements, 110.

3. Washburn's Easements, 110.

4. In *Cooper v. Smith*, 9 S. & R. (Pa.) 26; 11 Am. Dec. 658, an attempt was made to establish a pre-

joyed for more than twenty years over land which, during part of the time, had been glebe land, it was held that a grant could not be presumed, inasmuch as the rector, being only tenant for life, was incompetent to grant such an easement.¹

scriptive right to a landing for a ferry. In delivering the opinion of the court, Duncan, J., said: "If the plaintiff in error had given any evidence to show a continued exclusive possession and enjoyment, with the acquiescence of the owner of the inheritance, for twenty-one years, by way of analogy, as to the time of the Statute of Limitations, the court should have left this to the jury as presumptive evidence of a right, by grant or otherwise; and unless contradicted or explained, the jury ought to believe it. Length of time cannot be said to be an absolute bar, like a Statute of Limitations, but is only a presumptive bar to be left to a jury. The presumption of grant from long usage is for the sake of peace and furtherance of justice. It cannot be supposed where there has been a long exercise and possession of such right, that any person would suffer his neighbor to obstruct the light of his windows, or render his house uncomfortable, or to use a way for so long a time with carts and carriages, unless there had been some agreement between the parties to that effect; but this principle must always be taken with the qualification, that a possession from which a party would presume a grant or easement, must be with the knowledge of the person seised of the inheritance."

Goddard in his treatise on the Law of Easements, says: "The whole theory of prescription depends upon the presumption of a grant having been made: If, therefore, it can be shown that no grant could have been legally made, or that any easement lawfully created must have been subsequently extinguished by unity of seisin or otherwise, or if it can be shown to be a very improbable thing that a grant was ever made, the presumption cannot arise, and the title by prescription fails." This passage was quoted with approval by Chief Justice Cockburn, in *Angus v. Dalton*, L. R., 3 Q. B. D. 85, which was an action by the owners of a factory against the defendants for excavating the soil of an adjoining house in such a manner as to leave part of the factory without sufficient lateral support, and thereby causing it to

fall. It appeared that the two buildings had apparently been erected at the same time, and were estimated to be upwards of one hundred years old. Both had been occupied as dwelling-houses until about twenty-seven years before the accident, but the plaintiff's predecessors had then converted his house into a coach factory, removing the internal walls, and erecting a stack of brickwork which both served as a chimney stack, and supported the girders which had to be put up to sustain the floors. The defendants, in taking down the adjoining house and in digging cellars which had not previously existed, left a support for the chimney stack which proved insufficient, and it fell, drawing after it the entire factory. It was held by the majority of the court (Cockburn, C. J., and Mellor, J.), that the defendants were entitled to judgment, for first, no grant of a right of lateral support for the factory by the adjacent land could be presumed from the enjoyment of such support by the plaintiff for twenty years, inasmuch as the owners of this land never had any power to oppose the conversion of the dwelling-house into a factory, and had no reasonable means of resisting or preventing the enjoyment by such factory of lateral support from the adjoining soil, and for the same reason such a support was not an easement which had been enjoyed for twenty years within the Prescription Act (2 & 3 Wm. IV, ch. 71, § 2), as it could not be said to have been enjoyed by a person claiming right thereto and without interruption.

In *Parker v. Foote*, 19 Wend. (N. Y.) 309, it was held that the question of the presumption of right by grant or otherwise, although there has been an uninterrupted enjoyment of an incorporeal hereditament for more than twenty years, must be submitted to the jury; a judge is not justified in telling the jury that they must, but should instruct them that they may presume a grant, except in a plain case where there is no evidence to repel the presumption arising from twenty years' uninterrupted adverse user.

1. *Barker v. Richardson*, 4 B. & Ald. 578.

If, however, there has been an adverse, continuous and uninterrupted enjoyment of an easement for the period limited by the Statute of Limitations, and the use has been with the acquiescence of the owner of the estate upon which the easement has been conveyed, there arises a conclusive presumption, which cannot be overcome even by proof that there was no actual grant. In this way, by giving effect to the attendant circumstances connected with the use, as well as to the use itself for the statutory period, as good a title is obtained under the doctrine of presumptive grant, as under the ancient technical prescription.¹

1. Washburn in his treatise on Easements, page 114, says: "It may therefore be stated as a general proposition of law, that if there has been an uninterrupted user and enjoyment of an easement, a stream of water for instance, in a particular way, for more than twenty-one or twenty, or such other period of years as answers to the local period of limitation, it affords conclusive presumption of right in the party who shall have enjoyed it, provided such use and enjoyment be not by authority of law, or by or under some agreement between the owner of the inheritance and the party who shall have enjoyed it."

In *Rodgers v. Shepherd*, 33 W. Va. 307, it was held that where there has been an open and public use of an easement for more than twenty years unexplained, it will be presumed to be under a claim of right and adverse.

In *Smith v. Putnam*, 62 N. H. 369, it was held that in the absence of evidence showing that the use was permissive, the open, continuous, uninterrupted and unquestioned use of a well and driveway for more than fifty years, establishes an easement thereto.

Where the purchaser of land buys it with the parol understanding that a strip of land adjoining it is to be reserved for an alley, such understanding forming part of the consideration for the purchase, his continued and uninterrupted use of it as an alley, under claim of right, for more than twenty years, gives him a right of way by prescription. *McKinzie v. Elliott* (Ill. 1890), 24 N. E. Rep. 965.

An adverse possession and user of water for five years continuously and uninterruptedly, with the knowledge of and to the injury of the true owner, will bar his right thereto; but a mere claim of right to the use and enjoyment of water, however long continued, will

not ripen into adverse title thereto. *Cox v. Clough*, 70 Cal. 345.

Where defendant had used a turbine wheel and the same point of depression where the water entered to it for more than twenty years, as a matter of right, he established a right of user thereby. *Terry v. Smith*, 47 Hun (N. Y.) 333.

A had for more than twenty years maintained an aqueduct over the land of B, and used the water from a spring on B's land, when B conveyed the land to C, containing a covenant that "A is to have the water from a certain spring where it now runs in the aqueduct as long as he or his heirs shall want it." *Held*, that A had an indefeasible title to the easement, both by prescription and by deed. *Keysar v. Covell*, 62 N. H. 283.

A grant may be presumed from acts of use and occupation for ten years accompanied by a claim of ownership. And the rule is not affected by the fact that such occupation and acquiescence was the result of an erroneous fixing of a division line by adjoining owners. *Burdick v. Heivly*, 23 Iowa 511.

In a question of the presumption of a grant it is not necessary that actual possession should always be in the presumptive grantee. *Glass v. Gilbert*, 58 Pa. St. 266.

An uninterrupted user of an easement on the land of another for a period of twenty years, under a claim of right, while all parties concerned are free from any disability, and seised of estates in fee and in possession, is *prima facie* evidence of a right to such easement, and of a grant which is not lost or does not exist. *French v. Marstin*, 24 N. H. 440; 57 Am. Dec. 294.

A user for twenty years, exercised adversely and without anything to qualify it, will afford sufficient ground for the presumption of a grant; but if

III. DISTINCTION BETWEEN PRESCRIPTION AND CUSTOM.—Both prescription and custom apply to incorporeal hereditaments, but prescription is confined to those cases only where one person grants and another may take under the grant. Custom, on the other hand, is applicable to cases where the inhabitants of a particular locality have acquired an easement by long enjoyment without being capable of taking collectively as grantees under a deed.¹

the enjoyment can be referred to the leave or favor of the party over whose lands the right of way is claimed, or can be placed on any other footing than a claim or assertion of right, it will repel the presumption of a grant. *Evans v. Dana*, 7 R. 1. 306; *Hurlbut v. Leonard*, *Brayt. (Vt.)* 201.

The inhabitants of a town, in their corporate capacity, may prescribe for a way, or other easement or incorporeal hereditaments. And a grant may also be presumed from continued occupation, as well in favor of corporations as of individuals. *Com. v. Low*, 3 Pick. (Mass.) 408.

The existence of a very old deed, alone necessary to complete a perfect title in one in possession of land, will be presumed. *Arthur v. Arthur*, 2 Nott. & M. (S. Car.) 96.

In order to create the presumption of a grant it is not necessary that the possession, either in its origin or its continuance, should be accompanied by deeds or other writings, and they are only material to extend the boundary where a constructive possession is claimed beyond the actual occupation. *Marr v. Gilliam*, 1 Coldw. (Tenn.) 488.

In cases where the Statute of Limitations gives title to land, rules for presuming a conveyance cannot be sustained by the court. *Crawford v. Neff*, 3 Grant's Cas. (Pa.) 175.

In *Virginia*, twenty years' adverse user, exclusive undisturbed possession of things incorporeal, affords conclusive presumption of title. *Cornett v. Rhudy*, 80 Va. 710.

See also in general on the question of presumption of a grant, *Summer v. Child*, 2 Conn. 607; *Griffin v. Foster*, 8 Jones (N. Car.) 337; *Pue v. Pue*, 4 Md. Ch. 386; *Donnell v. Clark*, 19 Me. 174; *Campbell v. Thomas*, 9 B. Mon. (Ky.) 82; *Hall v. McLeod*, 2 Metc. (Ky.) 98; 74 Am. Dec. 400. And cases cited in subsequent notes.

1. The distinction between prescription and custom was considered by

Tindal, C. J., in *Lockwood v. Wood*, 10 Ad. & El. N. S. 50. In that case a person who held a market under a crown grant that certain persons styled Inhabitants of E., their heirs and assigns forever, should enjoy the market as freely as the grantor held of the crown. The court held that the grant did not exempt from stall an inhabitant not privy to the grant to such grant. The court said: "And upon referring to the several authorities which have been cited in support of the validity of such a prescription it will be found that the claim by the inhabitants, *qua* inhabitants, to an easement, wherever it has been allowed, has been invariably vested on the ground of custom, not on that of prescription. A custom which has existed from time immemorial without interruption within a certain place and which is certain and reasonable in itself, obtains the force of a law and is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm. In the case of custom therefore, it is unnecessary to look out for its origin; but in the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin where no grant could have been made to support it. Thus a custom for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom, as it was held in 5 Co. 87 (a), and yet a grant of such an easement to fishermen within the district *eo nomine* might well be void. . . . And further Lord Coke says, that "another difference was taken, and agreed, between a prescription, which always is alleged in the person, and a custom, which ought to always be alleged in the land; for every prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom; for that

Another distinction between prescription and custom is that the former extends to *profits à prendre* and the latter does not.¹

IV. CHARACTER OF THE ADVERSE USER.—The adverse use which will give title by prescription to an easement, is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. As in the case of adverse possession it must be continued for a long period; it must be adverse, under a claim of right, exclusive, continuous, uninterrupted and with the knowledge and acquiescence of the owner of the estate out of which the easement is claimed.

1. Long Continued.—The use which will ripen into title by prescription, must be long continued. In modern times the courts understand the long period of adverse use to correspond with the local period of limitation for quieting titles to land.²

ought to be reasonable, *et ex certa causa rationabili* (as Littleton saith), *usitata*, but need not be intended to have a lawful beginning; a difference which points out clearly the distinction which ought to govern the present case, viz: that such an easement in the inhabitants on Easingwold as is contended for, although it might be good by custom, if it had existed from time immemorial, yet it cannot be good by prescription, which must rest upon a grant to the inhabitants.

In order to determine whether rights are holden as a custom or as a prescription, it is necessary to advert merely to the manner in which they are holden; whether as a local user or as a personal claim, or dependent on a particular estate. *Perley v. Langley*, 7 N. H. 233.

1. In *Waters v. Lilley*, 4 Pick. (Mass.) 145, an attempt was made to establish a custom to take fish *in alieno solo* in an unnavigable river. The court by Parker, C. J., said: "The custom proposed to be proved is not one that could be sustained in law, even if specially pleaded; for a custom to take anything from another's land, or for a *profit à prendre*, is not a lawful custom. If such a right is available at all, it must be set up by prescription as belonging to some estate, and should be pleaded with a *que estate*. So it was decided in *Gateward's Case*, 6 Co. 60; and Coke says, 'note, reader, the law in this general case well resolved, and no book in the law is adjudged against it.' And in the case of *Grimstead v. Marlowe*, 4 T. R. 718, Lord Kenyon says the law has been so settled ever since the time of Gate-

ward's Case." See also *Pearsall v. Post*, 20 Wend. (N. Y.) 111; *Hardy v. Hollyday*, cited in 4 T. R. 718.

A town, however, in its corporate capacity, may gain a right to a *profit à prendre* by prescription. *Hill v. Lord*, 48 Me. 98; *Grimstead v. Marlowe*, 4 T. R. 718; *Sale v. Pratt*, 19 Pick. (Mass.) 191; *Foxhall v. Venables*, Cro. Eliz. 180.

2. *Hill v. Crosby*, 2 Pick. (Mass.) 467; 13 Am. Dec. 448; *Barnes v. Haynes*, 13 Gray (Mass.) 188; 74 Am. Dec. 629; *Campbell v. West*, 44 Cal. 646; *Miller v. Garlock*, 8 Barb. (N. Y.) 153; *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Nicholls v. Wentworth*, 100 N. Y. 455; *Perrin v. Garfield*, 37 Vt. 304; *Worrall v. Rhoads*, 2 Whart. (Pa.) 427; 30 Am. Dec. 274; *Hazard v. Robinson*, 3 Mason (U. S.) 272; *Demuth v. Amweg*, 90 Pa. St. 181; *Rowland v. Wolfe*, 1 Bailey (S. Car.) 56; 19 Am. Dec. 651; *Nash v. Peden*, 1 Spears (S. Car.) 17; *Mueller v. Fruen*, 36 Minn. 273.

In *Richard v. Williams*, 7 Wheat. (U. S.) 59, the Supreme court of the *United States* stated that "in general, it is the policy of a court of law to limit the presumption of grants to periods analogous to those of limitations, in cases where the statute does not apply."

The time of use must not be less than the term of limitation to give title by prescription. *Haight v. Price*, 21 N. Y. 241; *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57; *Green v. Chelsea*, 24 Pick. (Mass.) 71; *Lawton v. Rivers*, 2 McCord (S. Car.) 445; 13 Am. Dec. 741; *Jeter v. Mann*, 2 Hill (S. Car.) 641; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; 47 Am. Dec. 156; *Griffin v.*

2. Adverse.—The user to give title must be adverse.¹ be such a specific assertion of right as to expose the par

Foster, 8 Jones (N. Car.) 339; Sherwood v. Vliet, 20 Wis. 441; Gayetty v. Bethune, 14 Mass. 49; 7 Am. Dec. 188; Campbell v. Smith, 8 N. J. L. 140; 14 Am. Dec. 400; Prescott v. Phillips, cited 6 East 213; King v. Taffany, 9 Conn. 162; Gilman v. Tilton, 5 N. H. 231; Dyer v. Depui, 5 Whart. (Pa.) 586.

Evidence that a way was not kept in repair by complainant; that the original road-bed was not used for the length of time prescribed by statute; that trees were allowed to fall across the road and remain there, another way around them being used, will support a finding that the plaintiff was not entitled to the way by prescription. Russell v. Napier, 82 Ga. 770.

In *Tennessee*, the time limited by the Statute of Limitations has not been followed in cases of adverse user. In Ferrell v. Ferrell, 10 Heisk. (Tenn.) 329, Freeman, J., said: "The rule of presumption of a grant from the State has been settled in *Tennessee* by several cases to be twenty years, and we think this rule may be as well applied to a right of the character now under consideration, as to grants from the State. It is based on reason of public policy and to quiet titles, and is a presumption of law in favor of a long-continued possession. See Chilton v. Wilson, 9 Hun (N. Y.) 405; Cannon v. Philipps, 2 Sneed (Tenn.) 185. We think, therefore, these cases, recognizing the period for presumption of a grant, furnish a sounder analogy on which to fix the rule of presumption of a deed when it is to be made out solely by the user, than the period of seven years in our Statute of Limitations as to real property."

The following periods of use have been held sufficient to confer title by prescription:

Forty years. Canday v. Lambart, 2 Root (Conn.) 173; Nichols v. Boston, 98 Mass. 39; 93 Am. Dec. 132; Lewis v. San Antonio, 7 Tex. 288; Melvin v. Whiting, 10 Pick. (Mass.) 295; 20 Am. Dec. 524; Kent v. Waite, 10 Pick. (Mass.) 138; Coolidge v. Learned, 8 Pick. (Mass.) 511.

Thirty years. Wilson v. Marshall, 10 La. Ann. 327; Dodeman v. Barrow, 11 La. Ann. 87; Lajoie v. Primm, 3 Mo. 529.

Twenty-one years. Whelan v. Chrisman, 24 Pa. St. 298; 64 657; Okeson v. Patterson, 2 22.

Twenty years. Hill v. C. Pick. (Mass.) 467; 13 Am. I. Brace v. Yale, 10 Allen (M. Morrison v. Chapin, 97 Mass. nett v. Rhudy, 80 Va. 710; C. Lawton, 3 McCord (S. Car.) Kee v. Garrett, 1 Bailey (S. C. Campbell v. Smith, 8 N. J. 1 Am. Dec. 400; Felton v. Sin Ired. (N. Car.) 84; Griffin v. Jones (N. Car.) 339; Manier 4 B. Mon. (Ky.) 514; Stein v. 24 Ala. 130; 60 Am. Dec. 453; v. Rowe, 39 Ala. 722; Wright 38 Ala. 506; 82 Am. Dec. 73; v. Fernald, 26 Me. 436; 46 A. 573; Sargent v. Ballard, 9 Pick 251; Parker v. Foote, 19 W. Y.) 309; Miller v. Garlock, (N. Y.) 153; Webber v. Cha N. H. 326; 80 Am. Dec. 111; man v. Soule, 32 Ill. 278; 83 264; Evans v. Dana, 7 R. I. 30

Fifteen years. Rogers Brayt. (Vt.) 169; Tracy v. 36 Vt. 515; Shumway v. Simo 53; Arbuckle v. Ward, 29 Sherwood v. Burr, 4 Day (C. 4 Am. Dec. 211; Ingraham v. son, 2 Conn. 584.

Ten years. McCullough v. La. Ann. 466; Frederick v. E La. Ann. 383.

Seven years. Harrison v. Ga. 359.

Effect of Change of Statute tions.—Where title by presc not complete, when the law is altering the period, the past ti faced, and the substituted la mines the time which bars a Nickles v. Haskins, 15 Ala. 61 Rep. 154.

1. Examples.—In Sargent lard, 9 Pick. (Mass.) 251, t by Putnam, J., said: "Th tial ingredients were to l out by the owners of th claiming the service. They only prove the claiming fo years, but that it was continu terrupted and adverse—that is claim of right, with the acqu of knowledge of the owner." land v. Wolf, 1 Bailey (S. Ca

Am Dec. 651, Nott, J., said: "Lapse of time is not sufficient to afford such presumption. The use must be adverse to the claim of the owner of the land." In *Mitchell v. Walker*, 2 Aik. (Vt.) 266, 16 Am. Dec. 710, the court by Skinner, C. J., said: "This possession, it is contended by the plaintiff, and correctly, must be adverse to the claim of the owner or property." He adds, if the occupation be by mistake it will not avail, citing *Jackson v. Wilkinson*, 3 B. & C. 413, and 2 Sand. 173.

In an action for damages for obstructing an alley, plaintiffs claimed to have such an easement in it, by prescription, as entitled them to the continued and unobstructed use thereof. *Held*, that to acquire such an easement to land of another, the use must be open, adverse and under claim of right. *Dexter v. Tree*, 117 Ill. 532.

The laws of *California*, fixing a time in which a right by prescription shall be acquired, have not changed the common law requirements as to the manner of acquiring such right. It must still be by adverse possession; and one of the requisites of adverse possession being that it shall not be with the consent, express or implied, of the owner of the alleged servient estate, where, in an action to establish a right of way the court finds that the use of the way by plaintiff, claiming title by prescription, was with the implied consent of the owner of the land over which the way passed, a judgment for defendant is proper. *Thomas v. England*, 71 Cal. 456.

A right of way by prescription implies an adverse use of the way for twenty years; and the party using the way must use it as though he was exercising a right of property in himself, uncontrollable by the owner of the soil over which it runs. *Hogg v. Gill*, 1 McMull. (S. Car.) 329.

Part of a public highway was obstructed by a rail fence, but no attempt to reopen it was made by the public, and a new road-bed around the obstruction was beaten out by the public on the defendant's land and used continuously and worked as part of the public highway for more than seven years. Upon learning that the new road-bed was upon his land, defendant obstructed public travel. *Held*, that the public had acquired a right to the road-bed through defendant's land by adverse possession, and that defendant

was properly convicted for obstructing it. *Patton v. State*, 50 Ark. 53.

In establishing a prescriptive right of way over land of another, everything depends upon the character of the user. If exercised uninterruptedly, under a claim of right, and in the face of a proprietor *sui juris*, it may, in fifteen years, ripen into a right; but if done by the courtesy and license of the proprietor, and subordinately to his right as proprietor it will be otherwise. *Pierce v. Selleck*, 18 Conn. 321.

When the ditch running along the side of a road is used for over twenty years in draining the surface water of the road, or in confining spring water outside thereof, such user, taken in connection with the user of the road, amounts to a user of the ditch. *Dominick v. Hill*, 44 Hun (N. Y.) 622.

Where the purchaser of land buys it with the parol understanding that a strip of land adjoining it is to be reserved for an alley, such understanding forming a part of the consideration for the purchase, his continued and uninterrupted use of it as an alley, under claim of right, for more than twenty years, gives him a right of way by prescription. *McKinzie v. Elliott* (Ill. 1890), 24 N. E. Rep. 965.

Where one has permitted the public to use a road across his land for twenty years, but during that time has kept a gate at each end of the road, the right acquired by the public is a qualified prescription, and the commissioners of roads will be enjoined from removing the gates. *Green v. Bethea*, 30 Ga. 896.

Examples of User Not Adverse.—Where land is vacant and unoccupied, the mere fact that individuals travel over it and use it as a road for more than fifteen years, is not sufficient to constitute it a public highway. *State v. Horn*, 35 Kan. 717.

A narrow alley was opened along a lot in a populous part of a city to a business thoroughfare on which the lot abutted. The lot was unfenced and unused, and together with the alley was less than three rods wide. The city levied taxes on the lot as a separate and distinct parcel, and the same were paid. *Held*, that the public acquired no right to the lot by twenty years' user. *In re Hand St.* (Supreme Ct.), 5 N. Y. Supp. 158.

Where neither the extent of land inclosed or improved, nor the time when such inclosures or improvements were

action, if, as a matter of fact, he had no grant.¹ It must

made is shown, no adverse possession is established sufficient to support prescription. *Basseron v. McRae*, 9 La. Ann. 281.

After a sale under a mortgage executed by a firm, a member of the firm took possession as tenant of a grantee of the purchaser. *Held*, that such tenant could not allege adverse possession as against a grantee of his landlord. *Brunson v. Morgan*, 84 Ala. 598.

Mere use of a way overland for twenty years does not constitute it a highway, nor does a permissive use of it imply a dedication. The use must be adverse, as of right, and manifested by some action of the proper public authorities. *Stewart v. Frink*, 94 N. Car. 487; 55 Am. Rep. 619.

The public has no right to use soil adjoining navigable waters as a landing and place of deposit of property in its transit, against the owner's will, although such use has been continued for more than twenty years. The use cannot be urged as the foundation of a legal presumption of a grant, and thus justify a claim by prescription, nor as evidence of a dedication. Prescription will give no right to the exclusive occupation of another's land, as it may give to the traveler the right to pass over it without the power of halting thereon. *State v. Wilson*, 42 Me. 9.

The defendants can acquire no right by prescription to use the water of a stream to the injury of the complainants, until they show that the acts which are claimed to constitute the adverse user injured the complainants, and gave to them, or those under whom they claim title, a right of action. *Holsman v. Boiling Spring etc. Co.*, 14 N. J. Eq. 335.

Adverse Use a Question for the Jury.—The question whether a possession is adverse is for the jury, or the court sitting as such, and, in an action to establish a right of way by prescription, the finding of the court on that question, in the absence of the testimony from the record, will be presumed to be correct. *Thomas v. England*, 71 Cal. 456. See also in general on adverse user, *Mebane v. Patrick*, 1 Jones (N. Car.) 23; *Smith v. Bennett*, 1 Jones (N. Car.) 372; *Stokes v. Appomattox Co.*, 3 Leigh (Va.) 318; *Stewart v. Frink*, 94 N. Car. 497; 55 Am. Rep. 619; *State v. Horn*, 35 Kan. 717; *Patton*

v. State, 50 Ark. 53; *Colvin v. net*, 17 Wend. (N. Y.) 564; *Carley*, 24 Wend. (N. Y.) 451, Dec. 637; *Sargent v. Ballard*, (Mass.) 251; *Thomas v. England*, Cal. 456; *Trask v. Ford*, 3 437; *Delahoussaye v. Judice*, Ann 587; 71 Am. Dec. 521; *Bra Sharp*, 9 N. J. Eq. 9; *Gaye Bethune*, 14 Mass. 49; 7 Am 188; *Odiorne v. Wade*, 5 Pick. (421; *Lawton v. Rivers*, 2 McC (Car.) 445; 13 Am. Dec. 741; *Board v. Edrington*, 40 La. An Parish v. Kaspere, 109 Ind. 586. 1. *Felton v. Simpson*, 11 Ir (Car.) 84.

The Adverse Use Must be Specifically Defined.—Thus in order to gain scriptive right of way across the of another by user, it must be uniform route, and if used over route one year, and another that it would not establish a right of *Plimpton v. Coverse*, 44 Vt. 16 also *Burnham v. McQuesteen*, 48 446.

A right of way cannot be acquired by prescription unless the use is confined to a definite line, and is notorious, adverse and continuous. *Johnson v. Lewis*, 47 Ark. 66; *bull v. Rivers*, 3 McCord (S. 131; 15 Am. Dec. 622; *Oliver v. 47 Md. 301.*

To establish a by-road from 1 years' uninterrupted adverse user, there must be a certain well defined line of travel in the same over the entire route for all the *South Branch R. Co. v. Parl N. J. Eq. 489.*

A right of way in all directions where most convenient to the owner, and least prejudicial to the owner, cannot be prescribed. *v. Percival*, 5 Pick. (Mass.) 48 Am. Dec. 415.

But the appearance of a worn path with evidence of the user of the for a very long period, will justify finding of a way by prescription. *Baker v. Crosby*, 9 Gray (421.

The complaint alleged that plaintiff was in possession of a small tract of land which could be reached or crossing defendant's land; that those under whom he claimed had in the habit of thus crossing d

any way be permissive; a license is a complete rebuttal to the presumption of adverse user.¹

ant's land for more than twelve years, whereby a right of way had accrued to him. The suit was for damages on account of defendant's action in stopping up the way. *Held*, that as the way was not described by metes and bounds, and there was no averment that the crossing was by right or license, nor that the way had been open and continuous for the entire period alleged, and it not being alleged from whom either party derived title to their land, the complaint did not sufficiently define such a right of way as would at any time ripen into a vested right. *Johnson v. Lewis*, 47 Ark. 66.

A highway by user includes only so much land as is used for that purpose, and it cannot be extended upon adjacent lands against the consent of the owner, except under proper condemnation proceedings for that purpose. *Scheimer v. Price*, 65 Mich. 638.

1. One cannot claim by prescription where his holding has been under an agreement constituting an express license. *Dunham v. New Britain*, 55 Conn. 378; *Crounse v. Wemple*, 29 N. Y. 540.

Where for twenty years a way had been open to plaintiff over defendant's land, and he and his grantors had been permitted by defendant and his grantors to uninterruptedly use the way for fifty years, plaintiff obtained thereby but a mere naked license; but where the user is interrupted and under claim of title for more than twenty years, an easement exists, although the original claim was not well founded. *Parish v. Raspare*, 109 Ind. 586.

Plaintiff and W, his deceased brother, had lived upon adjoining lands. In going to and coming from the nearest highway to a certain town, plaintiff with the implied consent of W was accustomed from September 1, 1874, to February, 1884, to pass over the land of W, plaintiff grading the way, and W placing gates thereon. Plaintiff claimed the right to use such way, but never informed W of such claim, and he was never aware thereof, nor were his heirs until 1883. *Held*, that in order to perfect an easement by occupancy for five years, the enjoyment must be adverse, continuous, open and peaceable, and not, as in this instance, with the implied permission of the owner of

the servient estate. *Thomas v. England*, 71 Cal. 456.

If the claimant of the easement in any way recognizes the title of the owner, prior to the completion of the period of prescription, the claim is defeated. In *Colvin v. Burnet*, 17 Wend. (N. Y.) 569, Cowen, J., said: "It is well known that a single lisp of acknowledgment by the defendant, that he claimed no title, fastens a character upon his possession which makes it unavailable for ages." See also *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156; *Betts v. Davenport*, 3 Conn. 286; *Sumner v. Tileston*, 7 Pick. (Mass.) 198; *Monmouth Canal Co v. Harford*, 1 C. M. & R. 614.

A tenant cannot obtain an easement by prescription against his landlord. In *Phillips v. Phillips*, 48 Pa. St. 178; 86 Am. Dec. 576, the court by Thompson, J., said: "A tenant cannot acquire any kind of easement by prescription, as against his landlord. As such a right rests upon the presumption of a grant, it would lead to the absurdity of presuming a grant of a man to himself; for the tenant's possession is his possession, and whatever is lawfully done on the premises is presumed to be done with the sanction of the landlord." See also *O'Brien's Appeal*, 11 W. N. C. (Pa.) 229; *Kuhlman v. Hecht*, 77 Ill. 570.

An actual, uninterrupted use and enjoyment, as of right, of a well and a way thereto on land of another, with knowledge of such other party existing a sufficient length of time to create the presumption of a grant, establishes such grant, unless rebutted by proof that the use and enjoyment were permissive. *Smith v. Putnam*, 62 N. H. 369.

And in general if there has been the use of an easement for twenty years unexplained, it will be presumed to be under a claim of right, and adverse. *Miller v. Garlock*, 8 Barb. (N. Y.) 153; *Williams v. Nelson*, 23 Pick. (Mass.) 141; 34 Am. Dec. 45; *Blake v. Everett*, 1 Allen (Mass.) 248; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241; *Colvin v. Burnet*, 17 Wend. (N. Y.) 564; *Olney v. Fenner*, 2 R. I. 211; 57 Am. Dec. 711; *Steffy v. Carpenter*, 37 Pa. St.

The user must be adverse to some one in existence capable of asserting title against the user. Thus if the owner of a servitude is incapable, by reason of some disability, to assert his rights, no title can be acquired against him by prescription. A grant arising from the presumption of a grant arises by adverse use by an infant,¹ an insane person² or a married woman;³ nor will

41; *Garrett v. Jackson*, 20 Pa. St. 331.

A right of way was claimed over certain land by prescription. *Held*, that in the absence of evidence that the use shown was adverse, it would be presumed to have been permissive. *Whalley v. Jarrett*, 69 Wis. 613.

In *Maine*, it has been held that the continuous flowing of another's land for over twenty years will not gain an easement, where no right of action has accrued by reason of an injury done to the land overflowed. *Gleason v. Tuttle*, 46 Me. 288; *Underwood v. North Wayne Scythe Co.*, 41 Me. 291; *Nelson v. Butterfield*, 21 Me. 220; *Tinkham v. Arnold*, 3 Me. 120. The rule is different in *Massachusetts*. *William v. Nelson*, 23 Pick. (Mass.) 141; 34 Am. Dec. 45. See *Hammond v. Zehner*, 21 N. Y. 118.

In the following cases, claims to prescriptive rights were defeated, because the exercise of the rights was held to be permissive. *Kilburn v. Adams*, 7 Met. (Mass.) 33; 39 Am. Dec. 754; *Parker v. Framingham*, 8 Met. (Mass.) 360; *Marrison v. Creigh*, 37 Conn. 462.

1. In *Reimer v. Stuber*, 20 Pa. St. 462; 59 Am. Dec. 744, the court by Black, C. J., said: "No presumption of a grant arises from the adverse enjoyment of an easement against a minor or *feme covert*. The presumption operates in strict analogy to the Statute of Limitations, which recognizes the disabilities of infancy and coverture as sufficient excuses for inaction. But a second disability added to one which existed when the adverse enjoyment first began is always disregarded. Thus a coverture which took place during infancy is not taken into account after the infancy has ended."

In *Melvin v. Whiting*, 13 Pick. (Mass.) 184, it was held, that an easement will be required in the soil of another by adverse use and enjoyment, where the land descends to an infant heir, if the time of the adverse use and enjoyment during the life of the an-

cestor, added to that after the death of age (there having been no interruption of the use and enjoyment meantime) amounts to the period of twenty years. See also *Waite v. Peck*, 13 N. H. 360; 40 Am. Dec. 1.

2. In *Edson v. Munsell*, 10 (Mass.) 557, it was held that a grant in the land of an insane person cannot be acquired by prescription until the expiration of such time as his death or the removal of his disability as would bar an action by his legal representatives for a period of no matter how long such disability might continue. See also *McPatrick, v. Jones* (N. Car.) 23; 1 (N. Y.) 490.

3. In *McGregor v. Wait*, 72 (Mass.) 69 Am. Dec. 30, it was held that admissions made by a person are not competent evidence of a grant by prescription over land owned by her own right. *Metcalf, J.*, said: "It is the opinion of the court that the judge declined to admit evidence that the defendant, without her husband's consent, applied to Mrs. Wait for a shop on a part of the ground which the defendants claim a right of way. The evidence was offered for the purpose of proving a right of way owned in fee by Mrs. Hobbs, which her husband and herself seized and possessed in her right. It was admissible for this purpose, as it must have been on the ground of confessing or admitting that the defendant was subject to a servitude. A confession or admission, by her, would not bind either her or her heirs, or the plaintiff, with respect to the grant of her husband and herself. It is certain that she could not have a valid grant of a right of way under coverture, she was not competent to make a grant which would bind either herself or her heirs. At that one may, by acts in the absence of admission, by concealment, in effect do what could be done by deed, would be practicable to dispense with all the limitations."

such presumption arise against a remainderman or reversioner where the user has been during the continuance of a particular estate.¹

3. **Exclusive.**—Title to an easement cannot be acquired unless the enjoyment of the easement as claimed, excludes all others from participation in it.²

has imposed upon the capacity of infants or married women to alienate their estates." *Lowell v. Daniels*, 2 Gray (Mass.) 169; 61 Am. Dec. 448.

1. In *Wood v. Veal*, 5 B. & Ald. 454, it was held that no prescription could be had for a way where the land was in the occupancy of a tenant for ninety-nine years.

Where lights had been enjoyed for more than twenty years contiguous to land, which within that period had been glebe land, but was conveyed to a purchaser, it was held that no action would lie against such purchaser for building so as to obstruct the lights inasmuch as the rector, who was tenant for life could not grant the easement, and therefore no valid grant could be presumed. *Barker v. Richardson*, 4 B. & Ald. 579.

In *Daniel v. North*, 11 East 372, lights had been put out, and enjoyed without interruption for over twenty years during the occupation of the opposite premises by a tenant. The court held that such use could not conclude the landlord. Lord Ellenborough, C. J., said: "The foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant; and that cannot be presumed against him unless there was some probable means of his knowing what was done against him. And it cannot be laid down as a rule of law, that the enjoyment of the plaintiff's windows during the occupation of the opposite premises by the tenant of Sir Geo. Warrender, though for twenty years without the knowledge of the landlord, will bind the latter."

In *Parker v. Framingham*, 8 Met. (Mass.) 260, an attempt was made to set up title by adverse possession in a portion of the soil of a turnpike road. The court by Shaw, C. J., said: "It was intimated, in behalf of the appellees, that having long occupied part of the soil of the turnpike, lying between their shop and the traveled part of the road, for laying

materials, and other like uses, they had acquired a title by possession. But we think it very clear, that such occupation was permissive and not adverse, and therefore constituted no title by possession. It was not adverse to the owner of the soil; because, during the continuance of the turnpike he had no right to the possession. It could be no disseisin of the turnpike proprietors, or of the public; for they had an easement only, and no seisin."

See also in general, *Pierre v. Fernald*, 26 Me. 436; 46 Am. Dec. 573; *Baxter v. Taylor*, 4 B. & Ald. 72; *Bradbury v. Grimsel*, 2 Saund. 175; *Wallace v. Fletcher*, 30 N. H. 453.

2. In *Kilburn v. Adams*, 7 Met. (Mass.) 33; 39 Am. Dec. 754, the nature of an exclusive use was discussed by Chief Justice Shaw. In the course of his opinion he said: "The question is whether the plaintiffs, owners of an estate adjoining the academy lot, acquired a right of way over that lot, by the adverse and uninterrupted use of such way, by themselves and the former owners and occupiers of the estate, under the circumstances set forth in the report. The rule we think is, that where a tract of land, attached to a public building, such as a meeting-house, town house, school house and the like, and occupied with such house, is designedly left open and uninclosed, for convenience and ornament, the passage of persons over it, in common with those for whose use it is appropriated, is, in general, to be regarded as permissive, and under an implied license, and not adverse. Such a use is not inconsistent with the only use which the proprietors think fit to make of it; and therefore, until they think proper to inclose it, such use is not adverse, and will not preclude them from inclosing it, when other views of the interests of the proprietors render it proper to do so. And though an adjacent proprietor may make such use of the open land more frequently than another, yet the same rule will apply, unless there be some decisive act, indicating a separate and exclusive use, un-

4. **Continuous.**—The user must be continuous and maintain for a period long enough to establish the prescription. What constitutes a requisite continuity to establish a prescriptive right, depends largely upon the nature of the easement which is claimed. Thus in some cases the easement might not be used every day, but the continuity would not thereby be broken; while in other cases a single interruption might defeat the claim to a prescriptive right. Thus a right of way might only be exercised at intervals, and yet be established by prescription; while a slight interruption of a claim to flow another's land, or to receive lateral support might imperil the claim to the prescriptive right.¹

under a claim of right. A regular formed and wrought way across the ground, paved, macadamized, or graveled and fitted for use as a way, from his own estate to the highway, indicating a use distinct from any use to be made of it by the proprietors, would, in our opinion, be evidence of such exclusive use and claim of right. So would be any plain, unequivocal act, indicating a peculiar and exclusive claim, open and ostensible, and distinguishable from that of others. But the fact that a particular track or line was a little more worn and marked by travel, than the general surface of the lot, or that the adjacent proprietor had occasionally leveled a spot gullied by the rain, could scarcely be regarded, independently of other proof, as indicative of a claim of right."

"The enjoyment of easement, as claimed, whether it be a limited or more general enjoyment, should exclude others from a participation of it." *Davis v. Brigham*, 29 Me. 391; *Smith v. Higbee*, 12 Vt. 113; *Day v. Allen*, 22 Md. 529; *Dodge v. Stacy*, 39 Vt. 566; *Nash v. Peden*, 1 Spears (S. Car.) 17; *Thomas v. Marshfield*, 13 Pick. (Mass.) 240; *Curtis v. Angier*, 4 Gray (Mass.) 547; *Hamilton v. White*, 5 N. Y. 9; *First Parish v. Beach*, 2 Pick. (Mass.) 60; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241; *Kent v. Waite*, 10 Pick. (Mass.) 138; *McKenzie v. Elliot* (Ill. 1890), 24 N. E. Rep. 965.

In an action for trespass, defendant set up a right of way by prescription over what had formerly been a public highway, which had been discontinued or abandoned by the public. *Held*, that to acquire such right of way by user, such user might have commenced and continued for the requisite time after the abandonment of the highway; an adverse user by defendant and a

right to use as one of the public, could not exist at the same time. *Black v. O'Hara*, 54 Conn. 17.

A right of way claimed by plaintiff across defendant's farm by adverse user is not defeated by defendant's use of the same lane. *Wanger v. H. (Pa. 1888)*, 13 Atl. Rep. 81.

A way laid out by the owners of land for the use of their tenants and employees, was used also by other persons, owners of adjacent lands. *Held*, that although the use by the latter of the same character as, and did not interfere with the use of the former, was not necessarily permissive, might be adverse, so that a right of way might be acquired by such use. *Webster v. Lowell*, 142 Mass. 324.

1. "The time from which the prescription is to be reckoned in computing the duration of a continuous enjoyment, is when the injury or evasion of rights begins, and not the time when the injury causing it began that which first creates the injury." *Washburn v. Easements* 140; *Branch v. Doan* (Conn. 402; 18 Conn. 233).

In *Pollard v. Barnes*, 20 Mass. 191, the character of a continuous use was carefully considered. The court by Wilde, P. J., in concurring opinion said: "The plaintiff introduced evidence to show that from the fall of 1822 to the fall of 1846, the premises in dispute had been used as part of his mill yard, and the purpose of laying logs there for his customers to be sawed at his mill. And contradictory evidence was introduced by the defendants, tending to prove that for six years during the time the premises were not thus used."

Upon this evidence the jury were instructed, "that if the plaintiff had used and occupied the premises for the purpose of laying logs thereon, for the

years during that period, exclusive of the year or years omitted, his omission to place logs upon the premises, during one or more years, would not be such an interruption as to prevent the plaintiff from gaining a right of possession, unless the jury believed that the omission took place in consequence of an abandonment of his claim by the plaintiff."

It has been argued in support of these instructions, that although the enjoyment of an easement or privilege, in order to confer a title, must have been uninterrupted during the time required by law, yet, that a mere non-user of such easement or privilege is not to be considered as an interruption. And it is true, as laid down in *Gale & Whatley's* treatise on easements, "that in those easements which require the repeated acts of man for their enjoyment, as rights of way, it may be sufficient, if the user is of such a nature, and takes place at such intervals, as to afford an indication to the owner of the servient tenement, that a right is claimed against him."

But it is obvious that the non-user in the present case does not come within this rule of law. The evidence tended to prove a total cessation of the enjoyment of the easement, and that for a long time; and the owner had good reason to believe that the claim was abandoned; and if so, it seems immaterial whether the plaintiff had in fact abandoned his claim or not.

We think, therefore, that this is a case within the general rule as laid down in *Gale & Whatley*, p. 63, and which is supported by the authorities: "The continuity of enjoyment," it is said, "may be broken either by the cessation to use, or by the enjoyment not being had in the proper manner." And so the rule is laid down by Lord Lyndhurst, and by Parke, B., in *Monmouth Canal Co. v. Harford*, 1 C. M. & R. 614. Parke, B. says: "The issue is whether the occupiers of the closes of right" (that is, claiming a right), "without interruption, have had the use and enjoyment for twenty years, as they insist under this issue; therefore they must show an uninterrupted enjoyment for twenty years. If they had enjoyed for one week, and for the next, and so on alternately, their plea would not be proved." So Lord Lyndhurst says: "The simple question is, whether there has been a continued enjoyment of the way for twenty years;

and any evidence negative the continuance is admissible." The same principle of law is recognized in several subsequent cases. 4 Ad. & El. 383; 8 Ad. & El. 161; 2 Bing. & C. 705. These cases were decided on the construction of the Stat. 2 & 3 Wm. IV, ch. 71, which provides that no claim for any right of way or other easement shall be defeated, when such way shall have been actually enjoyed by any one claiming right thereto, without interruption for the full period of twenty years. A similar provision is contained in our Rev. Sts. ch. 60, § 27; that section provides, "that no person shall acquire any right or privilege of way, air, or light, nor any other easement from, in, upon, or over the land of another, by the adverse use thereof, unless such easement shall have been continued uninterrupted for twenty years."

The same continuity of possession was required by the common law, whereby a title by prescription could be acquired. "But both to customs and prescriptions," says Lord Coke, "these two things are incidents inseparable, viz.: possession or usage, and time. Possession must have three qualities: it must be long, continual and peaceable." See also *Williams v. Nelson*, 23 Pick. (Mass.) 141; 34 Am. Dec. 45; *Perren v. Garfield*, 37 Vt. 310; *Brace v. Yale*, 10 Allen (Mass.) 443; *Mertz v. Dorney*, 25 Pa. St. 519; *Carlisle v. Cooper*, 19 N. J. Eq. 260; *Esling v. Williams*, 10 Pa. St. 126; *Ingraham v. Hough*, 1 Jones (N. Car.) 39; *Battishill v. Reed*, 18 C. B. 696; *Bodfish v. Bodfish*, 105 Mass. 317; *Stein v. Burden*, 24 Ala. 130; 60 Am. Dec. 453; *Kirschner v. Western etc. R. Co.*, 67 Ga. 760; *Cave v. Crafts*, 53 Cal. 135; *Baker v. Pena*, 20 La. Ann. 52; *Rhodes v. Whitehead*, 27 Fed. Rep. 304; 84 Am. Dec. 631; *Whaley v. Stevens*, 27 S. Car. 549; *Levet v. Lapeyrollerie*, 39 La. Ann. 210; *Turner v. Hart*, 71 Mich. 128; *Ballard v. Struckman*, 123 Ill. 636; *Weed v. Keenan*, 60 Vt. 74.

Examples.—A use in one year cannot be connected with a use five years after, so as to give a right by prescription. *Watt v. Trapp*, 2 Rich. (S. Car.) 136; *Kilburn v. Adams*, 7 Met. (Mass.) 33.

An easement cannot be acquired by adverse possession, while the owner of the servient tenement, as agent of the owner of the dominant tenement, lets the latter to third persons for

short and not continuous terms. *Holland v. Long*, 7 Gray (Mass.) 486.

Where a ditch was dug and used over adjoining lands for over sixteen years, when it was filled, and another dug and used for five years, the time of using the two cannot be tacked together, so as to make out a prescription of twenty years. *Totel v. Bonnefoy*, 123 Ill. 653.

Where a tanner has thrown his ground bark into a stream for more than twenty years, he acquires no prescriptive right, to the injury of the owner below, on whose land the bark is deposited by the natural action of the water, unless it appears that this deposit has been made on this same land with this same injury annually during the whole term of the twenty years. *Crosby v. Bessey*, 49 Me. 539; 77 Am. Dec. 271.

Before a highway can be established by prescription, the general public under a claim of right, and not by mere permission of the owner, must have used some defined way, without interruption or substantial change, for twenty years or more, and a gate erected across the way, and maintained and kept closed at certain stated times during a period of four years, by the owner, evincing an intention to exclude the public from the uninterrupted use thereof, destroys any prescriptive right not already fully accrued. *Shellhouse v. State*, 110 Ind. 509.

The adverse user of an irrigating ditch, through the lands of another, during the cropping season only, the ditch not being needed at other times, constitutes a continuous adverse user. The omission to use a ditch when it was not needed did not break the continuity of the user. *Hesperia Land etc. Co. v. Rogers*, 83 Cal. 10.

A party claiming a right of way, passed over the land in 1819, and then again in 1824 and 1825, and continued passing until 1843. It was held not to be a continuous use except from 1824. *Watt v. Trapp*, 2 Rich. (S. Car.) 136.

A right was claimed to carry on an offensive trade in complainant's buildings which had stood more than twenty years, and in which he had carried on the business for eighteen years uninterruptedly. It was held, that the mere suspension of the business for two years, where there had been no interference with the enjoyment of the right, was not an interruption which

could affect the right, unless done with the intent to abandon the business. *Dana v. Valentine*, 5 Met. (Mass.) 8. But see *Carlisle v. Cooper*, 19 N. J. Eq. 260.

Continued Flowage.—A suspension of a flowage of land during a time that a mill-dam is being repaired, is not such an interruption to the continuity of the user, as to affect the right. *Wood v. Kelly*, 30 Me. 47; *Haag v. Delorme*, 30 Wis. 594.

Prescription in the use of running water may be established, although the same quantity was not used each year. *Jordan v. Lang*, 22 S. Car. 159.

A suspension of flowage owing to low water will not interrupt the right. *Gerenger v. Summers*, 2 Ired. (N. Car.) 229.

Where a mill owner maintained a dam, and raised the water of his pond to the height of his dam, whenever the water was high enough in the stream, and continued this more than twenty years under a claim of right, it was held that the height of his dam fixed the extent of his easement or right of flowing, although at times the water of the pond was below the top of the dam. *Winnipiseogee Lake Co. v. Young*, 40 N. H. 436.

There must be no material change in the extent or character of the flowage during the prescriptive period. Thus where one had enjoyed the use of a drain from his land over that on another for more than twenty years, but during the twenty years it had been materially changed in its size, direction and termination, it was held, that no right had thereby been gained. *Cotton v. Pocasset Mfg. Co.*, 13 Met. (Mass.) 429; *Stein v. Burden*, 24 Ala. 130; 60 Am. Dec. 453; *Whittier v. Cocheco Mfg. Co.*, 9 N. H. 454; 32 Am. Dec. 382; *Gerenger v. Summers*, 2 Ired. (N. Car.) 229; *Wright v. Moore*, 38 Ala. 593; 82 Am. Dec. 731; *Davis v. Brigham*, 29 Me. 391; *Stackpole v. Curtis*, 32 Me. 383; *Belknap v. Trimble*, 3 Paige (N. Y.) 577; *Bullen v. Rannels*, 2 N. H. 255; 9 Am. Dec. 55; *Darlington v. Painter*, 7 Pa. St. 473.

But one who has acquired, by prescription, a right to water on the public domain, does not lose his right by a change in the stream. *Tolman v. Casey*, 15 Oregon 83.

A right to flow is usually determined by the height of a dam. In *Cowell v. Thayer*, 5 Met. (Mass.) 253; 38 Am. Dec. 400, the rule was laid down that

The continuous user need not be confined to one person, but may be by successive owners of the dominant estate.¹

where a mill owner "has acquired a prescriptive right to a constant mill privilege by keeping up and using a dam more than twenty years, which dam in its usual operation, would raise the water to a given height, and has used it at his own pleasure, at that height, without any claim of right on the part of any other person, to have it drawn or kept down, for any part of the year, or upon any definite occasion, he has a right to retain it at the same height, although from a former leaky condition of the dam, the rude construction of the machinery, or the lavish use and waste of the stream, the water has not in fact been constantly or usually kept up to that height. If, therefore, he repairs the dam, without so changing it as to raise the water higher than the old dam, when tight and in repair, would raise it, or uses it in a different mode, and thereby keeps up the water more constantly than before, it is not a new use of the stream, for which an adjacent owner can claim damages, but a use conformable to his prescriptive right." See also *Alder v. Savill*, 5 Taunt. 454; *Lacy v. Arnett*, 33 Pa. St. 169; *Marcy v. Schults*, 29 N. Y. 354; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 407; *Hynds v. Shultz*, 39 Barb. (N. Y.) 600; *Hall v. Angsbury*, 46 N. Y. 622; *Vickerie v. Buswell*, 13 Me. 289; *Ray v. Fletcher*, 12 Cush. (Mass.) 200; *Bliss v. Rice*, 17 Pick. (Mass.) 33.

In *New Hampshire* the actual height of the water, and not the height of the dam, is the measure of the use. *Burnham v. Kempton*, 44 N. H. 90. The same rule prevails in *Pennsylvania*. In *Mertz v. Dorney*, 25 Pa. St. 519. *Knox, J.*, said: "If therefore, the plaintiff's land was flooded by means of the repairs to the dam to a greater extent than it had been for a period of twenty-one years, the defendant was liable for the easement, although the height of the dam might not have been increased." See also *Carlisle v. Cooper*, 19 N. J. Eq. 260. In the latter case the court said: "It is the height of the water, as ordinarily and usually kept in the dam when kept in repair as dams are kept for profitable and economical use, that will fix the height acquired by prescription."

Continued Use of Ways.—Plaintiffs acquired a right of way of neces-

sity by prescription over defendant's land. *Held* that the fact that when the ground was soft plaintiffs had sometimes turned out at one point, and made as many as seven different tracks there, did not affect their right to the way; nor was it material whether the road to which the way led was a country road or a mere by-road. *Cheney v. O'Brien*, 69 Cal. 199.

After twenty years' uninterrupted use of a way by the public, all presumptions are against the original owner. His occasionally piling things on it, and on one occasion building a calf pen on it are not such acts as will interrupt the running of the statute. *Toof v. Decatur*, 19 Ill. App. 204.

Encroachments upon a road or changes in the line of travel at other and distant points, do not prevent the road from becoming a public highway by user at points where the line of travel has remained substantially unchanged. *Hart v. Red Cedar*, 63 Wis. 634.

A road becomes a public highway by prescription by an open and an adverse use for seven years; and this, though the public travel may have deviated slightly from the original tract by reason of obstacles. *Howard v. State*, 47 Ark. 431.

A public way by prescription is not created by a twenty years' user of land as public highway, where, during half of the time, a railway has occupied a portion of the strip under a license from the owner of the land. *Speir v. New Utrecht*, 49 Hun (N. Y.) 294.

1. "The time which an ancestor possessed may be extended and allowed to his heirs; and the same rule applies to buyers and sellers. *Inter venditorem quoque et emptorem conjungi tempora.*" Inst. Justinian, lib. 2, tit. 6, § 8. All that would be required by the possessor would be, evidence that the possession had been legally continued from one owner to another." *Sargent v. Ballard*, 9 Pick. (Mass.) 251.

In *Kilburn v. Adams*, 7 Met. (Mass.) 43; 39 Am. Dec. 754, the owner of a dominant estate used a way for two years, and then, after some interval, sold his estate to one who used it for eighteen years. The court held that this did not give a prescriptive right to the way. In *Sargent v. Ballard*, 9

5. **Peaceable.**—The user must be peaceable.¹ If it appears during the period of the adverse user, the owner of the servient tenement denied the claim or opposed the use, the prescription will fail.²

Pick. (Mass.) 251, a former owner of land had enjoyed an easement for less than twenty years, when the commonwealth confiscated his land and conveyed it to the plaintiff, who likewise enjoyed the easement. The court held, that the time of enjoyment by the former owner could not be added to the time of enjoyment by the plaintiff, in order to make up the twenty years. See also *Melvin v. Whiting*, 13 Pick. (Mass.) 184; *McFarlin v. Essex Co.*, 10 Cush. (Mass.) 304; *Tracy v. Atherton*, 36 Vt. 503; *Perrin v. Garfield*, 37 Vt. 309; *Dodge v. Stacey*, 39 Vt. 558; *Okeson v. Patterson*, 29 Pa. St. 22.

1. *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 706; *Cave v. Crafts*, 53 Cal. 135.

2. A complaint and denial of a right are a sufficient interruption of the peaceable use. *Nichols v. Aylor*, 7 Leigh (Va.) 546.

Remonstrance and consultation of counsel was so held in *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. (U. S.) 549.

A complaint addressed to a station agent was held a sufficient remonstrance in *Chicago etc. R. Co. v. Hoag*, 90 Ill. 339.

A verbal act upon the premises was held a sufficient interruption in *Powell v. Bagg*, 8 Gray (Mass.) 441; 69 Am. Dec. 262.

In *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 180, the court said: "Resistance by verbal remonstrance or denial is sufficient."

In *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605, it was held that a mere complaint was not sufficient. The court by Depue, J., said: "Evidence that the owner of the land forbade the other party to enter and ordered him off, was undoubtedly competent as part of the plaintiff's case. Whether what occurred at that time would amount to an interruption of an easement would depend upon circumstances, upon the conduct of the party when forbidden to enter or when ordered off. If the owner of the servient tenement, being on the premises forbids the owner of the easement to enter for the purpose of enjoying

it and orders him off and then on a well grounded apprehension the former means to enforce obedience to his commands, desists and draws, an action on the case, the disturbance of the right would lie in view must have been present in the minds of the court, else why the prohibition to the place land? To give certainty to the purpose? A prohibition elsewhere might be so vehemently emphatic as to leave the denial right equally beyond a doubt. Certain expressions from the case have been quoted as indicating a verbal denial of the right will *ipso facto*, to determine the right that view be adopted, or the action of Mr. Justice Woodburman *v. White Rock Mfg. Co.*, 3 Woodb. & M. (U. S.) 551 the plaintiff and the taking of counsel such encroachments will bar the claim, it is obvious that by prescription will be of little avail. None of the authorities cited learned judge in *Powell v. Gray* (Mass.) 441; 69 Am. Dec. 262. I have not discovered in English cases any intimations of mere denials of the right, nor remonstrances or prohibition will be considered interruption of user of an easement, or as in that the enjoyment of it was tious. On the contrary, when subject has been mentioned elicited expressions of marked probation of such a proposition. . . . The whole doctrine of prescription is founded on public It is a matter of public interest to property should not remain uncertain and in dispute tests and mere denials of right evidence that the right is in as distinguished from a right. If such protests and unaccompanied by an act of law amounts to a disturbance actionable as such, be permitted the right in abeyance, the prescription law will be defeated and prescriptive rights be placed upon the

6. **Acquiescence and Knowledge of the Owner.**—No title by prescription can be acquired in an easement without the acquiescence and knowledge of the owner of the servient estate. The user must not be clandestine or by stealth, but open, notorious, visible and indisputable. When the user is of such a character and under a claim of right, the owner of a servient tenement is charged with notice, and his acquiescence is implied.¹

unstable of foundations: If the easement has been interrupted by any act which places the owner of it in a position to sue and settle his right, if he chooses to postpone its vindication until witnesses are dead or the facts have faded from recollection, he has his own folly and supineness to which to lay the blame. But if by mere protests and denials by his adversary, his right might be defeated, he would be placed at an unconscionable disadvantage. He could neither sue and establish his right, nor could he have the advantage usually derived from long enjoyment in quieting titles. Protests and remonstrances by the owner of the servient tenement against the use of the easement, rather add to the strength of the claim of a prescriptive right; for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, hostile and adverse; and if they be not accompanied by acts amounting to disturbance of the right in a legal sense they are no interruptions or obstructions of the enjoyment. The instructions of the judge were erroneous in this respect. The jury should have been told that a continuous enjoyment, under a claim of right for twenty years, not obstructed by some suable act, and having the other qualities of an adverse user, confers an indefeasible right."

In some States it is provided by statute that a person may be prevented from acquiring an easement by the service upon him of a notice on behalf of the owner of the premises of his intention to prevent the acquirement of such easement. *Massachusetts*, Pub. Stat. (1882), ch. 122, § 3; *Maine* Rev. Stat. (1883), ch. 105, §§ 13, 14; *Connecticut* Laws (1881), ch. 161, § 2, R. S. (1888), p. 322; *Indiana* Rev. Stat. (1881), § 4322; *Iowa* Rev. Code (1884), § 2034, p. 550; *Rhode Island* Pub. Stat. (1882), ch. 175, § 7.

1. In *Daniel v. North*, 11 East 372, Lord Ellenborough, C. J., said: "The

foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant; and that cannot be presumed against him unless there were some probable means of his knowing what was done against him."

In *Eaton v. Swansea Waterworks Co.*, 17 Ad. & El. 267, the court said: "It seems clear that, if the enjoyment is clandestine, contentious, or by sufferance, it is not of right. Enjoyment of a right must be *nec clam, nec vi, nec precario*."

Under the *Iowa* Code, § 2031, to entitle a person to title by prescription to a private way over the land of another, the fact of adverse possession must be established, distinct from and independent of evidence showing a mere prior use of the way, and that the person against whom the claim is made had express notice thereof. *Zigefoose v. Zigefoose*, 69 Iowa 391.

In *Carbrey v. Willis*, 7 Allen (Mass.) 368, a drain was constructed by the owner of two or more houses which he afterwards conveyed to different purchasers, and the drain remained more than twenty years, but was not known by the owner of either house to exist. It was held that such an enjoyment of the drain did not give the upper estate a right to maintain it through the lower one as a prescriptive easement.

The doctrine of prescription or presumption of grant from lapse of time, can have no application to a case of underground waters percolating, oozing or filtrating through the earth. *Frazier v. Brown*, 12 Ohio St. 294.

By a contract between the inhabitants of a town, by their selectmen and a railroad corporation by their president, a license was given to the town to make and use a road described, overland belonging to the railroad corporation, "and to maintain the same until the said corporation shall give them notice to discontinue the

7. **Extent of User.**—An easement acquired by prescription is restricted to the extent of the user.¹

V. OF WHAT A PRESCRIPTION MAY BE GAINED.—Prescription applies only to such rights as an individual or corporation may grant or take under a grant. It applies generally to incorporeal hereditaments, and more particularly to such easements as common of pasture, common of fishery, right of way, various rights connected with the use of waters, right of free and uninterrupted

same, reserving to the said corporation the right to give such notice at any time when they shall deem it for their interest to do so; and the said inhabitants accepting said license, hereby agree to the terms and limitations of the same which are herein expressed."

Held, that even if the contract was not authorized by the town, if the selectmen represented to the officers of the railroad corporation that they had authority from the town to enter into the contract, and such corporation relied upon the representation and by reason thereof authorized the building of the road upon its land, the town would acquire no right by prescription to the use of the way over the land as against the railroad company, until the latter was notified that the town was not using it by virtue of the license; provided that the use of the way by the town was not inconsistent with the agreement, and the company believed that the town was using the way in pursuance of the agreement, and this was a reasonable belief under all the circumstances. *Deerfield v. Connecticut River R. Co.*, 144 Mass. 325.

The easement of drainage across a lot cannot be claimed by virtue of an adverse user, where the evidence charges the owner of the servient lot with knowledge of the claim of the right, and of the existence of the drain ten years before he stopped it. *Treadwell v. Inslee*, 120 N. Y. 458.

Acquiescence, such as sustains a prescriptive right where uninterrupted user has existed twenty-one years, is not presumed against a party who has no choice but to acquiesce. A right by prescription never grows up where private property is taken for public use by authority of the State. *Jessup v. Loucks*, 55 Pa. St. 350.

1. *Polly v. McCall*, 1 Ala. Sel. Cas. 246; *Wright v. Moore*, 38 Ala. 593; 82 Am. Dec. 731; *Atkinson v. Bordman*, 20 Pick. (Mass.) 291.

Under a prescriptive right to enter

upon land, and take herbage the party cannot justify the cutting of grass, the digging of potatoes, nor gathering of apples. *Simpson v. 4 N. H. 301.*

Plaintiff had a license from the officers of a town to use a reservoir for fishing and sailing during his life. *Held*, that he cannot by the use of this license obtain an absolute right by prescription to last forever. *Ham v. New Britain*, 55 Conn. 278.

The dedication of a public highway may be presumed from use, notwithstanding the public travel may deviate at points from the old line. *Howard v. State*, 47 Ark. 431.

A right of way by prescription is a passage-way which has been established for other purposes, cannot be established by proof of a use which is consistent with the rights of the owner of the soil and of those who were first entitled to use the way. *Harper v. Fish of the Advent*, 7 Allen (Mass.) 478.

A right of way, claimed by prescription in a particular line, cannot be disproved by evidence that the users were accustomed to cross the land in different courses. *Snell v. Lee*, 14 Gray (Mass.) 473.

A right of way over the plaintiff's land in all directions, where convenient to the defendant and not prejudicial to the plaintiff, cannot be prescribed for, nor can a non-est grant of such way be prescribed. *Jones v. Percival*, 5 Pick. (Mass.) 16 Am. Dec. 415. Long practical usage by the grantees will constitute a restraint on the general terms of the grant. *Davidson v. Root* (Conn.) 358.

To establish a right of way by prescription, across another's land, the line of the way must be defined, its use must have been adverse to the owner and continuous for a specified length of time. *Johnson v. Le* Ark. 66.

light and air, right to lateral support, right to exercise an office, or to enjoy corporate franchises, or to maintain a market or ferry.¹

1. **Pasturage.**—A right to pasture cattle on another's land may be acquired by prescription as appurtenant to land.²

2. **Fisheries.**—The right to fish in another's waters is an incorporeal hereditament, and may be acquired by prescription.³

3. **Private Ways.**—Where the owner of land has used a way over another's land for a length of time equal to that required by the Statute of Limitations to bar an action to recover land, and the use has been adverse and continuous, a title by prescription is acquired in the way.⁴

4. **Highways.**—A county, town or township may in its corporate capacity acquire a right of way by prescription.⁵ Where the

1. "Prescriptions can only be for things which are the subjects of grant. And though sometimes the term is loosely applied to titles to corporeal hereditaments, when used with technical accuracy it is predicated of incorporeal hereditaments alone. To constitute a title, therefore, by prescription, there must be a thing claimed which may be granted, and a person to whom a grant may be made, and who may be a party to such grant. And in this consists one great distinction between a proper prescription and a custom, the latter being applicable to rights by way of easement which the public or the inhabitants of a particular locality may acquire by long enjoyment without having been incorporated or capable of collectively becoming grantees in any deed of conveyance." Washburn on Easements, 118.

2. *Thomas v. Marshfield*, 13 Pick. (Mass.) 240.

In *Rose v. Bunn*, 21 N. Y. 275, it was held that the inhabitants of a town might gain a right of easement of pasturage by prescription, but in *Donnell v. Clark*, 19 Me. 174, it was held that one may not prescribe for the exclusive use of the herbage upon another's land as appurtenant to his own land. In that case a person owned land adjoining a beach which he depastured, but there being no fence between his land and the beach, his cattle were accustomed to pass on to the beach, and thence over the adjoining beaches, which were unfenced. The court held that this was not such an adverse enjoyment of a right to run upon these beaches as to gain a prescriptive right thereby, since it was in no way injurious to the rights of the owners of the beaches, nor likely to produce resistance or opposition.

3. The cases are collected in *FISH AND FISHERIES*, vol. 8, p. 23.

4. *Parish v. Kaspere*, 109 Ind. 586; *Whaley v. Jarrett*, 69 Wis. 613; *Whaley v. Stevens*, 27 S. Car. 549; *Wanger v. Hipple* (Pa. 1888), 13 Atl. Rep. 81; *Barnes v. Haynes*, 13 Gray (Mass.) 188; 74 Am. Dec. 629; *Nicholls v. Wentworth*, 100 N. Y. 455; *Barbour v. Pierce*, 42 Cal. 657; *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361; 93 Am. Dec. 409; *French v. Marstin*, 24 N. H. 440; 57 Am. Dec. 294; *Cuthbert v. Lawton*, 3 McCord (S. Car.) 194; *Ferrell v. Ferrell*, 10 Heisk. (Tenn.) 329; *Blake v. Everett*, 1 Allen (Mass.) 248; *Kuhlman v. Hecht*, 77 Ill. 570; *Puryear v. Clements*, 53 Ga. 233.

The character, nature and extent of the user requisite to acquire title to a way by prescription, is explained in the other sections of this article.

5. In *Com. v. Low*, 3 Pick. (Mass.) 412, the court by Morton, J., said: "Ways of various kinds may be proved, not only by prescription, but by a continued and uninterrupted use of them for a period much within the memory of man. And it cannot be doubted that public highways may be shown by evidence of a user, as well as by the record of their laying out."

In *Connecticut*, the existence of a highway may be shown by prescription. *Ely v. Parsons*, 55 Conn. 83.

Under amended code *West Virginia*, ch. 43, § 31, every road worked under the direction of a surveyor of roads is in all courts of the State deemed a public road, although it may not appear that the same was formally established by an order of the county court. *Ball v. Cox*, 29 W. Va. 407.

In *Arkansas* where the public, with the knowledge of the owner, has

public has continuously used a way for the statutory period the presumption is that there was a dedication to the public of the right to use the way.¹

5. Right of Way Over Railroad.—A person can, by open, continuous and adverse use for the statutory period, acquire a right of way by prescription over the location of a railroad, although the road is in actual operation.²

claimed and continuously exercised the right of using land for a public highway, for a period equal to that fixed by the statute for bringing actions of ejectment, their right to the highway, as against such owner, is complete. *Howard v. State*, 47 Ark. 431.

In *Iowa*, evidence that a road had been traveled by the public, and improved by the proper authorities, for more than twenty years, is sufficient to submit to the jury the question whether there was a public road or not. *Casey v. Tama Co.*, 75 Iowa 655.

In *Nebraska*, where a public road laid out by competent authority has been accepted by the public, and traveled for more than ten years, the public acquires an easement therein, and the land owner will be liable if he obstructs it, whether the original proceedings to establish it were valid or not. *Langdon v. State*, 23 Neb. 509.

In *Kansas*, a highway may be proved by long usage; but for this, it must be such as to show that the public accommodation requires it to be a highway, and that it is the intention of the owner of the soil to dedicate the way to the public. *Cemetery Assoc. v. Meninger*, 14 Kan. 312.

To the same effect are the following cases: *Kelsey v. Furman*, 36 Iowa 614; *State v. Tucker*, 36 Iowa 485; *State v. Green*, 41 Iowa 693; *Com. v. Old Colony etc. R. Co.*, 14 Gray (Mass.) 93; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; 31 Am. Dec. 123; *Com. v. Pettitcler*, 110 Mass. 62; *Speir v. New Utrecht*, 121 N. Y. 420; *Gould v. Boston*, 120 Mass. 300; *Patton v. State*, 50 Ark. 53; *James v. Sammis* (Supreme Ct.), 10 N. Y. Supp. 143; *Commissioner of Highways v. Riker*, 79 Mich. 551; *Martin v. People*, 23 Ill. 395; *Lewiston v. Proctor*, 27 Ill. 414; *Duncombe v. Power*, 75 Iowa 185; *State v. Gregg*, 2 Hill (S. Car.) 387; *Barker v. Clark*, 4 N. H. 380; 17 Am. Dec. 428; *McCearley v. Lemeunier*, 40 La. Ann. 253; *Veale v. Boston*, 135 Mass. 187; *McWhorter v. State*, 43 Tex. 666; *Harper v. Dodds*, 3 Ill. App.

331; *Waltman v. Rund*, 109 Ind. 366; *Bolger v. Foss*, 65 Cal. 250; *Valentine v. Boston*, 22 Pick. (Mass.) 75; 33 Am. Dec. 711; *Com. v. Old Colony etc. R. Co.*, 14 Gray (Mass.) 93; *Brownell v. Balmer*, 22 Conn. 107; *State v. Green*, 41 Iowa 693; *Chicago v. Wright*, 69 Ill. 318; *Baldwin v. Herbst*, 54 Iowa 168; *State v. Boscawen*, 32 N. H. 331; *Krier's Private Road*, 73 Pa. St. 109.

1. *Washburn on Easements* 180.

The character of the adverse user requisite to give title by prescription to a highway, is explained in other sections of this article, and in *HIGHWAY*, vol. 9, p. 362.

2. *Turner v. Fitchburg R. Co.*, 145 Mass. 433.

A private right of way may be acquired by prescription across a railroad track, irrespective of the statute making it an offense to walk or stand on a railroad track. *Gay v. Boston etc. R. Co.*, 141 Mass. 407; *Turner v. Fitchburg R. Co.*, 145 Mass. 433.

Defendant having been accustomed from the year 1840 to use several crossings over the plaintiff's railroad where it ran through his land, in 1849 made an agreement allowing it to change location, and providing that he should give up one crossing, but that with that exception plaintiff would make and repair forever "the same number of crossings as they are now required to do over the railroad discontinued," and in 1855 gave plaintiff a deed of the new location "to use as if the road had been originally laid out there," and providing that the land should revert if not used for railroad purposes. There was a crossing on a private road over the original location planked for teams, but the new crossing was not planked, and was used only for foot passengers. In 1887, plaintiff fenced up the crossing; and a suit of trespass *quare clausum fregit* was brought against the defendant for tearing down the fence. *Held*, that by the agreement defendant was entitled to the crossing; and further that the facts would justify a

6. **Waters.**—The right to take or use water from another's land, or to overflow another's land, or to drain water upon another's land, are all easements which may be acquired by prescription.¹

7. **Light and Air.**—In *England* the easement of light and air may be acquired by prescription;² but in the *United States* such prescription is not generally recognized.³

finding that defendant had acquired by prescription a right to cross on foot. *Fitchburg R. Co. v. Frost*, 147 Mass. 118.

1. See *DAM*, vol. 4, p. 971; *DRAINS AND SEWERS*, vol. 6, p. 2; *WATERS*, and other sections of this article.

2. The use of light has been "enjoyed" with a building within the meaning of the English Prescription Act, which enacts that "when the access and use of light to and for any dwelling-house, work-shop or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible" (§ 3), if the owner of the building has had the amenity or advantage of using the access of light; it is not necessary that there should have been a continuous user. *Cooper v. Straker*, L. R. 40 Ch. D. 21.

The owner of a building having windows with movable shutters, which are opened at his pleasure, for admission of light, acquires a right to light under the act, at the end of twenty years, if he opens the shutters at any time he pleases for the admission of light during those twenty years, and if also there is no such interruption of the access of the light over the neighboring land "by the owners of the neighboring land acquiesced in for a year," as provided by § 4. *Cooper v. Straker*, L. R., 40 Ch. D. 21.

In such a case, it is proved that the window openings have remained unchanged for twenty years, and that the shutters were constructed so that they might be opened or closed at the pleasure of the owner of the building; the onus is thrown upon the owner of the neighboring land to prove that the right has not been acquired. *Cooper v. Straker*, L. R., 40 Ch. D. 21.

In an action for interfering with ancient lights of plaintiff's house, by raising an old party-wall fifteen feet above its original height, defendant pleaded that he had for many years been in the habit of piling up boxes and packing cases against and above the

wall, to a height exceeding that of the new wall. The evidence was conflicting as to the height of the pile of packing cases, and as to the time they remained, but it appeared that they were removed from time to time, some to be returned to the owners, the others to be broken up, and none of the witnesses could say how long they remained piled up. *Held*, that no interruption of plaintiff's enjoyment of light, continuing for one year, within the meaning of the English Prescription Act, was shown, as against plaintiff's *prima facie* case of enjoyment for twenty years. *Presland v. Bingham*, L. R., 41 Ch. D. 268.

See in general on the English doctrine for prescription of light and air, *Aldred's Case*, 9 Co. 58; *Bury v. Pope*, Cro. Eliz. 118; *Lewis v. Price*, 2 Saund. 175; *Darwin v. Upton*, 2 Saund. 175; *Moore v. Rawson*, 3 B. & C. 332; *Kelk v. Pearson*, L. R., 6 Ch. 809; *City of London Brewery Co. v. Tennant*, L. R., 9 Ch. 212.

3. In *Parker v. Foote*, 10 Wend. (N. Y.) 309, *Bronson, J.*, said: "There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in *England*; but I see that it has been recently sanctioned with some qualifications by an act of Parliament; but it cannot be applied in the growing cities and villages in this country, without working the most mischievous consequences. It has never, I think, been deemed a part of our law; and besides, it would be difficult to show that the rule in question was known to the common law previous to the 19th of April, 1775. There were two *nisi prius* decisions at an earlier day; but the doctrine was not sanctioned in Westminster Hall until 1786, when the case of *Darwin v. Upton* was decided by the K. B. This was clearly a departure from the old law. See also *Haverstick v. Sipe*, 33 Pa. St. 368; *King v. Large*, 7 Phila. (Pa.) 282; *Rennyson's Appeal*, 94 Pa. St. 147; 39 Am. Rep. 777; *Myers v. Gemmel*, 10 Barb. (N. Y.) 537; *Doyle v. Lord*, 64

8. **Lateral Support.**—In some American cases it has been intimated that the right of support can be enlarged by prescription so as to require the adjacent land to uphold the land of the house owner, not only in its natural state, but also in its burdened condition.¹ The weight of authority, however, is against this view.²

N. Y. 432; 21 Am. Rep. 629; Napier v. Bulwinkle, 5 Rich. (S. Car.) 311; Ward v. Neal, 37 Ala. 500; Keats v. Hugo, 115 Mass. 204; 15 Am. Rep. 80; Pierre v. Fernald, 36 Me. 436; Keiper v. Klein, 51 Ind. 316; Cherry v. Stein, 11 Md. 1; Hubbard v. Town, 33 Vt. 295; Mullen v. Stricker, 19 Ohio St. 135; 2 Am. Rep. 379; Powell v. Sims, 5 W. Va. 1; 13 Am. Rep. 629; Turner v. Thompson, 58 Ga. 268; 36 Am. Rep. 297; Lapere v. Luckey, 23 Kan. 534; 33 Am. Rep. 196; Ray v. Sweeney, 14 Bush (Ky.) 1; 29 Am. Rep. 388; Berkley v. Smith, 27 Gratt. (Va.) 892; Hayden v. Dutcher, 31 N. J. Eq. 217; King v. Miller, 8 N. J. Eq. 559; 55 Am. Dec. 246; Guest v. Reynolds, 68 Ill. 479; 18 Am. Rep. 570; Stein v. Hauck, 56 Ind. 65; 26 Am. Rep. 10; Klein v. Gehrung, 25 Tex. Supp. 232; 78 Am. Dec. 565; Ingraham v. Hutchinson, 2 Conn. 584; Morrison v. Marquardt, 24 Iowa 35; 92 Am. Dec. 444.

In *Gerber v. Grabel*, 16 Ill. 217, decided in 1854, the court thought that the English doctrine should be deemed of force in *Illinois*; but in *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570, that court adopted the rule laid down by the Supreme Court of *New York*, in *Parker v. Foote*, 19 Wend. (N. Y.) 309; and pronounced the English doctrine an anomaly in the law, as applied to the growing cities and villages of the *United States*.

And see 3 Kent's Com. 573; Washburn on Easements (4th ed.) 497.

In *Massachusetts* the doctrine established by the more recent decisions that the right cannot be acquired by prescription is now recognized by statute. *Massachusetts* Pub. St. ch. 122, § 1.

In *New Jersey*, as in *Massachusetts*, the more recent decisions reject the English doctrine and are in line with that of *New York* and the States of the Union generally. *Hayden v. Dutcher*, 31 N. J. Eq. 217. And see *Sutphen v. Therkelson*, 38 N. J. Eq. 318.

The English doctrine has been upheld in *Delaware*. *Clawson v. Primrose*, 4 Del. Ch. 643; and in *Louisiana*, *Taylor v. Boulware*, 35 La. Ann. 469.

1. In *Lasala v. Holbrook*, 4 Paige (N. Y.) 169, the chancellor said: "There is another class of cases, however, where the owner of a building on an adjacent lot is entitled to full protection against the consequences of any new excavation or alteration of the premises intended to be improved, by which he may be in any way prejudiced. These are ancient buildings, or those which have been erected upon ancient foundations, and which by prescription are entitled to the special privilege of being exempted from the consequences of the spirit of reform operating upon the owners of the adjacent lots; and also those which have been granted in their present situation by the owners of such adjacent lots, or by those under whom they have derived their title. *Palmer v. Fleshees*, 1 Sid. 167; *Cox v. Mathews*, 1 Ventr. 237; *Story v. Odin*, 12 Mass. 157; *Brown v. Windsor*, 1 C. & J. R. 20."

The English rule was upheld in *Stevenson v. Wallace*, 27 Gratt. (Va.) 87, where *Anderson, J.*, in delivering the opinion said: "If the plaintiff has enjoyed the support of the land or building of the defendant for twenty years, to keep up his house and both parties knew of that support, the plaintiff had a right to it as an easement, and the defendant could not withdraw that support without being liable in damages for any injury which occurs to the plaintiff thereby."

2. The expressions of judicial opinion in both *Lasala v. Holbrook*, 4 Paige (N. Y.) 169, and *Stevenson v. Wallace*, 27 Gratt. (Va.) 87, were merely *dicta*, as the decision of neither case turned upon this question. In the later *Virginia* case of *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581, a directly contrary view was taken. *Lewis, P. J.*, in delivering the opinion said: "The doctrine (*i. e.*, acquisition of a right by adverse user) may well apply to the acquisition of a right of way, or to the use of water and the like, but it is difficult to see how, on principle, it can be held to apply to a

9. **Offices.**—In *England* at common law some offices might be acquired by prescription, but in the *United States* it is not probable that there is any office which can be so acquired. In *South Carolina* it has been expressly decided that no office exists by prescription.¹

10. **Corporate Franchises.**—A corporation is said to exist by prescription, if its commencement cannot be shown, but a grant of a charter may be presumed from long-continued user of the corporate franchises.²

11. **Markets.**—The right to maintain a market may be acquired by prescription.³

12. **Ferries.**—The right to maintain a ferry may be maintained by prescription.⁴

13. **Miscellaneous.**—Amongst other easements which may be

case like the present; for when a man builds on his own soil to its extremity, he simply exercises a lawful right. How, under the circumstances mentioned, can there be said to be an adverse user of another's property, or how can the acquiescence of one in an act be implied who has neither the right nor the power to prevent it? It is true that in order to prevent the acquisition of the right, the adjoining owner might by excavating on his own soil, bring down his neighbor's building before the right to support could be fully acquired. But such an extraordinary and wrongful act would not only involve labor and expense, but might endanger and perhaps destroy his own house. And how can a man be reasonably required to improve his own property in order to preserve his right respecting it?" See also *Richart v. Scott*, 7 Watts (Pa.) 460; 32 Am. Dec. 779; *Mitchell v. Mayor of Rome*, 49 Ga. 19. The opinion in the latter case is quoted at length in *LATERAL AND SUBJACENT SUPPORT*, vol. 12, p. 936. Additional American cases on the question are *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312; *Napier v. Bulwinkle*, 5 Rich. (S. Car.) 311. Recent English cases are *Dalton v. Angus*, 6 App. Cas. 740; rev'g 3 Q. B. D. 85; *Hunt v. Peake*, 1 Johns. 705; 29 L. J. Ch. 785; *Partridge v. Scott*, 3 M.C. & W. 220; *Brown v. Windsor*, 1 C. & J. 20; *Hide v. Thornborough*, 2 C. & K. 250.

1. *Jeter v. State*, 1 McCord (S. Car.) 233.

2. *Greene v. Dennis*, 6 Conn. 293; *Stockbridge v. West Stockbridge*, 12

Mass. 400; *All Saints' Church v. Lovett*, 1 Hall (N. Y.) 191; *White v. State*, 69 Ind. 273.

Prescription has been applied more especially to the franchises of municipal corporations. In *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304, *Skinner, J.*, said: "Municipal corporations are created for the public good—are demanded by the wants of the community; and the law, after long continued user of corporate powers, and the public acquiescence, will indulge in presumption in favor of their legal existence." See also *People v. Maynard*, 15 Mich. 463; *Bow v. Allentown*, 34 N. H. 351, 69 Am. Dec. 489; *Dillingham v. Snow*, 5 Mass. 547; *New Boston v. Dunbarton*, 15 N. H. 201; *Sherwin v. Bugbee*, 16 Vt. 439; *Londonderry v. Andover*, 28 Vt. 416; *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319.

In *Stockbridge v. West Stockbridge*, 12 Mass. 400, where the act incorporating a town could not be found parol evidence tending to show its existence and loss was admitted; and, after more than thirty years' use of the powers and privileges of a town, such evidence was held to be competent evidence of the incorporation.

3. Blackstone defines a market to be a franchise derived from the crown by grant or prescription which presumes a grant. 2 Black. Com. 37.

4. In *Georgia*, seven years' exclusive possession and enjoyment of a ferry right creates a presumption of a grant. *Williams v. Turner*, 7 Ga. 348. See also *Trotter v. Harris*, 2 Y. & J. 285; *Blissett v. Hart*, Willes 508.

acquired by prescription, are the right to occupy a dock,¹ maintain a wharf,² to dig and carry away ore,³ to hang clothes to dry in another's yard,⁴ to turn teams in plowing upon another's land,⁵ to pile logs on another's land for the use of a mill,⁶ and to support and maintain a division fence.⁷ It may be said in general, that almost any lawful acts, adversely and continuously performed upon another's land for the period required by the Statute of Limitations, will establish an easement by prescription.

VI. WHAT MAY NOT BE PRESCRIBED FOR.—Prescription can not be maintained for an easement of prospect,⁸ for a public nuisance,⁹ for a right to erect buildings on another's land,¹⁰ or for any rights in underground waters.¹¹ Nor can there be any prescription against the rights of a citizen with respect to privileges secured by the constitution.¹²

VII. PLEADING AND EVIDENCE.—The party who pleads prescription is bound to prove the facts necessary to sustain the plea.¹³

1. *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Nichols v. Boston*, 98 Mass. 42; 93 Am. Dec. 132.

2. *Gray v. Bartlett*, 20 Pick. (Mass.) 186; 32 Am. Dec. 208.

3. *Gloninger v. Franklin Coal Co.*, 55 Pa. St. 9; 93 Am. Dec. 720; *Arnold v. Stevens*, 24 Pick. (Mass.) 109; 35 Am. Dec. 305; *Beatty v. Gregory*, 17 Iowa 109; 85 Am. Dec. 546; *Grove v. Hodges*, 55 Pa. St. 504; *Bush v. Sullivan*, 3 Green (Iowa) 344; 54 Am. Dec. 506.

4. *Drewell v. Towler*, 5 B. & Ald. 735.

5. *Jones v. Percival*, 5 Pick. (Mass.) 485; 16 Am. Dec. 415.

6. *Gurney v. Ford*, 2 Allen (Mass.) 576; *Pollard v. Barnes*, 2 Cush. (Mass.) 191.

7. *Boyle v. Tamlyn*, 6 B. & C. 329; *Adams v. Van Alstyne*, 25 N. Y. 232.

8. *Aldred's Case*, 9 Rep. 58 b; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Butt v. Imperial Gas Co.*, L. R. 2 Ch. App. 161.

9. *Philadelphia etc. R. Co. v. State*, 20 Md. 157; *Veazie v. Dwinel*, 50 Me. 496; *Com. v. Upton*, 6 Gray (Mass.) 476; *People v. Cunningham*, 1 Den. (N. Y.) 536; *Davis v. Winslow*, 51 Me. 293; 81 Am. Dec. 573; *Gerrish v. Brown*, 51 Me. 256; 81 Am. Dec. 569; *Bainbridge v. Sherlock*, 29 Ind. 364; 95 Am. Dec. 644; *Morton v. Moore*, 15 Gray (Mass.) 576.

10. *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) 357; 3 Am. Dec. 439.

11. *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721. See **WATERS** and **WATERCOURSES**.

12. *Baker v. Fales*, 16 Mass. 488.

13. *Succession of Montamat*, 15 La. Ann. 332; *Durham v. Holeman*, 30 Ga. 619; *Yancey v. Stone*, 9 Rich. Eq. (S. Car.) 429; *Duggan v. Cole*, 2 Tex. 381; *Mitchell v. Burdett*, 22 Tex. 633; *Smith v. Power*, 23 Tex. 29; *Cunningham v. Fraudtzen*, 26 Tex. 34.

To acquire a title by prescription, to an easement, it must, as a general rule, have been enjoyed in the same degree, and to the same extent, as claimed in the suit involving it. *Postlethwaite v. Payne*, 8 Md. 104.

In *Illinois*, in an action for obstructing air and light to the windows of a house, the declaration need not prescribe for ancient lights, but the common law prescription for use and enjoyment for a time whereof the memory of man runneth not to the contrary, may be shown in evidence. *Gerber v. Grabel*, 16 Ill. 217.

A prescriptive right to maintain a bridge across a navigable stream is not shown by proof that it has been maintained in the same place more than fifty years. *Arundel v. McCulloch*, 10 Mass. 70.

In trespass *quare clausum*, the defendant pleaded a highway from time immemorial. *Held*, that such plea was supported by proof of the existence of the way for more than sixty years, there being no evidence as to its commencement. *Odiorne v. Wade*, 5 Pick. (Mass.) 421.

The averment of a prescriptive right to a way in the owners of a farm is sustained by evidence that such owners, and any other persons having occasion

If the pleadings present a claim for a prescriptive title by one kind of user, evidence of user of another kind is inadmissible.¹ Whether sufficient user is proved to sustain a plea of prescription, is a question for the jury.²

PRESENCE—See note 3. (See also WILLS.)

for the way, have used it for the requisite time, although the same evidence proves a title by custom in other persons. *Kent v. Waite*, 10 Pick. (Mass.) 138.

An averment of a lost grant from the owner of a beach to the inhabitants of a town in their corporate capacity, to the use of all the inhabitants thereof, to take seaweed for manuring their lands, is not supported by evidence that individuals of the town had been accustomed, from a very early period of time, to take seaweed from the beach for that purpose. *Sale v. Pratt*, 19 Pick. (Mass.) 191.

Evidence that the grantee, at the time of receiving a deed of land, agreed by parol that the grantor might continue to exercise a right of way over the land, not reserved in the deed, is admissible for the purpose of showing that the grantor's subsequent possession of such easement for twenty years commenced under a claim of right. *Ashley v. Ashley*, 4 Gray (Mass.) 167.

Where there is substantial conflict in the evidence on the issues of adverse and continuous diversion and use by defendant of water in a stream, relied on by him as giving prescriptive title and right to the same, a finding that there was not such adverse or continuous use and diversion will not be disturbed. *Heilbron v. Kings River etc. Canal Co.*, 76 Cal. 11.

1. Thus if the defendant gives notice, with the general issue, that he will offer in evidence a prescriptive right of fishing in the sea adjoining the *locus in quo*, and of using and occupying the shore for that purpose, he cannot give evidence of any prescriptive right to erect huts on the shore for the purpose of fishing; such custom or usage must be pleaded or mentioned in the notice. *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) 357; 3 Am. Dec. 439.

2. *Anderson v. Bock*, 15 How. (U. S.) 323; *Thomas v. England*, 71 Cal. 456.

3. A breach of the peace is committed "in the presence of an officer," though done at some distance from him,

and in the dark, if he can detect the act, and could see the person doing it if it were light. *People v. Bartz*, 53 Mich. 493.

Obscene words uttered in the hearing of a female are used in her presence, especially so when addressed to her by name. *Brady v. State*, 48 Ga. 311.

When Wife Is in the Presence of Her Husband.—As to when the wife is in the presence of her husband, so that the law will presume she is under his control, and so that she may plead his constraint as an excuse for the commission of a crime, it has been held that she must be "near enough to act under his immediate influence and control." *Commonwealth v. Burk*, 11 Gray (Mass.) 437.

It does not seem to be necessary to show that the act was done literally in his sight, if the husband be near enough for the wife to be under his immediate influence and control, though not in the same room. It is sufficient if he were on the premises and near at hand, a momentary absence from the room or a momentary turning of his back might still leave her under his control. *Commonwealth v. Munsey*, 112 Mass. 287.

Where a wife went from house to house uttering counterfeit coin, the husband accompanying her but remaining outside, it was held that there was such a presence of the husband as to raise the presumption of coercion. *Connely's Cas.* 2 Lew. 229. See also *Hughe's Cas.*, 1 Russ. Cr. 21.

But where the wife carried to her husband who was in jail an implement of escape, it was held that she was not excused, though she procured the instrument by his direction. *Note to Rex v. Knight*, 1 Carr. & P. 116. And see generally *State v. Camp*, 41 N. J. L. 306; *Regina v. Buncombe*, 1 Cox. C. C.; *Seiler v. People*, 77 N. Y. 411; *Wagener v. Bill*, 19 Barb. (N. Y.) 321; *State v. Potter*, 42 Vt. 495; *Commonwealth v. Feeney*, 13 Allen (Mass.) 560; *Commonwealth v. Butler*, 1 Allen (Mass.) 4; *Commonwealth v. Murphy*, 2 Gray (Mass.) 516. See also **HUSBAND AND WIFE**, vol. 9, p. 826; **MARRIED**

PRESENT.—See note 1. (See also *PAROL EVIDENCE*, vol. 17, p. 451.)

PRESENTATION.—See note 2.

PRESENTMENT—(See also *BILLS AND NOTES*, vol. 2, p. 373; *INDICTMENT*, vol. 10, p. 470; *GRAND JURIES*, vol. 9, p. 15; *CLEARING HOUSE*, vol. 3, p. 282).—Producing or tendering, according to the terms of either instrument, first a bill of exchange to the drawee for acceptance or to the acceptor for payment; or second, a promissory note to the maker for payment.³

PRESIDE; PRESIDING.—See note 4.

PRESIDENT OF THE UNITED STATES.

I. His Election, 32.

II. His Powers, 33.

1. *Pardoning Power* (See *PAROL EVIDENCE*, vol. 17, p. 317), 33.

2. *Treaty-Making Power* (See *TREATIES*), 33.

3. *Powers as Commander-in-Chief*, 33.

4. *Miscellaneous Powers*, 35.

I. HIS ELECTION.—Under the constitution of the United States,⁵ Congress determines the time of choosing Presidential electors,

WOMEN, vol. 14, p. 649; *CRIMINAL LAW*, vol. 4, p. 697.

1. In the sense of "at This Time."—A bequest to a "present attendant physician" refers to the physician attending the testator at the date of the will. *Everett v. Carr*, 59 Me. 325.

Where a legislature authorized commissioners to negotiate bonds to raise a fund for the payment of a city's "present floating debt," it was held, that sums which became due for work done after the date of the act, could not be included in such debt, although the contract therefor existed prior to that date. *State v. Faran*, 24 Ohio St. 536.

Present in the sense of to Exhibit—to Give—to Make Known, etc.—The constitution of *California* requires that every bill that has passed the legislature must "be presented" to the governor before it becomes a law. This does not mean that the bill may be merely exhibited to that officer and immediately thereafter taken away or withdrawn, but he must have time to deliberately consider its provisions and prepare his objections. *Harpenden v. Haight*, 39 Cal. 109.

In an Indictment.—The word "present" means nothing more than that the jury "represent" or "show" to the court that a certain person has committed a certain offense. *Common-*

wealth v. Keefe, 9 Gray (Mass.) 292. See list of cross-references to **PRESENTMENT**.

2. "The word 'presentation' may have many meanings according to the context or as circumstances require, and it may mean either 'shewing' or 'delivering over,'" per Jervis, C. J., *Bartlett v. Holmes*, 13 C. B. 630. In that case the vendor's memorandum of contract was to deliver 1,000 tons of pig iron "on the presentation of this document," and it was held that there "presentation" meant "delivering over."

3. See 1 *Daniel Neg. Inst.* § 449, as to acceptance; § 571, as to payment. *And. Law. Dict.*

4. A judge may preside, whether sitting as a sole judge or as one of several judges. *Smith v. People*, 47 N. Y. 330. "Presiding justice" is equivalent to "chief judge" or "presiding magistrate." *Bean v. Loryea* (Cal. 1889), 22 Pac. Rep. 513.

A *Massachusetts* statute directed that the sheriff should "preside" at the trial of a petition for damages to land. *Held*, that this did not require him to personally keep or attend the jury while they are making up their verdict. That duty being an executive one, while his duty as "presiding officer" was judicial. *Tripp v. County Commissioners*, 2 Allen (Mass.) 558.

5. Art. 2, § 1.

and the day on which they shall give their votes, the day to be the same throughout the United States; but to the legislatures of the respective States remains the power to direct the mode of appointment of electors.¹ The constitution is silent on the question by whom electoral votes are to be counted and the result declared, but this is now regulated by statute.² The constitution declares that no Senator or Representative, or person holding an office of trust or profit under the United States shall be appointed an elector.³

II. HIS POWERS⁴—1. Pardoning Power.—(See PARDON, vol. 17, p. 317.)

2. Treaty Making Power.—(See TREATIES.)

3. Powers as Commander-in-Chief.—Under the constitution the President is Commander-in-Chief of the army and navy; and of the militia of the several States when called into the actual service of the *United States*. By virtue of the power to call out the

1. Art. 2, § 1.

2. In determining the result of the election for President in 1841, it was declared, by joint resolution of the two houses of Congress, that one person be appointed teller on the part of the Senate, and two on the part of the House of Representatives, who were, in the presence of the two houses, to make a list of the votes as they should be declared, and the result declared to the President of the Senate, who was to be the presiding officer, and to announce to the two houses the state of the vote and the persons elected. The Vice-President, in that case, broke the seals of the envelopes of the votes, and delivered the same over to the tellers to be counted. The tellers having read, counted and made duplicate lists of the votes, they were delivered over to the Vice-President, and read, and he then declared the result, and dissolved the joint meeting of the two houses. 1 Kent's Com., p. 277, note a.

In 1877, when the election of Tilden or Hayes depended upon whether the votes of Florida, Louisiana and South Carolina should or should not be counted, a temporary act, viz: the Electoral Commission Bill, was passed to meet the case, but it applied only to this particular election (19 Stat. at L. 227). The acts of February 3, 1887 (24 Stat. at L. 373), and of October 19, 1888, supplementary to that of 1887, have provided for the counting of the votes, so that the strain upon constitutional government, caused by the controversy of 1877, is unlikely to recur, at least in that particular form.

19 C. of L.—3

3. The Supreme Court of *Rhode Island*, in 1876, had before it, in *In re Corliss*, 11 R. I. 638, the question whether a member of the Centennial Commission held an office of trust under the *United States* such as made him ineligible as a presidential elector, and it was held that he was ineligible, and further, that ineligibility by reason of holding the office of commissioner at the time of the election could not be removed by a subsequent resignation of the office, and that the effect of such ineligibility in the case of one receiving the highest number of votes for elector was to avoid the election, and to make a new election necessary. In 16 Am. Law Reg. 21 is a learned note by Judge Mitchell of the *Pennsylvania* Supreme Court, then one of the editors of this review, commenting upon the *Rhode Island* decision, and reviewing the cases wherein analogous questions bearing upon the election of public officers have been discussed. It is said by Judge Mitchell that the question whether persons holding such disqualifying offices can, by resigning them after their election by the people, qualify themselves to act as electors of President and Vice-President has arisen in several States beside Rhode Island, and that many good lawyers have expressed the opinion that this might be done, but that it is difficult to see upon what foundation such an opinion can rest, and that the authority of the courts is clearly against it.

4. It is not the province of this article, in treating of the powers of the President, to go beyond the decisions

33

State militia to suppress insurrection, he possesses the further power of deciding whether such an exigency exists as to require his action.¹ As Commander-in-Chief of the army and navy, he has power to make and repeal rules and regulations for its government.² He may dismiss an officer from the service,³ but may not revoke the order of dismissal and thus restore the dismissed officer to his position,⁴ nor revoke an acceptance of a resignation to the same result.⁵ He may direct a commitment in accordance with the sentence of a naval court-martial, of one convicted of an attempt to desert.⁶ Under the war power and as Commander-in-Chief of the army, he may establish a provisional court⁷ in insur-

of the United States Supreme Court upon points adjudged. For a general discussion of the subject, the reader is referred to the standard treatises on constitutional government.

1. The *United States* act of February 28, 1795, provided that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the *United States*, on application of the legislature of such State or of the executive (when the legislature cannot be convened) to call forth such number of the militia of any other State or States as may be applied for, as he may judge sufficient to suppress such insurrection."

It was said in *Luther v. Borden*, 7 How. (U. S.) 38, "by this act, the power of deciding whether the exigency had arisen upon which the government of the *United States* is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government; and the President must, of necessity, decide which is the government, and which party is lawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

It was adjudged, in *Martin v. Mott*, 12 Wheat. (U. S.) 19, that the act aforesaid was constitutional, and that, under that act the President is the exclusive judge whether an exigency for

the exercise of the authority thereby conferred has arisen.

2. *United States v. Eliason*, 16 Pet. (U. S.) 291; *United States v. Freeman* 3 How. (U. S.) 556.

3. *Blake v. United States*, 103 U. S. 227; *Keyes v. United States*, 109 U. S. 336. And see 4 A. G. Op. 1; 6 A. G. Op. 4; 8 A. G. Op. 233; 12 A. G. Op. 424; 15 A. G. Op. 421. See also 1 Kent Comm. 309; 2 Story Const. (4th ed.) §§ 1537-1540, and notes; 2 Marshall's Life of Washington 162; Sergeant's Const. Law 372; Rawle Const., 7 ch. 14. It was not the purpose of § 5 of the act of July 13, 1866 (12 St. 92), to withdraw the power. *Blake v. United States*, 103 U. S. 227; *Keys v. United States*, 109 U. S. 336. And the power of dismissal may be exercised by the appointment of a successor, by and with the advice and consent of the Senate. *Blake v. United States*, 103 U. S. 227; *Keyes v. United States*, 109 U. S. 336; *McElrath v. United States*, 102 U. S. 426.

4. *United States v. Corson*, 114 U. S. 619.

5. *United States v. Mimmack*, 97 U. S. 426.

6. *Dynes v. Hoover*, 20 How. (U. S.) 65.

7. *The Grapeshot*, 9 Wall. (U. S.) 129; *Mechanics' etc. Bank v. Union Bank*, 22 Wall. (U. S.) 276. The court was instituted for the State of *Louisiana* by executive proclamation after the occupation of New Orleans by the Federal forces in 1862. It was held, that the power was authorized by the constitution. Chase, C. J., in delivering the opinion of the court, cited to the point, *Litensdorfer v. Webb*, 20 How. (U. S.) 176, in which case the authority of the officer of the army holding possession of conquered Mexican territory to establish a provisional government, was sustained. *Jecker v.*

gent territory occupied by troops. But it is not within his power to establish a prize court.¹

Congress not being in session and not having acted, the President may recognize the existence of civil war in the United States, and act with reference thereto; as, by instituting a blockade of the ports of rebellious States.²

4. Miscellaneous Powers.—The acts of the President as the executive are not subject to judicial control. He may not be enjoined by the Supreme Court from executing an act of Congress. The remedy in case of an abuse of executive power lies in the process of impeachment, and is not vested in the courts.³ He has power to recover parcels of the public land from sale and to set them apart for public use. His authority, in this respect, is recognized in numerous acts of Congress.⁴ As, in many cases, the President

Montgomery, 13 How. (U. S.) 498; 18 How. (U. S.) 110; *Cross v. Harrison*, 16 How. (U. S.) 164; *United States v. Rice*, 4 Wheat. (U. S.) 246; *Texas v. White*, 7 Wall. (U. S.) 700, were also cited by the court in illustration of the principles applicable to military occupation. It was held further, in the *Grapeshot*, 9 Wall. (U. S.) 129, that Congress had power, upon the close of the war, and the dissolution of the provisional court, to provide for the transfer of cases pending therein to the regular Federal tribunals.

1. So held in *Jecker v. Montgomery*, 13 How. (U. S.) 498, in relation to a prize court established at Monterey, during the Mexican war, such court consisting of a chaplain attached to a United States ship of war, who, at the request of the naval commander of the station, and under the sanction of the President, assumed to exercise admiralty jurisdiction in cases of capture.

2. The Prize Cases, 2 Black (U. S.) 635. The court, in its opinion in this case, adverted to the fact that two of the battles of the Mexican war had been fought before the passage of the act of Congress of May 14, 1846, which recognized "a state of war existing by the act of the Republic of Mexico."

3. In *Mississippi v. Johnson*, 4 Wall. (U. S.) 475, this was decided on motion for leave to file an original bill in equity in the *United States Supreme Court* to enjoin the President from carrying into effect the Reconstruction Acts of 1867. Counsel in arguing in support of the motion, contended that as the duties of the President were

clearly defined by the act they were rather ministerial than executive, and might, therefore, be restrained by injunction on the ground relied on for invoking the writ of *mandamus* or injunction against a subordinate executive officer charged with the execution of a ministerial duty, as in *Marbury v. Madison*, 1 Cranch (U. S.) 175; *Kendall v. Stokes*, 12 Pet. (U. S.) 534; *United States v. Guthrie*, 17 How. (U. S.) 284; *State v. Chase*, 5 Ohio St. 529; *Green v. Mumford*, 5 R. I. 472; *Ellis v. Grey*, 6 Sim. 214, in which latter case it was adjudged that the lords of the treasury in *England*, though constituting a prominent department of the executive government, might be enjoined by the judicial department; it was argued that the process, when directed against subordinate executive officers, was in effect a process against the head of the executive department; but the argument was deemed by the court, Chase, C. J., delivering the opinion, to be without force.

On grounds substantially similar, the same court, in *Georgia v. Stanton*, 6 Wall. (U. S.) 50, declined to entertain a suit to enjoin the General of the Army and other officers of the Federal government from carrying the same Reconstruction Acts into execution, the decision, however, in this case, being placed upon the ground that the questions of the constitutionality of the acts and of their tendency to abolish existing State governments were political and not judicial questions, and that the court was without power to interfere.

4. See *Grisar v. McDowell*, 6 Wall. (U. S.) 363; *Wolcott v. Des Moines*

acts through the heads of the executive departments, a direction or order by one of such heads may be, in legal intendment, the act of the President.¹ He may reopen, on the ground of fraud the proceedings of a commission which, under a treaty, has passed upon claims against citizens of the respective governments.² Instructions from the President to do an illegal act do not justify an officer acting under them.³ An executive proclamation takes effect when signed and sealed and deposited in the Department of State, irrespective of the date of its actual publication or of the fact that transactions may have been had in ignorance of the proclamation.⁴

PRESUME—(See also PRESUMPTIONS).—See note 5.

PRESUMPTIONS.—See index of cross-references in the notes.

- I. Definition, 38.
- II. Division, 39.
- III. General Rules, 39.
- IV. Conflicting Presumptions, 40.
- V. Conclusive Presumptions of Law, 41.
 1. *Infants Under Seven Years Incapable of Matrimony*, 41.
 2. *Infants Under Seven Years Incapable of Crime*, 41.
 3. *Adverse Possession for Statutory Period Raises Presumption of Title*, 41.
 4. *Grant of Incorporeal Hereditament Presumed After Continued User for Twenty Years*, 42.

VI. Rebuttable Presumptions of Law, 42.

1. *Innocence in Civil Cases*, 42.
 - a. *General Application of the Presumption*, 42.
 - b. *Application in Official Acts*, 43. [45.]
2. *Innocence in Criminal Cases*, 43.
3. *Love of Life*, 45.
4. *Contract Presumed Made in View of Law Making It Valid*, 45.
5. *Sanity in Criminal Cases*, 45.
6. *Sanity in Civil Cases*, 45.
7. *Supremacy of Husband Over Wife as to Her Acts Done in His Presence*, 45.

Co., 5 Wall. (U. S.) 688; *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Wolsey v. Chapman*, 101 U. S. 755. See also PUBLIC LANDS.

1. As a direction by the Secretary of War that a section of land be reserved for military purposes. *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; or an order from the Secretary of the Interior that certain public land be reserved from sale. *Wolsey v. Chapman*, 101 U. S. 755.

2. In *Frelinghuysen v. Key*, 110 U. S. 63, it was adjudged that the president had power to reopen the proceedings of the Mexican claims commission, on allegations of fraud, notwithstanding that the submission declared that the result of the proceedings should be deemed a full, final, and perfect settlement of every claim, and an award had been made against the Mexican government and the money paid to the United States to be paid over to the claimant.

3. So held in *Little v. Barreme*, 2 Cranch (U. S.) 170, where the order of the President to a commander of a ship of war, directing seizures for supposed violations of the non-intercourse act, were not authorized by law. And see *Otis v. Bacon*, 7 Cranch (U. S.) 589.

4. So held in *Lapeyre v. United States*, 17 Wall. (U. S.) 191, in which case four of the judges dissented on the ground that the date of the proclamation should control. In *United States v. Norton*, 97 U. S. 164, however, the court reaffirmed the rule laid down in *Lapeyre v. United States*, and held further, that such a proclamation took effect as of the beginning of the day, fractions of a day not being taken into account.

5. Infer is stronger than presume. The law does not presume, much less infer, fraud. *Morford v. Peck*, 46 Conn. 385. See also FRAUD, vol. 8, p. 635; DECEIT, vol. 5, p. 347.

8. *Infants Between Ages of Seven and Fourteen Incapax doli*, 45.
 - a. *General Rule*, 45.
 - b. *When Infant Charged with Committing Rape*, 46.
 9. *Death After Seven Years' Absence*, 46.
 10. *Foreign Law Corresponds to the Lex Fori*, 46.
 11. *Regularity of Marriage*, 47.
 12. *Regularity of Divorce*, 48.
 13. *Legitimacy*, 48.
 14. *Incapacity of Child Bearing*, 48.
 15. *Regularity of Official and Judicial Proceedings*, 49.
 16. *Regularity of Legislative Proceedings*, 50.
 17. *Regularity in Records and Proceedings of Corporations*, 50.
 18. *Correctness in Dates of Documents*, 50.
 19. *Regularity as to the Formalities of Documents*, 51.
 - a. *General Rule*, 51.
 - b. *Presumption that Document Was Stamped*, 51.
 - c. *Presumption that Deed Was Sealed and Delivered*, 51.
 20. *Right to Act*, 51.
 - a. *In Particular Office*, 51.
 - b. *As Member of a Particular Profession*, 52.
 - c. *As Corporation*, 52.
 21. *Letter in Answer Presumed to be Genuine*, 52.
 22. *Business Transactions Presumed to Have Ordinary Effect*, 52.
 23. *Possession Raises a Presumption of Title*, 53.
 24. *Soil of Highways, etc., Belongs to Adjacent Proprietor*, 54.
 25. *Easements Presumed from Unity of Grant*, 54.
 26. *Ancient Documents Presumed to be Genuine*, 55.
 27. *Presumption of Payment After Twenty Years*, 55.
 28. *Receipt Raises Presumption of Payment*, 55.
 29. *Presumption of Execution of Instruments as Between Trustee and Beneficiary*, 55.
- VII. Presumptions of Fact**, 56.
1. *General Principles*, 56.
 - a. *Definition*, 56.
 - b. *Strong and Weak Presumptions*, 57.
 - c. *Accumulative Presumptions*, 57.
 - d. *Distinction Between Strong Presumptions of Fact, and Rebuttable Presumptions of Law*, 57.
 - e. *Conflicting Presumptions*, 59.
 - f. *Mixed Presumptions*, 59.
 - g. *Presumptions of Fact and Burden of Proof*, 61.
 2. *Psychological Presumptions*, 61.
 - a. *Definition*, 61.
 - b. *Knowledge of Fact — When Presumed*, 61.
 - c. *Genuineness of Documents Raises Presumption of Truth*, 63.
 - d. *Prudence in Avoiding Danger — When Presumed*, 64.
 - e. *Presumptions of Intent*, 64.
 - (1) *In General*, 64.
 - (2) *Adequate Purpose*, 64.
 - (3) *Presumption of Malice in Criminal Cases*, 65.
 - (4) *Presumption of Malice in Civil Cases*, 67.
 - f. *Negligence — When Presumed*, 67.
 - g. *Presumptions from the Alteration of Testimony*, 68.
 - (1) *Mutilation or Destruction of Documentary Evidence*, 69.
 - (2) *Presumptions from Holding Back Proof*, 70.
 - (3) *Presumption from Fabrication of Testimony*, 72.
 - h. *Presumptions of Guilt from Acts Indicating Fear*, 73.
 3. *Physical Presumptions, Presumptions of Regularity and Title*, 74.
 - a. *Continuance of Life*, 74.
 - b. *Survivorship in a Common Disaster*, 75.
 - c. *A Relationship Once Established is Presumed to Continue*, 75.
 - d. *Residence Presumed Continuous*, 76.
 - e. *Occupancy Presumed Continuous*, 76.

- | | |
|--|---|
| <p><i>f. Habits and Appearance Presumed Unchanged, 76.</i>
 <i>g. Coverture and Cohabitation Presumed Continuous, 77.</i>
 <i>h. Solvency and Insolvency Presumed Continuous, 77.</i>
 <i>i. Constancy of Nature, 77.</i>
 <i>j. Physical Sequences, 77.</i>
 <i>k. Probable Habits of Animals, 78.</i>
 <i>l. Conduct of Men in Emergencies, 78.</i>
 <i>m. Proper Negotiation of Negotiable Paper, 78.</i></p> | <p><i>n. Regular Appointment of Officers and Agents, 79.</i>
 <i>o. Regularity of Business Men, 79.</i>
 <i>p. Non-existence of Claim Presumed from Non-claimers, 80.</i>
 <i>q. Letter Posted Presumed to Arrive at Usual Time, 80.</i>
 <i>r. Letter Sent by Special Messenger — Telegrams, 81.</i>
 <i>s. Acquiescence in Possession May Raise Presumption of Grant, 81.</i></p> |
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I. DEFINITION.—Presumptions are either logical inferences or legal assumptions from certain facts as to the existence or non-existence of facts in issue. If logical inferences they are presumptions of fact, if legal assumptions they are presumptions of law.¹

1. There are several so-called presumptions which are not treated in this article, as they are nothing but positive rules of law paraphrased, and are not strictly presumptions. For example, it is said that "every one is conclusively presumed to know the law," which is another way of stating the maxim "*Ignorantia legis neminem excusat*." So also the statement that every one is presumed to intend the natural consequences of his acts merely means that he will be held equally responsible for them whether he intended them or not. Again the rule of substantive law that a carrier is an insurer and negligence is immaterial is stated thus, that there is a presumption that the loss of goods by a common carrier is a negligent one. One learned writer also puts in this class the presumption of innocence and all the conclusive presumptions of law. Best's Ev. (Am. ed.), p. 304, n.

As to the existence or non-existence of certain presumptions in maritime law, see MARINE INSURANCE, vol. 14, p. 371. See ADVANCEMENTS, vol. 1, p. 218; BONDS, vol. 2, p. 462; CARRIERS OF GOODS, vol. 2, p. 810; CODICILS, vol. 3, p. 299; CORPUS DELICTI, vol. 4, p. 310; JURISDICTION, vol. 12, p. 270; MASTER AND SERVANT, vol. 14, p. 751; MERGER, vol. 15, p. 326; ILLEGAL CONTRACTS, vol. 9, p. 903; IMPLIED TRUSTS, vol. 10, p. 24.

This article is founded on Dr. Whar-

ton's Evidence, and the free use of that book, both in the arrangement and treatment of the subject, is hereby acknowledged.

A presumption may be defined to be an inference affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted. Best's Ev. (Am. ed.), p. 306.

Presumptions of law consist of those rules which in certain cases either forbid or dispense with any ulterior inquiry. Greenleaf Ev., p. 20; Taylor's Ev., p. 90.

A presumption of law is a juridical postulate that a particular predicate is universally assignable to a particular subject. Wharton's Ev., book 2, p. 406.

In Tanner v. Hughes, 53 Pa. St. 289, the court by Agnew, J., said: "A legal presumption is the conclusion of the law itself of the existence of one fact from others in proof, and is binding on the jury, *prima facie* till disproved, or conclusively, just as the law adopts the one or the other as the effect of proof."

"A presumption of fact is a logical argument from fact to fact." Wharton's Ev., vol. 2, § 1226.

"A presumption of fact means that a certain fact or set of facts furnishes evidence of another." Prof. Thayer.

Abbot, C. J.: "A presumption of fact

II. DIVISION.—From the above definition it will be seen that presumptions consist of two general classes—presumptions of law and presumptions of fact;¹ and presumptions of law are again subdivided into conclusive and rebuttable presumptions, conclusive presumptions being those presumptions which the law raises from certain facts and forbids any evidence being introduced to contradict them, while rebuttable presumptions of law are those presumptions which the law declares to be true until evidence is introduced to the contrary.²

III. GENERAL RULES CONCERNING PRESUMPTIONS.—Presumptions must be based upon facts and cannot be drawn from other presumptions.³ Presumptions of law may change from time to time,⁴ and such presumptions may be created by either legislative

is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning, and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could be thus ascertained, by inference in a court of law, very few offenders could be brought to punishment." *Reg. v. Burdett*, 4 B. & Ald. 161.

"Presumptions of fact are at best but mere arguments, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural force and efficacy in generating conviction in the mind, and should not be aided by suggestions or intimations from the court as to what they do or do not prove." *Lawhorn v. Carter*, 11 Bush (Ky.) 7.

1. Dr. Wharton draws the following distinctions between presumptions of law and those of fact:

"(1) A presumption of law derives its force from jurisprudence as distinguished from logic.

"(2) To a presumption of law, probability is not necessary; but probability is necessary to a presumption of fact.

"(3) Presumptions of law relieve, either provisionally or absolutely, the party invoking them from producing evidence; presumptions of fact require the production of evidence as a preliminary.

"(4) The conditions to which are attached presumptions of law are fixed and uniform; those which give use to presumptions of fact are inconstant and fluctuating." *Wharton on Ev.*, vol. 2, § 1237.

2. 1 Greenl. Ev. (14th. ed.), §§ 15, 33; 1

Taylor's Ev. (8th ed.), §§ 71, 109; *Best's Ev.* (Am. ed.), §§ 306, 314.

3. *Richmond v. Aiken*, 25 Vt. 324; *Doolittle v. Holton*, 26 Vt. 588; *Ellis v. Ellis*, 58 Iowa 720; *People v. Hensing*, 28 Ill. 410; *Danley v. Rector*, 10 Ark. 211; 50 Am. Dec. 242; *Whelton v. Hardisty*, 8 E. & B. 232; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Pennington v. Yell*, 11 Ark. 236; 52 Am. Dec. 262; *U. S. v. Ross*, 92 U. S. 281; *Manning v. John Hancock Mut. L. Ins. Co.*, 100 U. S. 694; *Douglas v. Mitchell*, 35 Pa. St. 446; *McAleer v. McMurray*, 58 Pa. St. 126; *Philadelphia City Pass. R. Co. v. Henrice*, 92 Pa. St. 331.

In *Philadelphia City Pass. R. Co. v. Henrice*, 92 Pa. St. 431, the question was as to whether there had been negligence on the part of the driver of a street car. The plaintiff offered evidence to show that the driver had to work for eighteen hours daily, and asked the court to direct the jury that from this they might infer that the driver was physically incapable of performing his duties properly, and from this inference they might presume that he was negligent. The lower court so directed the jury, and such direction was held on an appeal by the supreme court to be error, as a presumption could not be based upon a presumption but only upon a fact.

4. Dr. Wharton illustrates this by the following: "That a man cannot be in the same week in Rome and London, was an irrebuttable presumption in the twelfth century; it is no presumption at all in the nineteenth. That information cannot be passed instantaneously from one business center to another was, in the twelfth century irrebuttably presumed; in the nineteenth century

or judicial action.¹ Presumptions cannot contradict facts nor overcome facts that have been proved,² but if the evidence on both sides be equal, then the presumption should prevail.³ Presumptions cannot act *in futuro*,⁴ nor be retroactive,⁵ and "a presumption may be rebutted by a stronger presumption."⁶

IV. CONFLICTING PRESUMPTIONS.⁷—If the presumption of continuance and that of payment conflict, the latter will prevail;⁸ as between the presumption of payment and that of innocence, the latter will prevail;⁹ the presumption of innocence will prevail over the presumptions of continuance of life,¹⁰ continuance of an exist-

most of our business contracts are effected by information so received." Wharton on Ev., vol. 2, § 1234.

1. See an article by Professor Thayer, of Harvard, entitled, "Presumptions, and the Law of Evidence" in Harvard Law Review, vol. 3, No. 4.

See ABSENCE, vol. 1, p. 39.

See Opinion of Gray, C. J., and cases cited in Holmes v. Hunt, 122 Mass. 605; 23 Am. Rep. 381.

2. Lawson on Presumptive Evidence, 576; Galpin v. Page, 18 Wall. (U. S.) 364; Whitaker v. Morrison, 1 Fla. 29; 44 Am. Dec. 627; Van Buren v. Cockburn, 14 Barb. (N. Y.) 122.

3. Lawson on Presumptive Evidence, 576; Graves v. Colwell, 90 Ill. 615.

4. Lawson on Presumptive Evidence, 579; Covert v. Gray, 34 How. Pr. (N. Y.) 450; Strong v. Strong, 1 Abb. Pr., N. S. (N. Y.) 233. In Covert v. Gray, 34 How. Pr. (N. Y.) 450, the plaintiff brought an action against the defendant for enticing the plaintiff's minor son to enlist in the army. The question was as to the measure of damages; whether the plaintiff could recover only for the loss of service to the date of the trial, or to the end of the war which was then raging, or until the end of the son's term which was three years. *Held*, that he could only recover for the loss up to the date of the trial, as there was no presumption that the war would continue. The court by Mason, J., said: "The rule is reasonable which presumes the continuance of an existing fact at the time of the trial, for the other party can overthrow it by proof if it be not so; but when it presumes a future continuance the party has no ability to unfold the future and give an answer by his proof."

5. Lawson on Presumptive Evidence 579; Erskine v. Davis, 25 Ill. 228; Barelli v. Lytle, 4 La. Ann. 557; Taylor v.

Cresswell, 45 Md. 422; Murdock v. State, 68 Ala. 567.

If A is a *feme covert* in 1860 there is no presumption that she was so in 1854. Erskine v. Davis, 25 Ill. 251; Murdock v. State, 68 Ala. 567. If it is officially certified that A is a justice of the peace on June 29, 1848, there is no presumption that he occupied such a position on June 5th of that same year. Barelli v. Lytle, 4 La. Ann. 557.

If A is insane in 1864 there is no presumption that he was so in 1860. Taylor v. Cresswell, 45 Md. 522.

6. Per Heath, J., in Jayne v. Price, 5 Taunt. 328. See also *infra*, this title, *Conflicting Presumptions*.

7. See Lawson on Presumptive Evidence 582.

8. See PAYMENT, vol. 18, p. 148; Potter v. Titcomb, 7 Me. 302.

9. Potter v. Titcomb, 7 Me. 302.

10. Rex v. Guyning, 2 B. & Ald. 386; Sharp v. Johnson, 22 Ark. 79; Greensborough v. Underhill, 12 Vt. 604; Cameron v. State, 14 Ala. 546; 48 Am. Dec. 111; Chapman v. Cooper, 5 Rich. (S. Car.) 452; Lockhart v. White, 18 Tex. 102; Yates v. Houston, 3 Tex. 442; Hull v. State, 7 Tex. App. 593; People v. Geilen, 58 Cal. 218; 41 Am. Rep. 258; Murray v. Murray, 6 Oregon 18; Breiden v. Paff, 12 S. & R. (Pa.) 430; Kelly v. Drew, 12 Allen (Mass.) 107; 90 Am. Dec. 138; Montgomery v. Bevans, 1 Sawy. (U. S.) 666; Spears v. Burton, 31 Miss. 555; Wilkie v. Collins, 48 Miss. 496.

In *England* the rule would seem to be at present that in the case of a conflict between the presumptions of innocence and continuance of life, they both give way, and it is a question of fact for the jury in view of all the circumstances of the case. Reg. v. Harborne, 2 A. & E. 540; Lapsley v. Grierson, 1 H. L. Cas. 500; Reg. v. Lumley, 1 L. R., C. C. 196; Reg. v. Wiltshire, L. R., 6 Q. B. D. 366.

ing state of things,¹ of marriage,² of chastity,³ of regularity of official acts.⁴

V. CONCLUSIVE PRESUMPTIONS OF LAW.—1. Infants Under Seven Years Incapable of Matrimony.—Infants both male and female under seven years of age are irrebuttably presumed to be incapable of matrimony, and a marriage in which either of the contracting parties was under that age would be not merely voidable but absolutely void.⁵

2. Infants Under Seven Years Incapable of Crime.—Infants under seven years of age are irrebuttably presumed to be *incapax doli*.⁶

3. Adverse Possession for the Statutory Period Raises Presumption of Title.—Possession of land for the period mentioned in the Statute of Limitations, under a claim of absolute title and ownership constitutes against all persons but the sovereign a conclusive presumption of a valid grant.⁷

1. *Klein v. Landman*, 29 Mo. 259. If however an illicit connection be formed and the parties continue to live under the same roof, a continuance of their immoral relationship will be presumed. *Carolti v. State*, 42 Miss. 334; 97 Am. Dec. 465; *Floyd v. Calvert*, 53 Miss. 46. These cases would seem to be based upon the principle that the parties had a chance to form a valid union but preferred a meretricious one, and therefore the continuance of the relationship would be presumed; if however there was a bar to a valid union which subsequently became removed, the principle laid down in the above cases does not hold, and the presumption of innocence prevails. *Wilkinson v. Payne*, 4 T. R. 468; *Lawson on Presumptive Evidence* 586.

2. *Clayton v. Wardell*, 4 N. Y. 230; *Case v. Case*, 17 Cal. 598; *Armstrong v. Hodges*, 2 B. Mon. (Ky.) 70; *Willard v. Harmer*, 8 C. & P. 697; *Catherwood v. Caslon*, 13 M. & W. 261; *West v. State*, 1 Wis. 209; *Com. v. Littlejohn*, 15 Mass. 163; *Morris v. Miller*, 1 Wm. Bl. 632.

See also *BIGAMY*, vol. 2, p. 192; *MARRIAGE*, vol. 14, p. 521.

3. If A be indicted for seduction under a statute punishing the seduction of "any unmarried female of previous chaste character" the burden of proof is on the prosecution to show the chaste character of the seduced. 2 *Wharton's Cr. Law* 1751; *West v. State*, 1 Wis. 209; *People v. Roderigas*, 49 Cal. 9; *Zabriskie v. State*, 43 N. J. L. 640; 39 Am. Rep. 610; *Oliver v. Com.*, 101 Pa. St. 218; 47 Am. Rep. 704; *Com. v. Whitaker*, 131 Mass. 224.

In some of the States the burden of proof is on the defense to show that the seduced was not of a previous chaste character. *State v. Andre*, 5 Iowa 389; *State v. Shean*, 32 Iowa 88; *State v. Wells*, 48 Iowa 671; *State v. Higdon*, 32 Iowa 262; *Crozier v. People*, 1 Park. Cr. Rep. (N. Y.) 457; *Cook v. People*, 2 Thomp. & C. (N. Y.) 404; *Slocum v. People*, 90 Ill. 274; *People v. Brewer*, 27 Mich. 134; *People v. Squires*, 49 Mich. 487; *Wood v. State*, 48 Ga. 192; 15 Am. Rep. 664; *Wilson v. State*, 73 Ala. 527.

4. *Weimer v. Bunbury*, 30 Mich. 216; *Houghton Co. v. Rees*, 34 Mich. 481.

5. See authorities cited under *MARRIAGE*, vol. 14, p. 487. Also see *Bishop's Mar. and Div.*, § 148; *Wharton's Ev.*, vol. 2, § 1270.

6. See authorities cited under *INFANTS*, vol. 10, p. 697; *CRIMINAL LAW*, vol. 4, p. 683.

7. See *LIMITATIONS TO ACTIONS*, vol. 13, p. 604; 1 *Greenleaf on Ev.*, § 16; 2 *Min. Insts.* (3rd ed.) 569; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Corning v. Troy Iron etc. Co.*, 34 Barb. (N. Y.) 529; *Croxall v. Shererd*, 5 Wall. (U. S.) 268; *Bicknell v. Comstock*, 113 U. S. 149; *Knox v. Cleveland*, 13 Wis. 245; *Moore v. Luce*, 29 Pa. St. 260; 72 Am. Dec. 629.

In *Green v. Biddle*, 8 Wheat. (U. S.) 1, the court by Washington, J., said: "If there be no remedy to recover the possession, the law necessarily presumes a want of right to it."

In *Moore v. Luce*, 29 Pa. St. 260, 72 Am. Dec. 629, the court by Lewis, C. J., said: "The law never deliberately

There must, however, be an actual occupation of the premises claimed.¹

4. Grant of Incorporeal Hereditament Presumed After Continued User for Twenty Years.—A grant of an incorporeal hereditament will be presumed from an uninterrupted adverse possession thereof for twenty years.²

VI. REBUTTABLE PRESUMPTIONS OF LAW—1. Innocence in Civil Cases—*a.* GENERAL APPLICATION OF THE PRESUMPTION.—It is a presumption of law that every one has conformed to the law, and the burden of proof is on him who alleges the contrary.³

takes away all remedy without an intention to destroy the right."

A possession, not continuous, but nearly so, for one hundred years, accompanied by a payment of taxes for the last seventy-seven years of the time, was held to justify the presumption of a deed, and that the presumption was based on what might have occurred and not on what the jury might fairly suppose did occur. *Fletcher v. Fuller*, 120 U. S. 534.

Pennsylvania.—In *Pennsylvania*, twenty-one years is the time which raises a presumption of title to land, and this presumption unrepelled will defeat any claim that is set up against it. *Strimpfler v. Roberts*, 18 Pa. St. 283; 57 Am. Dec. 606.

There is a difference of opinion among judges and law writers as to whether the policy of the Statute of Limitations is to raise a presumption of satisfaction or is merely to discourage litigation and to be considered as a statute of repose. The weight of authority at the present day seems to be in favor of holding it to be a statute of repose. 2 *Minor's Insts.* (3rd ed.) 543; *LIMITATION OF ACTIONS*, vol. 13, p. 692.

1. *Martin v. Jackson*, 27 Pa. St. 504; 67 Am. Dec. 489; *ADVERSE POSSESSION*, vol. 1, p. 252.

2. See *EVIDENCE*, vol. 7, p. 98; *HIGHWAYS*, vol. 9, p. 366; *INCORPOREAL HEREDITAMENTS*, vol. 10, p. 353; *PRESCRIPTION*.

3. *Powell v. Welbank*, 2 W. Bl. 852; *Ross v. Hunter*, 4 T. R. 33; *Williams v. East India Co.*, 3 East 192; *Rex v. Hawkins*, 10 East 211; *Bennett v. Clough*, 1 B. & Ald. 461; *Rodwell v. Redge*, 1 C. & P. 220; *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 69; *Hewlett v. Hewlett*, 4 Edw. Ch. (N. Y.) 7; *Jackson v. Shaffer*, 11 Johns. (N. Y.) 513;

Hartwell v. Root, 19 Johns. (N. Y.) 345; 10 Am. Dec. 232; *Richards v. Kountze*, 4 Neb. 201; *Lincoln v. French*, 105 U. S. 614; *Dixon v. Columbus etc. R. Co.*, 4 Biss. (U. S.) 137; *Hall v. Otis*, 77 Me. 122; *Turner v. Komvenhoven*, 100 N. Y. 115.

A man who sells liquor will be presumed to have conformed to the law in reference to having a license, etc. *Timson v. Moulton*, 3 Cush. (Mass.) 269; *Horan v. Weiler*, 41 Pa. St. 470.

Fraud will never be presumed; the burden is on the party alleging it. *Leete v. Ins. Co.*, 15 Jur. 1161; *Greenwood v. Lowe*, 7 La. Ann. 197; *Mandal v. Mandal*, 28 La. Ann. 556; *Jones v. Simpson*, 116 U. S. 609; *Young v. Edwards*, 72 Pa. St. 267; *Mead v. Conroe*, 113 Pa. St. 220; *Marksbury v. Taylor*, 10 Bush (Ky.) 519; *Vanbibber v. Berne*, 6 W. Va. 168; *Stewart v. Thomas*, 15 Gray (Mass.) 171; *Hatch v. Bayley*, 12 Cush. (Mass.) 27; *Elliott v. Stoddard*, 98 Mass. 145; *Cooke v. Cooke*, 43 Md. 522; *Whitfield v. Stiles*, 57 Mich. 410; *Clements v. Mackeboeuf*, 92 U. S. 425; *Jones v. McLeod*, 103 Mass. 58; *Kline v. Baker*, 106 Mass. 61; *Thomas v. Rembert*, 63 Ala. 561; *Horan v. Weiler*, 41 Pa. St. 470; *Huchberger v. Home F. Ins. Co.*, 5 Biss. (U. S.) 106.

In the case of a *devastavit* by an executor, it will be presumed that the income was first misappropriated and not the principal. *Cook v. Lowery*, 95 N. Y. 103.

If it is a servant's duty to collect money for his master, the presumption is that he has handed it over and acted in good faith. *Turner v. Komvenhoven*, 100 N. Y. 115.

A lessee of mortgaged premises as between him and the owner is simply entitled to be paid out of any surplus

b. APPLICATION IN OFFICIAL ACTS.—This presumption operates in favor of the regularity and validity of official acts.¹ This last presumption of regularity and validity of official acts, however, "will not be extended so as to make it cover substantive independent facts, as distinguished from facts

arising on foreclosure sale, the loss resulting to him from the extinguishment of the lease, which is the value of the use of the premises for the remainder of his term less the rents reserved. In the absence of proof the presumption is that the rents reserved are the fair value of the use, and that no damage is sustained by the lessee. *Larkin v. Misland*, 100 N. Y. 212.

For presumption of good faith in a contracting party, see generally INTERPRETATION. vol. 11, p. 507.

Where a deed or other instrument is susceptible of two constructions one of which the law would carry into effect, while the other would be in contravention of some legal principle or statutory provision, the parties will always be presumed to have intended the former. *Best's Ev.*, § 347; *Earl Cairns, L. C.*, in *In re Glasgow Bank*, 4 L. R. App. Cas. 337; *Erle, J.*, in *Mayor v. R.*, 4 E. & B. 397; *Co. Litt.* 42 a and b; *Lewis v. Davison*, 4 M. & W. 654; *Kenton Co. Ct. v. Bank Lick Turnpike Co.*, 10 Bush (Ky.) 529.

A had commenced an action against B to recover money; he then agreed with C to suspend the proceedings on payment of a specified sum and the delivery of several promissory notes, C promising that if any of the notes were dishonored, and A was to issue a *capias* or detainer against B, he, C, would surrender him into custody or pay the money due on the notes. Held, binding, the presumption being that the contract was legal and must be construed to mean that C was to procure the surrender of B by lawful means, as by his consent, and not by any attempt to take him forcibly into custody. *Lewis v. Davison*, 4 M. & W. 654.

1. *Rex v. Hinckley*, 12 East 361; *Rex v. Catesby*, 2 B. & C. 814; *Gosset v. Howard*, 10 Q. B. 452; *Rex v. Stainforth*, 11 Q. B. 66; *Rex v. Broadhempston*, 1 E. & E. 155; *Ross v. Reed*, 1 Wheat. (U. S.) 482; *Philadelphia etc. R. Co. v. Stimpson*, 14 Pet. (U. S.) 448; *Minter v. Crommelin*, 18 How. (U. S.) 89; *U. S. v. Weed*, 5 Wall. (U. S.) 62; *Campbell v. Laclede Gas Co.*,

119 U. S. 445; *Cofield v. McClelland*, 16 Wall. (U. S.) 331; *Gonzales v. Ross*, 120 U. S. 605; *U. S. v. Tichenor*, 12 Fed. Rep. 415; *U. S. v. Adams*, 24 Fed. Rep. 348; *Shorey v. Hussey*, 32 Me. 579; *Wheelock v. Hall*, 3 N. H. 310; *Kimball v. Lamphrey*, 19 N. H. 215; *Forsyth v. Clark*, 21 N. H. 409; *Drake v. Mooney*, 31 Vt. 617; 76 Am. Dec. 145; *Richardson v. Smith*, 1 Allen (Mass.) 541; *Jones v. Boston*, 104 Mass. 461; *Smith v. Hill*, 22 Barb. (N. Y.) 656; *Wood v. Terry*, 4 Lans. (N. Y.) 80; *Jackson v. Shafer*, 11 Johns. (N. Y.) 517; *Coxe v. Deringer*, 82 Pa. St. 236; *Wellersburg etc. Plank Road v. Bruce*, 6 Md. 457; *Davis v. Johnson*, 3 Munf. (Va.) 81; *Paine v. Tutwiler*, 27 Gratt. (Va.) 440; *Ward v. Barrows*, 2 Ohio St. 241; *Titus v. Lewis*, 33 Ohio St. 304; *Ashe v. Latham*, 5 Ind. 435; *Banks v. Bales*, 16 Ind. 423; *Elston v. Castor*, 101 Ind. 426; 51 Am. Rep. 754; *Niantic Bank v. Dennis*, 37 Ill. 381; *Todemier v. Aspinwall*, 43 Ill. 401; *Conwell v. Watkins*, 71 Ill. 488; *Sinclair v. Learned*, 51 Mich. 335; *Rowan v. Lamb*, 4 Greene (Iowa) 468; *Arnold v. Juneau Co.*, 43 Wis. 627; *Kobs v. Minneapolis*, 22 Minn. 159; *Palmer v. Boling*, 8 Cal. 384; *Boyd v. Buckingham*, 10 Humph. (Tenn.) 434; *Jewell v. Porche*, 2 La. Ann. 148; *Morse v. McCall*, 13 La. Ann. 215; *O'Hara v. Blood*, 27 La. Ann. 57; *Webber v. Gottschalk*, 15 La. Ann. 376; *New Orleans v. Halpin*, 17 La. Ann. 185; *Trotter v. Board etc. of Public Schools*, 9 Mo. 69; *Dupuis v. Thompson*, 16 Fla. 69; *Sadler v. Anderson*, 17 Tex. 245.

The mere fact that cotton which had been captured reached the custody of a treasury agent, would not justify the conclusion of fact or the presumption of law that the cotton was sold and the proceeds paid into the treasury.

The *dictum* that public officers are presumed to have performed their duty is much too general and unrestricted language as enunciating a principle of law. Prior official acts may be inferred from subsequent official acts proven. But no presumption of law or fact that an officer has exe-

which are the incidents of official duty."¹ If a public officer be charged with misconduct the only effect of this presumption is to throw the burden of proof on the party so charging him,² and this same rule holds if the conduct of the officer come collaterally in issue.³

cuted all of his duties in relation to a matter in controversy arises from proof of prior circumstances which placed him in the position of obligation and ability to perform the same, unless there be evidence of subsequent facts which might have resulted therefrom. *Johnson v. U. S.*, 14 Ct. of Cl. 276.

Where an officer or party is in the attitude of asserting rights founded on official acts, and when due performance is essential to the right, due performance must be proved and cannot be presumed. *Wood v. Terry*, 4 Lans. (N. Y.) 80.

Notice of a foreclosure sale is indispensable to its validity, and as it is the act of the party and not of the officer making the sale, the presumption of the performance of official duty does not apply for the purpose of making out a valid foreclosure without actual proof of notice. *Sinclair v. Learned*, 51 Mich. 335.

A sheriff's deed must be under seal, and the court will not presume such a deed to be sealed against the express admission, in an answer, of the party invoking such a presumption, that the sheriff omitted by mistake to seal the deed. *Moreau v. Branham*, 27 Mo. 351.

In a prosecution for bigamy, where the marriage was proved by the witness present to have taken place at the parish church, and to have been solemnized by the curate of the parish, it was held unnecessary to prove either the registration of the marriage or the fact of any license having been granted. *Rex v. Allison, R. & R.*, C. C. 109.

1. Wharton on Ev., vol. 2, § 1318; *Murphy v. Chase*, 103 Pa. St. 260; *U. S. v. Ross*, 92 U. S. 281.

This presumption has no application to a constable who distrains and sells goods under a landlord's warrant, he being an agent of the landlord and not an officer of the law. *Murphy v. Chase*, 103 Pa. St. 260.

Because a claimant's property was captured and sent forward by a military officer, and there is an unclaimed

fund in the treasury derived from sales of property of the same kind, a court is not authorized to conclude, as matter of law, that the property was delivered by that officer to a treasury agent, that it was sold by the latter, and that the proceeds were paid into the treasury. *U. S. v. Ross*, 92 U. S. 281.

2. *Bruce v. Holden*, 21 Pick. (Mass.) 187; *Clapp v. Thomas*, 5 Allen (Mass.) 158; *Phelps v. Cutler*, 4 Gray (Mass.) 137; *sed confer State v. Melton*, 8 Mo. 417; *Hartwell v. Root*, 19 Johns. (N. Y.) 345; 10 Am. Dec. 232.

3. *Lea v. Polk Co. Copper Co.*, 21 How. (U. S.) 493; *Sheldon v. Wright*, 7 Barb. (N. Y.) 39; *Allegheny v. Nelson*, 25 Pa. St. 332; *Kelly v. Green*, 53 Pa. St. 302; *Jenkins v. Parkhill*, 25 Ind. 473; *Todemier v. Aspinwall*, 43 Ill. 401; *Dollarhide v. Muscatine Co.*, 1 Greene (Iowa) 158; *Guy v. Washburn*, 23 Cal. 111; *Hickman v. Boffman*, Hard. (Ky.) 348; *Ellis v. Carr*, 1 Bush (Ky.) 527; *Phelps v. Ratcliffe*, 3 Bush (Ky.) 334; *Dawkins v. Smith*, 1 Hill Eq. (S. Car.) 369.

Dr. Wharton says: "It is sometimes said that the law presumes that police officers do their duty. The law, however, presumes no such thing. If a public officer is sued for misconduct, then the case goes to the jury on the evidence, there being no presumption of virtue in his favor sufficient to outweigh preponderating proof on the other side. What the law says, and all that it in this respect says, is that a public officer is so far assumed *prima facie* to do his duty that the burden is on the party seeking to charge him with misconduct.

And this is in full harmony with the general rule above given, that on the actor lies the burden. The same reasoning applies in cases where the conduct of the officer comes collaterally in question. The burden is on those assailing such conduct; and so far, but only so far, the conduct of such officer is *prima facie* presumed to be right. In a suit by a private person against an officer the burden is on the plaintiff to make out his case, just as a similar burden is on the plaintiff in a suit by an officer against a private person. Where

2. **Innocence in Criminal Cases.**—In all criminal proceedings the accused is presumed to be innocent, and the burden of proof is on the prosecution to show the guilt of the accused beyond a reasonable doubt.¹

3. **Love of Life.**—Love of life is a rebuttable presumption of law, and the burden of proof is on him who alleges the contrary.²

4. **Contract Presumed Made in View of Law Making It Valid.**³

5. **Sanity in Criminal Cases.**—In criminal cases the accused is presumed to be sane,⁴ and the burden of proof is on the defendant to show the contrary.⁵ Where, however, a person has been proved to be insane, the insanity is presumed to continue, and the burden of proof shifts to the prosecution.⁶

6. **Sanity in Civil Cases.**—In all civil proceedings where the sanity of any one is in issue, the burden of proof is on the party who alleges insanity.⁷ Where, however, a person has been proved to be insane, the insanity is presumed to continue, and the burden of proof shifts to the party alleging sanity.⁸

7. **Supremacy of Husband Over Wife as to Her Acts Done in His Presence.**—Acts done by a wife in the actual or constructive presence of her husband are presumed to be done under his coercion, but such presumption may be rebutted by evidence to the contrary.⁹

8. **Infants Between the Ages of Seven and Fourteen Are Presumed to be Incapax Doli.**—*a.* THE GENERAL RULE.—Infants between the ages of seven and fourteen are presumed to be *incapax doli*, and the burden of proof is on him who alleges the contrary.¹⁰

the facts go to the jury, there is no more presumption of law in either case that the officer did right than there is a presumption of law that the private person did right. In criminal prosecutions for misconduct in office, the presumption in favor of the officer, when the case goes to the jury, is only the ordinary presumption of innocence." Wharton on Ev., vol. 2, § 1319.

1. See cases cited under BURDEN OF PROOF, vol. 2, p. 657; CRIMINAL PROCEDURE, vol. 4, p. 856; LARCENY, vol. 12, p. 879.

2. See cases cited under LIFE, vol. 13, p. 628; LIFE INSURANCE, vol. 13, p. 644; ACCIDENT INSURANCE, vol. 1, p. 88, note 2.

See also Continental Ins. Co. v. Delpuch, 82 Pa. St. 225; Guardian Mut. L. Ins. Co. v. Hogan, 80 Ill. 35; 22 Am. Rep. 180; Way v. Illinois Cent. R. Co., 40 Iowa, 341; Morrison v. New York Cent. etc. R. Co., 63 N. Y. 643; Illinois Cent. R. Co. v. Cragin, 71 Ill. 184.

He who alleges suicide must prove it,

and if the evidence on both sides is equal the presumption of love of life will prevail. (Wharton on Ev., vol. 2, § 1247) Continental Ins. Co. v. Delpuch, 82 Pa. St. 225; Guardian Mut. L. Ins. Co. v. Hogan, 80 Ill. 35; 22 Am. Rep. 180.

3. See CONFLICT OF LAWS, vol. 3, p. 546; Whart. on Ev., § 1250; Kilgore v. Dempsey, 25 Ohio St. 413; Smith v. Whittaker, 23 Ill. 367.

4. See authorities cited under CRIMINAL LAW, vol. 4, p. 715; BURDEN OF PROOF, vol. 2, p. 657; INSANITY, vol. 11, p. 159.

5. As to amount of evidence necessary to overcome this presumption, see authorities cited under BURDEN OF PROOF, vol. 2, p. 658.

6. See authorities cited under CRIMINAL LAW, vol. 4, p. 715; INSANITY, vol. 11, p. 160.

7. See INSANITY, vol. 11, p. 159.

8. See INSANITY, vol. 11, p. 160.

9. See CRIMINAL LAW, vol. 4, p. 697.

10. See BURDEN OF PROOF, vol. 2, p.

b. WHEN INFANT IS CHARGED WITH HAVING COMMITTED RAPE.—If the crime of which the infant is charged be rape there is an irrebuttable presumption in *England*¹ that he is impotent, but in the *United States* the presumption of impotency can be overcome in some States² by proof that the infant has reached the age of puberty, but in other States,³ it is irrebuttable.

9. Death After Seven Years' Absence.—The absence of a person for seven years, without his being heard of by those persons who would naturally have heard from him if he were alive, raises a presumption of his death, and throws the burden of proof on the party alleging him to be alive.⁴

This presumption, however, will be rebutted by proof of circumstances which will explain his failure to be heard from,⁵ and there is no presumption as to his having died at any particular period during the seven years, and the burden of proving his death at any particular time is on the party who asserts it.⁶

10. Foreign Law Corresponds to the Lex Fori.—The settled rule is that foreign States whose system of jurisprudence is derived from the same source with our own, are presumed to be governed by law materially the same as our own.⁷ This presumption, however, does not extend to States whose jurisprudence springs from a different source, nor can we impute to a foreign State, idiosyncrasies of the

654; AGE, vol. 1, p. 327; INFANCY, vol. 10, p. 697; CRIMINAL LAW, vol. 4, p. 684; RAPE.

1. *Rex v. Eldershaw*, 3 C. & P. 396; *Rex v. Groombridge*, 7 C. & P. 582; *Rex v. Phillips*, 8 C. & P. 736; *Rex v. Jordan*, 9 C. & P. 118; *Rex v. Brimilow*, 9 C. & P. 366.

2. *People v. Randolph*, 2 Park. Cr. Rep. (N. Y.) 174; *Williams v. State*, 14 Ohio 222; 45 Am. Dec. 536; *Hiltabiddle v. State*, 35 Ohio St. 52; 35 Am. Rep. 592; *Wagoner v. State*, 5 Lea (Tenn.) 352; 40 Am. Rep. 36; *State v. Pugh*, 7 Jones (N. Car.) 61; *Moore v. State*, 17 Ohio St. 521; *O'Meara v. State*, 17 Ohio St. 515; *Com. v. Green*, 2 Pick. (Mass.) 580; *Stephen v. State*, 11 Ga. 225.

3. *State v. Handy*, 4 Harr. (Del.) 566; *State v. Sam, Winst.* (N. Car.) 300; *Williams v. State*, 20 Fla. 777.

A boy under fourteen years of age cannot be convicted of an attempt to commit a rape. *Rex v. Eldershaw*, 3 C. & P. 366; *Rex v. Groombridge*, 7 C. & P. 582; *Rex v. Phillips*, 8 C. & P. 736; *Rex v. Jordan*, 9 C. & P. 118; *Rex v. Brimilow*, 9 C. & P. 366; *State v. Sam, Winst.* (N. Car.) 300; *Law v. Com.*, 75 Va. 885; *State v. Pugh*, 7 Jones (N. Car.) 61; *State v. Handy*, 4

Har. (Del.) 566. *Contra*, *Com. v. Green*, 2 Pick. (Mass.) 380, and *Com. v. Underhill*, Lewis, Cr. L. (Pa.) 102.

A boy under fourteen years of age, however, may be convicted as a principal in the second degree. *R. v. Eldershaw*, 3 C. & P. 366; *Law v. Com.*, 75 Va. 885; 40 Am. Rep. 750.

4. See ABSENCE, vol. 1, p. 37.

5. See ABSENCE, vol. 1, p. 39.

6. See ABSENCE, vol. 1, p. 39.

As to the existence of any presumption of fact of survivorship in a common disaster, see ABSENCE, vol. 1, page 44.

As to presumption of loss of vessels, see MARINE INSURANCE, vol. 14, p. 371.

7. See JUDICIAL NOTICE, vol. 12, p. 163; NOTARY PUBLIC, vol. 16, p. 767.

Marsters v. Lash, 61 Cal. 622; *Shumway v. Leakey*, 67 Cal. 458; *Hill v. Wilkes*, 41 Ga. 499; 5 Am. Rep. 540; *St. Louis etc. R. Co. v. Weaver*, 35 Kan. 412; *Brimhall v. Van Campin*, 8 Minn. 13; 82 Am. Dec. 118; *Peterson v. Chemical Bank*, 32 N. Y. 21; 88 Am. Dec. 298; *Harris v. White*, 81 N. Y. 532; *Cannon v. Northwestern Mut. L. Ins. Co.*, 29 Hun (N. Y.) 470; *Peabody v. Carrol*, 9 Mart. (N. Car.) 395; 13 Am. Dec. 305; *Allen v. Watson*, 2

law which we know to be peculiar to our own.¹ It seems to be doubtful whether this rule will apply with regard to statute law,² but the weight of authority seems to hold that it will be presumed that they are the same.³ There is no presumption that the penal statutes of a foreign State are the same as our own.⁴

11. Regularity of Marriage.—If a marriage has taken place it will be presumed to have been valid,⁵ and the burden of proof is on him who alleges the contrary. A marriage will be presumed from cohabitation and reputation and the burden of

Hill (S. Car.) 319; Moore v. Hood, 9 Rich. Eq. (S. Car.) 311; 70 Am. Dec. 210; Rape v. Heaton, 9 Wis. 328; 76 Am. Dec. 269.

The law of a foreign state is presumed to be the same as our own, though it differ from that held by the Supreme Court of the *United States*. Cannon v. Northwestern Mut. L. Ins. Co., 29 Hun (N. Y.) 470.

In the absence of proof, a foreign Statute of Limitations will be presumed to be similar to that of the forum. Bagwell v. McTighe, 85 Tenn. 616.

In the absence of evidence to the contrary, it will be presumed, in an *Iowa* court, that the law of another State is similar to that of *Iowa* in requiring notaries public to use a seal. Goodnow v. Litchfield, 67 Iowa 691.

Crimes Malum In Se.—Acts which are criminal by the law of the forum and are *malum in se*, will be presumed to be crimes in a foreign state. Cluff v. Mutual Ben. L. Ins. Co., 13 Allen (Mass.) 308.

Common Law.—In some States the common law will be presumed to be in force in the absence of other proof. *Missouri*, Meyer v. McCabe, 73 Mo. 236; *Alabama*, Bradley v. Harden, 73 Ala. 70; Conner v. Trawrick, 37 Ala. 289; 79 Am. Dec. 58; *Indiana*, Rogers v. Zook, 86 Ind. 237; Robards v. Marley, 80 Ind. 185; *New Jersey*, Seyfert v. Edison, 45 N. J. L. 393; *Michigan*, Ellis v. Maxson, 19 Mich. 186; 2 Am. Rep. 81; *Maine*, Carpenter v. Grand Trunk R. Co., 72 Me. 388; 39 Am. Rep. 340; *Oregon*, Cressley v. Tatom, 9 Oregon 541.

1. 2 Whart. on Ev. (3rd ed.), § 1292; Flato v. Hulhall, 72 Mo. 522; Sloan v. Torry, 78 Mo. 623. The laws of such States must be offered in evidence. Sloan v. Torry, 78 Mo. 623.

There being no proof in a *Missouri* court of what the *Illinois* statute is, it will be presumed to be the same as

that of *Missouri*, *Illinois* being part of the Louisiana purchase, when the common law was not in force. Silver v. Kansas City etc. R. Co., 21 Mo. App. 5.

2. McCulloch v. Norwood, 58 N. Y. 564; Harris v. White, 81 N. Y. 532. See also Wilcox Silver Plate Co. v. Grun, 72 N. Y. 17; Kefeer v. Mason, 36 Ill. 406.

3. Neese v. Farmers' Ins. Co., 55 Iowa 604; Heckman v. Alpaugh, 21 Cal. 225; Marsters v. Lash, 61 Cal. 622; Lux v. Haggin, 69 Cal. 255.

In the absence of any statement to the contrary, it is presumed that the law of *New York*, with regard to the issuing of letters to one of two or more executors appointed by a will, and his power to act as sole executor, is the same as in *California*. Brown v. San Francisco Gas Light Co., 58 Cal. 426.

Where the administration in *Iowa* is but ancillary to the original administration in a foreign State and the law applicable to the case in that State is not shown, it will be presumed to be the same as our own. Hadley v. Gregory, 57 Iowa 157. See Creswell v. Slack, 68 Iowa 110.

4. Cutler v. Wright, 22 N. Y. 472; Harris v. White, 81 N. Y. 532.

In the absence of evidence, it will not be presumed that the usury laws of another State impose the same penalty or forfeiture as those imposed by the laws of *Arkansas*. Grider v. Driver, 46 Ark. 50.

5. See MARRIAGE, vol. 14, p. 519; Piers v. Piers, 2 H. L. Cas. 331; Sastry v. Lembecutting, 6 App. Cas. 364; Harrod v. Harrod, 1 K. & J. 15; Rex v. Brampton, 10 East 282; Redgrave v. Redgrave, 38 Md. 93; Rex v. Creswell, L. R., 1 Q. B. D. 446; Lasederdale Peerage Case, 10 App. Cas. 602; Wilkie v. Collins, 48 Miss. 496; Sichel v. Lambert, 15 C. B., N. S. 781.

proof is on the person denying it.¹ If the presumption of innocence conflict with that of marriage the former will prevail.² The presumption of marriage can only be shaken by the clearest evidence.³ If, however, a connection has an illicit origin the presumption that it continues is stronger than the presumption of marriage.⁴

12. Regularity of Divorce.—A formal decree of divorce is presumed to be valid, and the burden of proof is on the party who would impeach it.⁵

13. Legitimacy.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother's husband could have been his father, raises a presumption that he is the legitimate child of his mother's husband, which can only be rebutted by proof that either his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition of the husband; or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred.⁶

14. Incapability of Childbearing.—In *England*, a woman of fifty-two years of age or over is rebuttably presumed to be incap-

1. See MARRIAGE, vol. 14, pp. 520-21. See also *DeTharen v. Attorney Gen'l*, L. R., 1 App. Cas. C. L. 686; *Piers v. Piers*, 2 H. L. Cas. 331; *Sastry v. Lembeccutting*, 6 App. Cas. 364; *Jones v. Reddick*, 79 N. Car. 290; *Canjolle v. Ferre*, 26 Barb. (N. Y.) 177; *Peck v. Peck*, 12 R. I. 485; 34 Am. Rep. 702; *Holmes v. Holmes*, 6 La. Ann. 463; 26 Am. Dec. 482; *Cargile v. Wood*, 63 Mo. 501.

2. See *supra*, this title, *Conflicting Presumptions* and also MARRIAGE, vol. 14, p. 521. See also *Catherwood v. Caslon*, 13 M. & W. 261; and *confer Rooker v. Rooker*, 33 L. J. Mat. Cas. 42.

3. "This presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability." Per Lord Lyndhurst in *Morris v. Davies*, 5 Cl. & Fin. 163, and approved by Lord Cottenham in *Piers v. Piers*, 2 H. L. Cas. 332. See also *Harrison v. Southampton*, 22 L. J. Ch. 722; *Bredalbane's Case*, L. R. 1 H. L. Sc. 182; *Cunningham v. Cunningham*, 2 Dow. 507.

The presumption of marriage may be rebutted by proof that the woman

formerly lived with another man in such a manner as to raise the same presumption of marriage with him. *George v. Thomas*, 10 U. C., Q. B. 604.

4. *Lapsley v. Grierson*, 1 H. L. Cas. 498; *Cunningham v. Cunningham*, 2 Dowl. 483; *Blackburn v. Crawford*, 3 Wall. (U. S.) 176; *Clayton v. Wardell*, 4 N. Y. 230; *Canjolle v. Farrie*, 23 N. Y. 106; *Yardley's Estate*, 75 Pa. St. 211; *Hunt's Appeal*, 86 Pa. St. 204; *Reading F. Ins. etc. Co.'s Appeal*, 113 Pa. St. 204.

5. See DIVORCE, vol. 5, p. 843; *Bonman v. Bonman*, 64 Ill. 75; *Ayers v. Harshman*, 66 Ind. 291; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 146.

There is no presumption that a court of record in another State has jurisdiction to grant a divorce in a case where no service of process upon the libellee appears by the record to have been made. *Com. v. Blood*, 97 Mass. 538.

6. *Stephen's Digest of the Law of Evidence*, art. 98. See authorities cited under BASTARDY, vol. 2 p. 137; LEGITIMACY, vol. 13, p. 224; EVIDENCE, vol. 7, p. 97.

able of childbearing,¹ but in this country the courts have refused to adopt such a presumption.²

15. Regularity of Official and Judicial Proceedings.—When any judicial or official act is shown to have been done in a manner substantially regular, the burden of proof is on those who deny that the formal requisites to its validity have been complied with.³

1. *In re* Widows' Trusts, L. R., 11 Eq. 408; Taylor's, Trusts, 43 L. T. R., N. S. 795; Davidson v. Kingston, L. R., 18 Ch. Div. 213; Maden v. Taylor, 45 L. R. J. Ch. 569; Leng v. Hodges, Jac. 585; Miles v. Knight, 12 Jur. 666; Brown v. Pringle, 4 Hare 124; Dodd v. Wake, 5 De G. & S. 226; Brandon v. Woodthorpe, 10 Beav. 463; Davis v. Bush, 8 Jur. 1114; Edwards v. Tuck, 23 Beav. 271; Lyddon v. Ellison, 19 Beav. 565; Haynes v. Haynes, 35 L. J. Ch. 303; Forty v. Reay, 1 Dart's V. & P. (4th ed.) 320; Groves v. Groves, 12 W. R. 45; Davidson v. Kimpton, L. R., 18 Ch. Div. 213. See also note to *In re* Apgar, 37 N. J. Eq. 502.

2. *In re* Millner's Estate, L. R. 14 Eq. 245, a woman aged forty-nine years and nine months, who had been long married to a husband who was still living, was presumed to be incapable of childbearing.

Some of the earlier authorities deny this presumption. See 2 Black. Com. 125; Coke on Litt., 402, 53; Fraser v. Fraser, Jac. 586; Coke on Litt., 28 a; Reynolds v. Reynolds, 1 Dick. 374; Jee v. Audley, 1 Cox 325; Concut v. Soane, 54 L. T., N. S. 656.

3. *In Croxton v. May*, L. R., 9 Ch. Div. 388, the court refused to presume a woman to be incapable of childbearing whose age is fifty-four years and six months, and who had never had any children, but who had only been married three years.

4. *In re* Apgar, 37 N. J. Eq. 501; List v. Rodney, 83 Pa. St. 483.

5. Stephen's Digest of the Law of Evidence, art. 101. See EVIDENCE, vol. 1, p. 98; GRAND JURIES, vol. 9, pp. 8, 11.

"After verdict a court in review will assume that all facts necessary for the support of the verdict were proved, unless the contrary appear in the record duly before the court." Wharton on Ev., vol. 2, § 1305; Speers v. Parker, 1 T. R. 141; Jackson v. Pesked, 1 M. & Sel. 237; Davis v. Black, 1 G. & D. 432; Harris v. Goodwyn, 9 Dowl. 409; Goldthorpe v. Hardman, 13 M. & W. 377; Minor v. Bank, 1 Pet. (U. S.) 68; Dob-

son v. Campbell, 1 Sumn. (U. S.) 319; Addington v. Allen, 11 Wend. (N. Y.) 374; Smith v. Keating, 6 C. B. 136; Vivian v. Shipley, Cro. Car. 384; Thorpe v. Thorpe, Lutw. 253; Pippet v. Hearne, 5 B. & Ald. 634; Wilkinson v. Martin, 2 Cr. & J. 658; Delamere v. Reg., L. R., 2 Eng. & Ir. Ap. 419; Bridge v. Grand Junction R. Co., 3 M. & W. 248; Buckout v. Swift, 27 Cal. 433; 87 Am. Dec. 90; Thatcher v. State, 48 Ark. 60; Woods v. Courtney, (Oregon), 17 Pac. Rep. 745; Brown v. Miner, 128 Ill. 148; Trustees etc. v. Stolly, 26 Ill. App. 389; Ricketts v. Birmingham St. R. Co., 85 Ala. 600; Behymer v. Nordloh (Colo.), 21 Pac. Rep. 37; Chamberlain v. Brown, (Neb.) 41 N. W. Rep. 284.

For the application of this principle in criminal cases see R. v. Waters, 1 Den. C. C. 356; R. v. Bowen, 13 Q. B. 790; Beale v. Com., 25 Pa. St. 11.

Bill of exceptions must show affirmatively error complained of. It will not be presumed. Wagers v. Dickey, 17 Ohio 439; Coil v. Willis, 18 Ohio 28.

"Where a matter is so essentially necessary to be proved that had it not been given in evidence the jury could not have given such a verdict; there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict," per Lord Ellenborough in Jackson v. Pesked, 1 M. & Sel. 234.

"The verdict cannot be taken to establish more than is necessarily involved in the proof of the facts alleged," per Lord Denman in Davis v. Black, 1 G. D. 432.

"I have always understood the rule to be, that after verdicts all shall be assumed to have been proven at the trial which is necessary to make out the whole charge or defense, as it appears on the declaration or on the pleadings of the cause," per Tindal, C. J., in Harris v. Goodwyn, 9 Dowl. 409. See also AMEND, vol. 1, p. 553; VERDICT.

When a cause is submitted to a jury upon conflicting testimony, there being

16. Regularity of Legislative Proceedings.—In the absence of proof to the contrary it will be presumed that whatever legislative proceedings are necessary to give validity to an act of the legislature have been complied with.¹

17. Regularity in Records and Proceedings of Corporations.—The records and proceedings of a corporation are presumed to be legal, and the burden of proof is on the party assailing them.²

18. Correctness in Dates of Documents.—When any document bearing a date has been proved, it is rebuttably presumed to have been made on the day on which it bears date; and if more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed, but independent proof

no objections to the instructions of the court, if the verdict is consistent with the line of testimony presented by one of the parties to the suit, an appellate court will presume that the jury adopted the line of testimony which is consistent with the verdict. *Cooper v. Hall*, 22 Neb. 168.

On a settled case, which stated that plaintiffs showed the truth of their allegations, it must be presumed that they proved that their cause of action arose within three years next before the commencement of the action; defendant not having made objection that there was not such evidence, and that being one of their material allegations. *Greer v. Herren*, 99 N. Car. 492.

The rule in equity, as at law, is that, in the absence of all the testimony upon which the lower court acted, it will be presumed that everything was established which could have been proved under the pleadings by any reasonable intentment. *Smith v. Fletcher* (Ark.), 11 S. W. Rep. 824.

As to influence of lapse of time in curing defects in judicial records, see *Williams v. Eyton*, 4 H. & N. 357; *Society for Propagation of the Gospel v. Young*, 2 N. H. 310; *Brown v. Wood*, 17 Mass. 68; *Seward v. Didier*, 16 Neb. 58.

As to the presumptions of jurisdiction of courts of general and limited jurisdiction, see *COURTS*, vol. 4, p. 453; *JURISDICTION*, vol. 12, p. 271.

For operation of this presumption of regularity in military courts, see *Slade v. Minor*, 2 Cranch (C. C.) 139.

1. *Knox v. Vinsant*, 27 Ark. 278; *English v. Oliver*, 28 Ark. 320; *Worthen v. Badgett*, 32 Ark. 515; *Chicot Co. v. Davies*, 40 Ark. 200; *Coleman v. Dobbins*, 8 Ind. 156; *Miller v. State*, 3

Ohio St. 484; *Hunt v. Van Alstyne*, 25 Wend. (N. Y.) 605; *Thomas v. Dakin*, 22 Wend. (N. Y.) 112; *Weyand v. Stover*, 35 Kan. 546. The courts can, however, and will, if necessary, look into the legislative record to see if an act was properly passed.

Burr v. Ross, 19 Ark. 250; *English v. Oliver*, 28 Ark. 320; *Knox v. Vinsant*, 27 Ark. 278; *State v. Little Rock etc. R. Co.*, 31 Ark. 716; *Jones v. Hutchinson*, 43 Ala. 723; *Purdy v. People*, 4 Hill (N. Y.) 390; *Warner v. Beers*, 23 Wend. (N. Y.) 134; *Spangler v. Jacoby*, 14 Ill. 297; 58 Am. Dec. 571; *Prescott v. Board of Trustees of Illinois etc. Canal*, 19 Ill. 324; *Fowler v. Pierce*, 2 Cal. 165; *State v. McBride*, 4. Mo. 303.

2. *Grady's Case*, 1 De G. J. & S. 504; *Lane's Case*, 1 De G. J. & S. 504; *Hathaway v. Addison*, 48 Me. 440; *Mussey v. White*, 3 Me. 200; *Cobleigh v. Young*, 15 N. H. 493; *Speer v. Bartholemew*, 2 Met. (Mass.) 479; *State v. Lime*, 23 Minn. 521; *Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177; *Wilson v. State*, 16 Tex. App. 497; *Bliss v. Kaweah etc. Canal Co.*, 65 Cal. 502; *Pitts v. Temple*, 2 Mass. 538; *Com. v. Woelper*, 3 S. & R. (Pa.) 29; *Taylor v. Taylor*, 10 Minn. 107.

In an action against an assessor for an imprisonment of the plaintiff for non-payment of a school district tax, alleged to be illegal for want of legal districts in the town, if the arrest is admitted or approved, the burden is on the defendant to prove that the entire town is legally districted by territorial limits. This burden is not shifted by proof of the existence of districts *de facto* for more than forty years through the entire town, nor by proof that a town record book, now lost, contained a rec-

of the correctness of the date will be required if the circumstances are such that collusion as to the date might be practiced, and would, if practiced, injure any person or defeat the objects of any law.¹

19. Regularity as to Formalities of Documents—*a.* THE GENERAL RULE.—Documents on their face solemnly executed are *prima facie* presumed to have been executed in conformity with the local law of the place of execution.²

b. PRESUMPTION THAT DOCUMENT WAS STAMPED.—When secondary evidence of a document required by law to be stamped can be given, the burden of proof is on the party alleging it not to have been stamped, unless it be shown to have remained unstamped for some time after its execution.³

c. PRESUMPTION THAT DEED WAS SEALED AND DELIVERED.—When any document purporting to be and stamped as a deed appears or is proved to be or to have been signed and duly attested, it is presumed to have been sealed and delivered, although no impression of a seal appears thereon.⁴

20. Right to Act—*a.* IN PARTICULAR OFFICE.—All public officers who are proved to have acted as such, are presumed to have been duly appointed to the office until the contrary is shown.⁵

ord of a districting of the entire town, it not appearing that such record was made after the act of 1789, chapter 16, which required territorial districts. *Bassett v. Porter*, 10 Cush. (Mass.) 418; *Clark v. Wardwell*, 55 Me. 61.

The return upon a warrant calling a town meeting must show that an attested copy thereof was posted up in some public and conspicuous place in the town where the meeting was to be held. If a town has appointed by vote in legal meeting a different mode of notifying its meetings, it is incumbent upon the party desiring to establish the legality of the meeting to show that it was called in the mode prescribed by the town. *Clayton v. Wardwell*, 55 Me. 61.

1. Stephen's Digest of the Law of Evidence, art. 85. See *BILL OF SALE*, vol. 2, p. 276; *DATE*, vol. 5, p. 78; *EVIDENCE*, vol. 7, p. 89.

2. *Rex v. Gray*, 10 B. & C. 807; *Rex v. Ashburton*, 8 Q. B. 876; *Rex v. Whiston*, 4 A. & E. 667; *Doe v. Mason*, 3 Camp. 7; *Rex v. Catesby*, 2 B. & C. 814; *Rex v. Whitchurch*, 7 B. & C. 573; *Doe v. Bingham*, 4 B. & Ald. 672; *Brighton Railway Co. v. Fairclough*, 2 Man. & G. 674; *Clements v. Macheboeux*, 92 U. S. 425; *Polk v. Wendal*, 9 Cranch (U. S.) 87; *Bagnell v. Broderick*, 13 Pet. (U. S.) 450;

Minter v. Crommelin, 18 How. (U. S.) 87; *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 70; *Van Rensselaer v. Vickery*, 3 Lans. (N. Y.) 57; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *State v. Lawson*, 14 Ark. 114; *Sadler v. Anderson*, 17 Tex. 245.

3. See *EVIDENCE*, vol. 7, p. 89. See also *Hart v. Hart*, 1 Hare 1; *Pooley v. Goodwin*, 4 A. & E. 94; *Rex v. Long Buckley*, 7 East 45; *Crisp v. Anderson*, 1 Stark. N. P. 35.

4. Stephen's Digest of the Law of Evidence, art. 87. See *EVIDENCE*, vol. 7, p. 89.

5. *Parke, B.*, in *M'Gahey v. Alston*, 2 M. & W. 211; *Radford v. McIntosh*, 3 T. R. 632; *Bevan v. Williams*, 3 T. R. 635; *McMahon v. Lennard*, 6 H. L. Cas. 970; *Rex v. Verelst*, 3 Camp. 432; *Rex v. Jones*, 2 Camp. 131; *Butler v. Ford*, 1 C. & M. 662; *Wotton v. Gairn*, 16 Ad. & El. N. S. 48; *Doe v. Barnes*, 8 Q. B. R. 1037; *Rex v. Howard*, 1 M. & Rob. 187; *Rex v. Newton*, 1 C. & K. 480; *Bunbury v. Matthews*, 1 C. & K. 382; *Doe v. Brown*, 5 B. & Ald. 243; *Pritchard v. Walker*, 3 C. & P. 212; *Rex v. Murphy*, 8 C. & P. 310.

This presumption applies even where the title to the office is in issue. *McMahon v. Lennard*, 6 H. L. Cas. 970.

Presumption will be applied in trial

b. AS MEMBER OF A PARTICULAR PROFESSION.—Also if a person has exercised a particular profession, proof of his so acting raises a presumption of his being entitled to exercise that profession,¹ except in cases where the issue is directly or indirectly whether the plaintiff is entitled to so act, then he must prove his title.²

c. AS CORPORATION.—So the mere fact of a corporation acting as such is sufficient evidence, until contradicted, of its corporate existence,³ and every reasonable intendment will be presumed in favor of the corporate existence.⁴

21. A Letter in Answer Presumed to be Genuine.⁵

22. Business Transactions Presumed to Have Ordinary Effect.—Business transactions, where proved, are assumed, so far as the burden of proof is concerned, to have been performed with the ordinary object of such transactions.⁶

for murder of constable in discharge of his duty. *Rex v. Gordon*, 1 Leach C. C. 515.

If a person be indicted for an offense committed in his capacity as a public officer, this presumption will apply. *Rex v. Rees*, 6 C. & P. 606; *Rex v. Barrell*, 6 C. & P. 124; *Rex v. Townsend*, C. & M. 178; The circumstances of the case may reduce it to a presumption of fact. *Rex v. Goodwin*, 1 Lew. C. C. 100.

1. *Rex v. Fordinbridge*, E. B. & E. 678; *Rex v. St. Marylebone*, 4 D. & R. 475; *Berryman v. Wise*, 4 T. R. 366; *Greemaire v. Valon*, 2 Camp. 143.

2. *Collins v. Carnegie*, 1 A. & E. 695; *Sellers v. Tell*, 4 B. & C. 655; *Pickford v. Gutch*, 8 T. R. 305 (a) *sed confer*. *Tindal*, C. J., in *Cannell v. Curtis*, 2 Scott 379.

3. *Rex v. Langton*, L. R., 2 Q. B. D. 296; *Baltimore etc. R. Co. v. Sherman*, 30 Gratt. (Va.) 602; *Calkins v. State*, 18 Ohio St. 366; 98 Am. Dec. 121; *Oakland Gas Light Co. v. Dameron*, 67 Cal. 663; *Brown v. Scottish-American Mortgage Co.*, 110 Ill. 235; *Hudson v. Green Hill Seminary*, 113 Ill. 618.

Dr. Wharton states the following exceptions to this general rule: 1. Where the question at issue is the due organization of the corporation, when it sues on a debt conditioned on such organization. (See *Cook v. Pearce*, 23 S. Car. 239). As in *Nelson v. Blakey*, 54 Ind. 30; *Rigelow v. Gregory*, 73 Ill. 197; *Gent v. Manufacturers' etc. Ins. Co.*, 107 Ill. 652; as where assessments or subscriptions were conditioned on such organization. 2. Where it claims as against third parties, penalties or for-

feitures dependent on its corporate character. 3. Where the question is whether it comes up to a description in a will; where its title is contested by the sovereign; where it asserts the rights of eminent domain."

With the exceptions above mentioned it is enough for a corporation to show by parol, *de facto* existence; nor is it any reply that the corporation does not exist *de jure*. *Douglass Co. v. Bolles*, 94 U. S. 104; *New Orleans etc. R. Co. v. Ellerman*, 105 U. S. 173; *Bank of Manchester v. Allen*, 11 Vt. 302; *First Parish v. Stearns*, 21 Pick. (Mass.) 148; *Merchants' Nat. Bank v. Glendon*, 120 Mass. 97; *Trustees etc. v. Hills*, 6 Cow. (N. Y.) 23; 16 Am. Dec. 429; *National Dock R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Jersey City Gaslight Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427; *Thompson v. Cander*, 60 Ill. 247; *Darst v. Gale*, 83 Ill. 136; *Miami Powder Co. v. Hotchkiss*, 17 Ill. App. 622; *Sprague v. Cutler etc. Lumber Co.*, 106 Ind. 242; *Toledo etc. R. Co. v. Johnson*, 55 Mich. 456; *Stockton etc. G. R. Co. v. Stockton etc. R. Co.*, 45 Cal. 680; *Page v. Bank*, 20 Kan. 440; *Williams v. Hintermeister*, 26 Fed. Rep. 889.

4. See CORPORATIONS, vol. 4, p. 287.

5. See LETTERS, vol. 13, p. 260.

6. Wharton on Ev., vol. 2, § 1239.

"If an old lease expire, and rent is afterwards received, the landlord is presumed to continue a tenancy from year to year, though this might be rebutted by proving that the payment was made under circumstances inconsistent with it; as, for example, under the impression that an old lease was still subsisting." Wharton on Ev., vol. 5, § 1259;

23. Possession Raises a Presumption of Title.—Possession of real or personal property raises a presumption of title in favor of the party in possession.¹ Possession in order to be the ground of

Bishop v. Howard, 2 B. & C. 100; Doe v. Taniere, 12 Q. B. 998; Ecclesiastical Comrs. v. Merril, L. R., 4 Ex. 162; Doe v. Crago, 6 C. B. 90; Trent v. Hunt, 9 Ex. R. 24, per Alderson, B.

Under this heading is also put the so-called presumption of fact, that in actions of trover the jury may infer a conversion from unexplained evidence of a demand and refusal. Canuce v. Spanton, 7 Man. & Gr. 903; Stancliffe v. Hardwick, 2 C. M. & R. 1. See CONVENTION, vol. 4, p. 115.

The presumptions under this heading, however, would seem rather to be positive rules of law paraphrased than strictly technical presumptions.

1. ADVERSE POSSESSION, vol. 1. p. 303; LEASE, vol. 12, p. 1036; EJECTMENT, vol. 6, p. 234.

Succession of Alexander, 18 La. Ann. 337. LIMITATIONS OF ACTIONS, vol. 13, p. 694, and see note 1.

Real Property.—Finch v. Alston, 2 Stew. & P. (Ala.) 83; Currier v. Gale, 9 Allen (Mass.) 522; Magee v. Scott, 9 Cush. (Mass.) 148; 55 Am. Dec. 49; Wendell v. Blanchard, 2 N. H. 456; Ward v. McIntosh, 12 Ohio St. 231; Burke v. Hammond, 76 Pa. St. 172; Austin v. Bailey, 37 Vt. 219; 86 Am. Dec. 703.

Personal Property.—Goodwin v. Garr, 8 Cal. 616; Baxter v. Ellis, 57 Me. 178; Vining v. Baker, 53 Me. 544; Millay v. Butts, 35 Me. 139; Linscott v. Trask, 35 Me. 150; Vastine v. Wilding, 45 Mo. 89; 100 Am. Dec. 347; Bordine v. Combs, 15 N. J. L. 412; Wickes v. Adirondack Co., 4 Thomp. & C. (N. Y.) 250; Fish v. Skut, 21 Barb. (N. Y.) 333; Clifton v. Lilley, 12 Tex. 130.

See Weston v. Higgins, 40 Me. 102.

The payment of taxes procuring a policy of insurance describing the premises and naming the person to be insured, the act of giving a promissory note to insure against losses, and the payment of assessments to meet losses are all proper tests of ownership, not conclusive, but competent to be submitted to and weighed by the jury. Hodgson v. Shannon, 44 N. H. 572.

The filing of a will in the probate office and proving the instrument is good *prima facie* evidence of the right of the devisees named in such will to hold

under it. Hodgson v. Shannon, 44 N. H. 572.

Possession of land for nine years, under a claim of title in fee, is *prima facie* sufficient to support a petition for damages thereto, sustained by reason of the discontinuance of a highway. Hawkins v. Berkshire Co., 2 Allen (Mass.) 254.

Negotiable Instruments.—An illustration of this principle is found in the decisions which hold that possession of a negotiable instrument indorsed in blank is *prima facie* evidence of title. Wickes v. Adirondack Co., 4 Thomp. & C. (N. Y.) 250; Crandall v. Schroepel, 1 Hun (N. Y.) 557; James v. Chalmers, 6 N. Y. 209; Ruby v. Culbertson, 35 Iowa 264; Collins v. Gilbert, 94 U. S. 753; Dugan v. U. S., 3 Wheat. (U. S.) 172.

The possession by the plaintiff of a promissory note sued on and its production by him upon the trial, is presumptive of his title or right to sue upon it, and that such right existed when the suit was commenced, and the plaintiff need not be the real or beneficial owner to entitle him to recover. Hovey v. Sebring, 24 Mich. 232; 9 Am. Rep. 122.

Where a promissory note is found in the maker's hands, canceled, his indebtedness thereon is presumptively discharged, and proof that no payment has been made, nor offset surrendered in respect thereof, does not destroy the presumption. Gray v. Gray, 2 Lans. (N. Y.) 173.

The possession of a vessel by persons claiming it as owners, is presumptive evidence of their ownership, and it is only when their title is impeached by contradictory proof that the production of the vessel's register can be necessary. Stacey v. Graham, 3 Duer (N. Y.) 444; Bailey v. Steamer New World, 2 Cal. 370.

While the fact that a widow has possession of bonds which belonged to her husband may be presumptive evidence of her ownership of them, her declarations may reduce her ownership to a life interest; and the fact that on one occasion the claimant of the interest in remainder spoke of the bonds as the widow's, should not necessarily be deemed a bar of his right to maintain his claim. Comer v. Comer, 120 Ill. 420.

such presumption must be such as will give color of title.¹ A mere tortious possession obtained by violence is not possession within the meaning of the rule.² The possession must be such as is consistent with an unqualified ownership.³

24. Soil of Highways, etc., Belongs to the Adjacent Proprietor.—It is a *prima facie* presumption of law that the title of the soil of a highway is in the adjoining proprietors.⁴ If the land on each side is owned by different proprietors they each own to the middle of the road.⁵

25. Easements Presumed from Unity of Grant.—Upon the principle that the grant of property carries with it all things which are within the power of the grantor to confer and which are necessary to the use and enjoyment of the same, an easement may be presumed from the granting of property to the use and enjoyment of which the easement is necessary.⁶

Continued possession by the grantor for a considerable time after the deed has been recorded supports a presumption of possession under a claim of right. *Stevens v. Hulin*, 53 Mich. 93.

1. *Nieto v. Carpenter*, 21 Cal. 455; *Magee v. Scott*, 9 Cush. (Mass.) 148; 55 Am. Dec. 49; *Waldron v. Tuttle*, 3 N. H. 340.

Factors, Brokers.—The presumption of ownership resulting from possession, is not applicable to factors, brokers, and other avowed agents, with respect to money or property intrusted to them for the special purposes of their vocation. *Succession of Boisblanc*, 32 La. Ann. 109.

2. *Weston v. Higgins*, 40 Me. 102; *Clifton v. Lilley*, 12 Tex. 130.

3. *Nieto v. Carpenter*, 21 Cal. 455; *Wilson v. Atkinson*, 77 Cal. 485; *Colvin v. Warford*, 20 Md. 357; *Linscott v. Trask*, 35 Me. 150.

The possession of a servant in the right of the master is such possession as will not raise a presumption of title. *Linscott v. Trask*, 35 Me. 150.

The fact that a constructive possession only has been held does not change the presumption in favor of a person who has had actual possession during part of the time. *Glass v. Gilbert*, 58 Pa. St. 266; *Hastings v. Wagner*, 7 W. & S. (Pa.) 216.

4. See **HIGHWAYS**, vol. 9, p. 375; 2 *Smith's L. C.* (8th. Am. ed.) 145; *Cooke v. Green*, 11 Price 736; *Hillam v. Headley*, Holt 463; *Read v. Leeds*, 19 Conn. 182; *Johnson v. Anderson*, 18 Me. 76; *Winter v. Peterson*, 24 N. J. L. 524; 61 Am. Dec. 678; *Cox v. Freedley*, 33 Pa. St. 124; 75 Am. Dec. 584; *Paul*

v. Carver, 26 Pa. St. 223; 67 Am. Dec. 413; *Harris v. Elliott*, 10 Pet. (U. S.) 25; *Morrow v. Willard*, 30 Vt. 118.

The presumption of law is that the owner of land abutting on a street is the owner of the fee in the street. *Rich v. Minneapolis*, 37 Minn. 423.

5. 1 *Minor's Insts.* (3rd. ed.) 137; *Champlin v. Pendleton*, 13 Conn. 23; *Johnson v. Anderson*, 18 Me. 76; *Winter v. Peterson*, 24 N. J. L. 524; 61 Am. Dec. 678; *Paul v. Carver*, 26 Pa. St. 223; 67 Am. Dec. 413; *Cox v. Freedley*, 33 Pa. St. 124; 75 Am. Dec. 584; *Morrow v. Willard*, 30 Vt. 118.

A conveyance of land bounded by the side of a street gives the grantee a title to the center of it if the grantor had title to that extent, and did not expressly, or by clear implication, reserve it; although the distances set forth in the deed bring the line only to the side of the street; and if such street be vacated, the grantee will have a right to extend his line to the middle of it. *Cox v. Freedley*, 33 Pa. St. 124; 75 Am. Dec. 584.

6. See **EASEMENTS**, vol. 6, p. 143.

Broom's Legal Max., p. 478; 2 *Minor's Insts.* (3rd. ed.), p. 21; *Washburn on Easements and Servitudes* (4th. ed.) 41; *Prescott v. Williams*, 5 Met. (Mass.) 429; 39 Am. Dec. 688; *Prescott v. White*, 21 Pick. (Mass.) 341; 32 Am. Dec. 266; *Nichols v. Luce*, 24 Pick. (Mass.) 102; 35 Am. Dec. 302; *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49; *Blakely v. Sharp*, 9 N. J. Eq. 9; *Brakely v. Sharp*, 10 N. J. Eq. 206; *McMillin v. Cronin*, 57 How. Pr. (N. Y.) 53; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169; 25 Am. Dec. 524; *Thompson v. Uglow*, 4 Oregon 369; *Humph-*

26. Documents Over Thirty Years of Age Are Presumed to be Genuine.—When instruments are over thirty years of age, free from suspicion on their face, and come from the proper custody, they are presumed to be genuine and are admissible in evidence without other proof of their authenticity.¹

27. Presumption of Payment After Twenty Years.—In the absence of evidence explaining the delay, the payment of a debt will be presumed after the expiration of twenty years.²

28. Receipt Raises Presumption of Payment.³

29. Presumption of Execution of Instruments as Between Trustee and Beneficiary.—"Where a person in possession of any property is shown to be entitled to the beneficial ownership thereof, there is a presumption that every instrument has been executed which it was the legal duty of his trustees to execute in order to perfect his title."⁴

reys v. Brogden, 12 Ad. & El., N. S. 747.

The grantee of a lot, which fronts on the principal thoroughfare in the city, is not entitled to a way, of necessity, across adjoining lots, to a street on the east. *Fischer v. Laack*, 76 Wis. 313.

When the only way of access to the plaintiff's land was over the land of strangers or over a tract called "The Factory Field," which was the property of the parties under whom the plaintiff held his land, and which was owned by them when his land was conveyed to him, it was held that he had a way of necessity over the Factory Field. *Kimball v. Cochecho R. Co.*, 27 N. H. 448; 59 Am. Dec. 387.

A building contained two stores below and a hall above, which was used independently, and to which the only mode of access was by a stairway in the south store. The owner of the building conveyed the store to different persons, no mention being made of the hall and stairway. The grantees became tenants in common in the hall. *Held*, that the owner of the north store had the right to use the stairway in the south store. *Galloway v. Bone-steel*, 65 Wis. 79; 56 Am. Rep. 616.

A mortgagee of a lot with a house and appurtenances resting partly on another strip of land belonging to the mortgagor and fenced in with the mortgaged lot but not described in the mortgage, was held to take on foreclosure an easement to the use of so much of said strip as is reasonably necessary. *John Hancock Mut. L. Ins. Co. v. Patterson*, 103 Ind. 582; 53 Am. Rep. 550.

1. See ANCIENT DOCUMENTS, vol. 1, p. 565; EVIDENCE, vol. 7, p. 90.

2. See PAYMENT, vol. 18, p. 207; LIMITATIONS OF ACTIONS, vol. 13, p. 669.

3. See PAYMENT, vol. 18, p. 200; RECEIPTS.

4. See EVIDENCE, vol. 7, p. 99; Stephen's Digest of the Law of Evidence, art. 101; Lawson on Presumptive Evidence, p. 403.

See also Mathews on Presumptive Evidence; Sugden on Vendors; 1 Greenl. on Ev., § 46; *Doe v. Sybourn*, 7 T. R. 2; *Doe v. Staple*, 2 T. R. 696.

This presumption may be applied, although it be not founded on a belief that such a conveyance was actually made. *Hillary v. Waller*, 12 Ves. 252.

As between trustee and *cestui que trust*, mere length of time alone will not raise the presumption. *Goodright v. Suynnuer*, 1 Ld. Ken. 385; *Goodson v. Ellison*, 3 Russ. 588; *Hillary v. Waller*, 12 Ves. 252; *Flournoy v. Johnson*, 7 B. Mon. (Ky.) 694; *Doe v. Langdon*, 12 A. & E., N. S. 719; *Langley v. Smyd*, 1 S. & S. 45; *Keene v. Deardon*, 8 East 363.

The jury may be directed to presume a conveyance in less time than twenty years. *England v. Slade*, 4 T. R. 682.

No conveyance will be presumed as long as the trustees have any duties to perform. *Beach v. Beach*, 14 Vt. 28; 39 Am. Dec. 204; *Doe v. Steaple*, 2 T. R. 684; *Keene v. Deardon*, 8 East 248; *Flournoy v. Johnson*, 7 B. Mon. (Ky.) 694. "A conveyance may be presumed where the estate has been dealt with by the beneficial owner in a manner in

This presumption of law is necessary for the quieting of titles.¹

VII. PRESUMPTIONS OF FACT.—1. General Principles.—a. DEFINITION.—A presumption of fact is an inference from a fact to a fact—the strength of the inference for the logical reason. It derives no additional force from positive law.²

which reasonable men do not deal with their estates unless they are the legal as well as the beneficial owners." *Perry on Trusts*, § 354. *Ganard v. Tuck*, 8 C. B. 248; *Cottrell v. Hughes*, 15 C. B. 532; *Wilson v. Allen*, 1 Jac. & W. 611.

The presumption will only be made in favor of the person in whom the beneficial title is clearly vested. *Doe v. Cooke*, 6 Bing. 179; *Tenny v. Jones*, 10 Bing. 75; *Bartlett v. Downes*, 3 B. & C. 616; *Noel v. Bewley*, 3 Sim. 103; *Wilson v. Allen*, 1 Jac. & W. 611.

If the defendant shows no title but a mere naked possession, the presumption will not arise. *Doe v. Cooke*, 6 Bing. 179.

1. *Perry on Trusts*, § 349.

2. **Definitions.**—"A presumption of fact is a logical argument from a fact to a fact or, as the distinction is sometimes put, it is an argument which infers a fact otherwise doubtful, from a fact which is proved." *Wh. on Ev.* (3rd ed.), par. 1226.

"A presumption of fact is properly an inference of that fact from other facts that are known. It is an act of reasoning." *Phil. on Ev.*, C. & H. notes, vol. 1, p. 598 (4th Amer. ed.).

Illustrations.—The malicious intent to kill from the deliberate use of a deadly weapon. Aquatic habits in an animal found with web feet. That goods which disappeared under circumstances which indicate larceny, were stolen by him in whose possession they were found a short time afterwards. The possible illustrations are innumerable. . . . "they are coextensive with the facts, both physical and psychological, which may under any circumstances whatever become evidentiary in courts of justice." *Best's Ev. (Am. ed.)*, § 316.

The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. It is this uniformly experienced connection which leads to its recognition by law without other proof; the presumption, however, having more or less force in proportion to the univer-

sality of the experience." *Greenleaf's Ev.*, vol. 1, par. 14, 4th ed. (1883).

The fact from which the presumption is to be made must have been proved. *Wh. on Ev.* (3rd ed.), par. 1226, n. 3.

Must be Made Directly from a Fact Proved.—"In the first place, as the very foundation of indirect proof is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter shall be established by direct evidence in the same manner as if they were the very facts in issue."

Stark. on Ev., p. 80 (10th Amer. ed.).

The presumption must be directly drawn from a fact in proof, not from a fact presumed from a fact in proof.

In *U. S. v. Ross*, 92 U. S. 283, the court by *Strong, J.*, said: "No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is to be relied on to prove a fact, the circumstances must be proved, and not themselves presumed."

In *McAleer v. McMurray*, 58 Pa. St. 126, the plaintiff attempted to prove that he was induced to buy certain stock by showing from facts offered in evidence that he was presumed to have seen and inspected the certificate of organization of the company, and by its false representations it was further presumed that he was induced to buy the stock. The court held that this last was not a presumption of law or fact to be submitted to the jury. The court by *Thompson, C. J.*, said: "I cannot well conceive of a case where a presumption of fact can ever be drawn from presumptions of the same kind."

See also *Douglass v. Mitchell*, 35 Pa. St. 446.

Wheelton v. Hardisty, 8 El. & Bl. 232; *Philadelphia City Pass. Co. v. Henrice*, 92 Pa. St. 431; 39 Am. Rep. 699; *People v. Hessing*, 28 Ill. 410; *Pennington v. Yell*, 11 Ark. 212.

The Probative Force of Presumptions of Fact Rest on Logic.—It is clear that presumptive evidence and the presumptions to which it gives rise, are not in-

b. **STRONG AND WEAK PRESUMPTIONS.**—The inference from a fact to a fact is either strong or weak according to the frequency with which, in our experience, the fact in proof proceeds or succeeds the fact inferred. It is a strong presumption of fact, for instance, that one who strikes and kills a defenseless man has done so with malice in his heart, but it is a weak presumption that goods lost were stolen by the person in whose possession they were found a long time after the loss.¹

c. **ACCUMULATIVE PRESUMPTIONS.**—There is often a single presumption of fact arising from several distinct facts in proof. There are many presumptions which, standing alone, would be of little or no weight, but when considered in connection with other facts, form a link in the chain of evidence and render complete a body of proof which would otherwise be imperfect.²

d. **DISTINCTION BETWEEN STRONG PRESUMPTIONS OF FACT AND REBUTTABLE PRESUMPTIONS OF LAW.**—There is apparently

debited for their probate force to positive law. *Best's Ev. (Am. ed.), § 303.* Thus the presumption that an estate is situate in a certain place arising from the fact that a written contract to convey is dated at that place, is one of fact and may be rebutted by oral evidence. *Mead v. Parker, 115 Mass. 413.*

Character of Presumptions of Fact.—

When inferring the existence of a fact from others, courts of justice (assuming the inference properly drawn) do nothing more than apply under the sanction of the law a process of reasoning which the mind of any intelligent being would under similar circumstances have applied for itself; and the force of which rests altogether on experience and observation of the course of nature, the constitution of the human mind, the springs of human action and the usages and habits of society." *Best's Ev. (Am. ed.), § 303.*

Presumptions of fact belong rather to a treatise on logic than a legal treatise. A discussion of such presumptions would be wholly out of place here if it were not for the fact that under our method of trial by jury the neglect of the judge to point out a presumption of fact, and to show on whom the burden of dispelling such presumptions lies, are grounds for a new trial; as is also the refusal of a jury to find as a fact the presumptions called to their attention by the judge who presided at the court.

1. Sir Edw. Coke divides presumptions of fact into violent, probable, and light or temperate. *Co. Litt. 6 b.* Best divides them with reference to

their effect on the burden of proof. In this he follows the commentators on the civil law. *Huberus, Prael. Jur. Civ., lib. 22, tit. 3, n. 15; Matth. de Prob. ch. 2 notes 1 and 5; Westenbergius, Principia Juris., lib. 22; tit. 3, § 26. 27. Cited in Best's Ev. (Am. ed.), § 319.* By the burden of proof is here meant rather the effect on the weight of the evidence. See for a distinction between the "weight of the evidence" and burden of proof, *BURDEN OF PROOF, vol. 2, p. 655.*

2. The following from Pothier is quoted by Mr. Best: "A sister was charged with the payment of a sum of money to her brother; after the death of the brother, there was a question whether this was still due to his successor. Papinian decided that it ought to be presumed that the brother had released to his sister; and he founded the presumptions of such release on three circumstances: 1st. From the harmony which subsisted between the brother and sister; 2nd. From the brother having lived a long time without demanding it; 3rd. From a great number of accounts being produced, which had passed between the brother and sister, upon their respective affairs, in none of which was there any mention of it. Each of these circumstances, taken separately, would only have formed a simple presumption, insufficient to establish that the deceased had released the debt; but their concurrence appeared to Papinian to be sufficient proof of such release." Quoted from *Best's Ev. (Am. ed.), § 320*, who cites the law "*Procula*," which will be found

great similarity between strong presumptions of fact and rebuttable presumptions of law. The former always and the latter frequently are the result of our long experience of their truth. The distinction lies in the fact that the neglect of the judge to call the attention of the jury to a strong presumption of fact, from a fact or facts in proof, affords ground on which it may be urged that the verdict should be set aside. When, however, from the evidence, there is a presumption of law, the neglect of the judge to tell the jury that, as a matter of law, certain facts being proved, they must assume certain other facts to be true, or their refusal to do so is ground for a new trial as a matter of right. When from the evidence there is a strong presumption of fact, the judge can only tell the jury that they should make the presumption. If the jury do not choose to do so, the verdict is not set aside as a matter of right; but in many cases the result is practically the same, as the court will invariably set aside a verdict in which the jury has ignored a strong presumption of fact, on the ground that the verdict is against the weight of the evidence.¹

Dig., lib. 22, tit. 3, l. 26, and 1 Ev. Poth., art. 816.

1. **The Distinction.**—"The resemblance between inconclusive presumptions of law, and strong presumptions of fact, cannot have escaped notice—the effect of each being to assume something as true until it is rebutted; and, indeed, in the Roman law, and in other systems where the decision of both law and fact is intrusted to a single judge, the distinction between them becomes in practice almost imperceptible. But it must never be lost sight of in the common law, where the functions of the judge and jury are usually kept distinct. Best's Ev. (Am. ed.), § 323.

The same author marks the true theoretic difference in the following sentence: "It has been already stated, as a characteristic distinction between presumptions of law and presumptions of fact, either mixed or simple, that, where the former are disregarded by a jury, a new trial is granted as a matter of right, but that the disregard of any of the latter, however strong or obvious, is only ground for a new trial at the discretion of the court." Best's Ev. (Am. ed.), § 327.

The Distinctions Frequently Lost Sight of.—Practically, however, we find the same presumption often spoken of as a presumption, first of fact, and then of law. As, for instance, in the following: "Whether or not a payment by a trader is made in contemplation of bankruptcy, while being left to the

jury, has been considered so much a question of law, that though two juries have decided it in the negative, the court if satisfied that their conclusion is erroneous, will send the case down for a third trial." Gibson v. Musket, 3 Scott, N. R., p. 434. Coltman, J., remarked: "Though the question in this case is one that must be presented to a jury, it is in reality a question of law."

This confusion between law and fact which apparently makes the court judge the fact as well as the law of the case has been condemned; and the wisdom in the action of the court in the above case in sending the case down for a third trial doubted. Hilliard, New Trials, ch. 2, par. 2. State v. Farish, 23 Miss. 483; Best Ev. (Am. ed.), § 327.

Disregard of the Obvious Presumptions of Fact by a Jury Ground for a New Trial.—The reason for the power on the part of the court to grant a new trial in cases is that, though questions of fact are the peculiar province of the jury, the courts, by virtue of their general controlling power over everything which relates to the administration of justice, will usually grant a new trial when an important presumption of fact, or an important mixed presumption, has been disregarded by the jury. But new trials will not always be granted when successive juries disregard such a presumption." Best's Ev. (Am. ed.), § 327.

As to how many new trials will be

e. **CONFLICTING PRESUMPTIONS.**—Since, from the proof of any fact, some presumption, either strong or weak, is sure to arise in the trial of every case, there are always conflicting presumptions. The rules for determining their relative weight are rules for the practical reason only, not rules of law, and while much discussed by the civilians, have been little considered by common law judges.¹

f. **MIXED PRESUMPTIONS.**—There is a class of presumptions of law which are treated as presumptions of fact. Where it is evident to the judge at the trial of the cause that great injustice will be done if the strict technical proof of rights required by law is required, he may allow the jury to presume, or even instruct them to presume that as proved which the evidence offered, while it does not contradict, is nevertheless wholly inadequate to establish. The cases where the courts will do this usually arise where long established rights would otherwise be defeated by lack of

granted when a presumption of fact has been disregarded, see *Foster v. Steele*, 3 Bing. N. Cas. 892; *Foster v. Allenby*, 5 D. P. C. 619; *Davies v. Roper*, 2 Jurist, N. S. 167.

As a general rule no more than two trials will be granted. "Even if on nicely scrutinizing all the evidence, we have a doubt whether the verdict was right, it could never be right for us to make no weight of two verdicts by a jury, in order to take the chance of a third." Per Lord Mansfield, in *Swinerton v. Marquis of Stratford*, 3 Taunt. 233. See also *NEW TRIAL*, vol. 16, p. 554, n. 7. For cases in which three trials were granted, see *Gibson v. Mirskett*, 3 Scott 419.

Failure of the Court to Call Attention to Strong Presumptions of Fact.—A new

trial will also be granted on the failure of the trial judge to instruct the jury as to their duty to make the strong presumptions of fact which appear from the evidence. Thus the corporation of Truso in 1795 made a lease of the office of Meter, with all fees, emoluments, etc., arising from the measuring of coal imported. It was proved that the corporation had been accustomed for nearly sixty years to receive these payments upon all coal imported into the port. The judge at the trial told the jury that he was not aware that there was any rule of law to prevent them from presuming the immemorial existence of the right from the modern usage; but he did not expressly advise them that they ought to make such a presumption, unless some evidence to the contrary appeared. The court

granted a new trial. Parke, B., said: "It is difficult to say, after looking at the report of the learned judge, that there was any misdirection;" but he adds, "The correct mode of presenting the point to them would have been, that, for uninterrupted modern usage they should find the immemorial existence of the payment, unless some evidence is given to the contrary. That is the ordinary mode in which such questions are left to the jury, and it is very important that the rule should be observed . . ." *Jenkins v. Harney*, 4 C. M. & R. 894.

1. Best's Ev. (Am. ed.), §§ 331, 332, 333, 334, has laid down the following general rules:

1. "Special presumptions take precedence of general" *Menochius de Præsumptionibus*, lib. 1, quæst. 29, notes 7 & 8; 2 Ev. Poth. 332. This rests on the general principle that all general inferences are capable of being easily rebutted by direct proof of specific facts negating the applicability of the general presumption to the particular case. Mr. Best cites, as an example of this, *Rowe v. Brenton*, 8 B. & C. 737, where the general presumption that the owner of the surface of the land owns the minerals under it (*Rowbotham v. Wilson*, 8 H. L. Cas. 348) was rebutted by the presumption arising from the fact of the use of those minerals by others. See also *Rowe v. Grenfel*, R. & M. 396; *Jayne v. Price*, 5 Taunt. 326; *Miles v. Rose*, 5 Taunt. 705; *Reg. v. Montague*, 4 B. & C. 508; *Mayor of Lynn v. Turner*, Cowp. 86.

2. "Presumptions derived from the course of nature are stronger than

proof of their origin.¹ A mixed presumption is therefore similar to a presumption of law, in that, unlike other presumptions of fact, it is not founded on man's experience of its truth in fact, but on expediency. On the other hand, it is treated as a presumption of fact. The refusal of the jury to adopt a presumption of this character is not ground for a new trial as a matter of right.

casual presumptions." See *infra*, this title, *Physical Presumptions*.

3. "Presumptions are favored which give validity to acts." See *supra*, this title, *Innocence in Criminal Cases*.

4. "The presumption of innocence is favored in law." See *supra*, this title, *Innocence in Criminal Cases*.

1. Besides the mixed presumptions mentioned in the text there are three other distinct classes of cases which have been considered by text writers under the term of "mixed presumptions." See cases cited in Best's *Ev.* (Am. ed.), §§ 324, 325.

First, Cases where the court has instructed the jury to find as a fact that which is evidently not a fact. Illustrations of this class serve to show the danger of such artificial presumptions. In *Powell v. Milbanke*, Cowp. 103 (n), Lord Mansfield advised a jury to presume a grant from the crown on the strength of enjoyment under two presentations stolen from the Crown. Lord Eldon condemned this case in *Harmood v. Oglander*, 8 Ves., 130, n. (a). See also *Gibson v. Clark*, 1 Jac. & W. 159, 161, n. (a), where Eyre, C. B., spoke of it as "presumption run mad."

Second. Where the court has refused to grant a new trial, though the jury under permission from the judge at the trial has presumed that which is evidently contrary to fact. *Eldridge v. Knott*, Cowp. 214, per Lord Mansfield, *citing*, *Mayor of Hull v. Horner*, Cowp. 102.

"In the case of new trials," says Lord Kenyon, Ch. J., in *Wilkinson v. Payne* 4 T. R. 468, "it is a general rule that in a hard action where there is something on which the jury has raised a presumption agreeably to the justice of the case, the court will not interfere by granting a new trial, where the objection does not lie in point of law."

He then mentions the following illustration which indicates the absurdities resulting from allowing the sympathies of the jury to find that as a fact which reason shows is not a fact. In an action on the game laws it was

suggested that the gun was not charged with shot, but that the bird might have died in consequence of fright; and the jury having given a verdict for the defendant the court refused to grant a new trial.

The case of *Wilkinson v. Payne*, 4 T. R. 468, was one in which the jury had found a legal marriage, though it appeared in evidence that the marriage was not a legal one, because neither party was of age at the time the marriage relations commenced, and when the husband came of age, and a legal marriage ceremony could have been performed, the wife was on her death-bed, *in extremis*. See the criticism on this case by Sir W. D. Evans, 2 *Ev. Poth.* 330.

"The power of directing the jury to what length they may venture, has often been stated beyond due limits, by the judges, for, in cases of hardship they have urged the juries to presume facts which are manifestly incredible." *Gresley Evid. in Equity*, p. 484.

Presumptions of the Second Kind Condemned.—Presumptions of this kind have been generally condemned. *Cockburn, C. J.*, in *Angus v. Dalton*, 3 Q. B. D. 105, said, speaking of presumptions as to the existence of grants: "Juries were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction. Well might Sir W. D. Evans, while admitting the utility of this doctrine, say that its introduction was 'a perversion of legal principles and an unwarrantable assumption of authority.'" But see *contra* remarks of Lord Blackburn in *Dalton v. Angus*, 6 App. Cas. 812.

For examples in which the jury have not been allowed to make such presumptions, see *Fenwick v. Reed*, 5 B. & Ald. 232; *Wright v. Smithies*, 10 East 409; *Reg. v. The Chapter of Exeter*, 12 A. & E. 512.

The cases leave it almost doubtful whether the law recognizes this class of presumptions. They simply illus-

g. PRESUMPTIONS OF FACT AND BURDEN OF PROOF.—The weight of evidence depends upon facts which are proved directly, and the facts which can be presumed from what is proved. Every presumption of fact has more or less effect on the weight of the evidence. Presumptions of fact, unlike presumptions of law, do not affect the burden of proof; but the result of strong presumptions of fact is to compel the party who would dispel them to introduce testimony to alter the weight of the evidence.¹

2. **Psychological Presumptions.**—a. DEFINITION.—A psychological presumption is one which infers the existence of a particular mental state; such as knowledge, ignorance, love, hatred, malice, pleasure, pain, etc. From their subjective nature the thoughts and feelings which form the conscious existence of our fellow-men must always be a matter of inference.²

b. KNOWLEDGE OF FACT—WHEN PRESUMED.—In performing any act it is a presumption of fact that the actor, if not totally bereft of his reason, knew more or less perfectly the conditions which surrounded him. How far we may infer this knowledge, as also its definiteness and accuracy depends upon the particular circumstances of each case.³

trate the unwillingness of judges in particular instances to set aside the judgment of juries. In the words of Mr. Gresley each case "but adds one to the many thousand of absurd and unwarrantable decisions, which juries will venture upon during their brief and irresponsible authority."

Mixed Presumptions Proper.—The only distinctly recognized class of presumptions are those spoken of in the text, viz: that class of cases where the jury is allowed or recommended to make presumptions which, while not contrary to fact are greater than is warranted by the facts directly shown in evidence. " . . . It is the every day practice for judges to advise juries to presume without proof the most solemn instruments, such as charters, grants, and other public documents, as likewise all sorts of private conveyances." Best's Ev. (Am. ed.), § 324. Thus, evidence of adverse possession for more than twenty years warrants the presumption that the possessor had a deed of the property possessed, and all things necessary to give the deed effect were duly done. *Brattle Square Church v. Bullard*, 2 Met. (Mass.) 363. For other instances see *Melvin v. Locks and Canals*, 17 Pick. (Mass.) 255; *Ryder v. Hathaway*, 21 Pick. (Mass.) 298; *Valentine v. Piper*, 22 Pick. (Mass.) 85; *White v. Loring*, 24 Pick. (Mass.) 319; *Mc-*

Nair v. Hunt, 5 Mo. 300; *Hepburn v. Auld*, 5 Cranch (U. S.) 262; *Ma-verick v. Austin*, 1 Bailey (S. Car.) 59. Also *supra*, this title, *Adverse Possession, etc.*, *Raises a Presumption of Title to Real Estate*; EVIDENCE, vol. 7, p. 98.

1. BURDEN OF PROOF, vol. 2, p. 655.

2. Wh. Evid. (3rd ed.) par. 1240: "Psychological facts are those which have their seat in an animate being by virtue of the qualities by which it is constituted animate, as, for instance, the sensations or recollections of which he is conscious, his intellectual assent to any proposition, the desires or passions by which he is agitated, his *animus* or intention in doing particular acts, etc." Best's Ev. (Am. ed.), § 12.

3. Wharton on Ev. par. 1243.

Distinguished from the Doctrine of Estoppel.—Presumptions of this kind, while closely connected, must not be confused with the irrefutable presumptions of law arising from acts which form the basis of the doctrine of estoppel. See *supra*, this title, *Conclusive Presumptions of Law*.

Knowledge of Notorious Facts.—Besides a knowledge of heat and cold, the existence of states of war and peace, and public events of importance, men may be presumed to know of events much discussed at the time, and especially when they are indirectly interested in such events, thus:

During the legal-tender controversy, A to avoid litigation, agreed to pay B in notes for a bond and mortgage payable in "money," and if at any time thereafter it should be decided by the Supreme Court of the United States that this was not a good legal tender, on return of the notes he would pay "B" in gold. *Held*, that the jury could presume the parties knew of the case of *Heburn v. Griswold*, then before the Supreme Court involving the constitutionality of the legal-tender act, and that they referred to this specific case when they said: "If any time hereafter it should be decided by the Supreme Court etc," *Woodruff v. Woodruff*, 52 N. Y. 53.

Knowledge of Business Men as to Facts Connected with Their Business.—A man in a particular business may be presumed to know the general customs of the trade in which he is engaged.

Thus it is a reasonable presumption that those who are dealing in articles of commerce, especially those who purchase by the wholesale from importers, are acquainted with the different names by which such articles are known to the commercial world. *Moore v. Des Arts*, 2 Barb. Ch. (N. Y.) 636.

An underwriter can be presumed to have read Lloyd's Shipping List. *Mackintosh v. Marshall*, 11 M & W. 116. In this case the weight of the presumption was avoided by showing that the underwriter had received a letter sent for the purpose of deceiving him and stating a false time for the vessel's sailing.

A and B were both brokers. A ordered B to sell shares for him. *Held*, that the jury could presume that the seller knew the usages of trade for brokers to become responsible to each other in such dealings: viz, that if he did not deliver the shares to the broker, who acted as agent in contracting for their sale, the agent could go into the market and buy shares to fulfill his contract with third parties, charging the difference to the delinquent broker. *Bayliffe v. Butterworth*, 1 Ex. Rep. 424. See also *Sutton v. Tatham*, 10 A. & E. 27; *Graves v. Legg*, 11 Ex. R. 642.

Contracts between brokers must be interpreted according to the rules of the stock exchange.

Taylor v. Staay, 2 C. B., N. S. 175; *Bayley v. Wilkins*, 7 C. B. 886; *Dun-*

can v. Hill, L. R., 6 Exch. 255; *Grissell v. Bristowe*, L. R., 4 C. P. 36.

See BY-LAWS, vol. 2, p. 710; LIS PENDENS, vol 13, p. 709.

One engaged in the Bombay trade may be presumed to know that it is the custom to compress bales of cotton before shipment and that freight is measured on the bales so compressed. *Buckle v. Knoop*, 36 L. J. Exch. 49.

Kelly, C. B., delivering an opinion in this case, said: "I think the jury may presume, and the jury were bound to presume, that any one who enters into a contract of a nature commonly and frequently entered into amongst persons dealing in a particular commodity or engaged in a particular trade to which that contract relates knows, as he is bound to know, of every usage bearing upon the interpretation of a contract of such a nature."

Insurers may be presumed to know the custom of vessels in dealing with freight insured.

An underwriter insured cargoes to the coast of Labrador. *Held*, he could be presumed to know the custom of trade for vessels not to discharge their cargoes for three or four weeks after the arrival off the coast. *Noble v. Kennoway*, 2 Dougl. 510.

In *DaCosta v. Edmunds*, 4 Camp. 141, Lord Ellenborough left it to the jury to say whether it was usual to store carboys of vitriol on deck, and told them if there was a usage to that effect they were bound to take notice of it.

One may be presumed to know the effect of that which he does in the course of business thus: An attorney who draws the articles of copartnership may be presumed to know the liability of those who form the partnership.

Burritt v. Dickson, 8 Cal. 113; but all the employees of a railroad cannot be presumed to know the schedule for trains, but only such as are directly connected with them. *Georgia R. Co. v. Rhodes*, 56 Ga. 645.

Regularity in Business.—A clerk indorsed on the back of a bill: "March 4th delivered a copy to C. D." It being shown that it was his duty, after delivering copies of bills so to indorse the original, it may be presumed that the bill was duly delivered. *Champneys v. Peck*, 1 Stark 404. See also *Patteshall v. Turford*, 3 B. & Ad. 890; *Pritt v. Fairclough*, 3 Camp. 305.

On relevancy of all recitals of facts

c. GENUINENESS OF DOCUMENTS RAISES PRESUMPTION OF TRUTH.—This means that when it is found that a document

in documents to prove those facts, see EVIDENCE, vol. 7, pp. 75, 76.

Knowledge of Facts Bearing on Contract.—One who enters into a contract may be presumed to know all the material facts bearing on that contract.

See *Burton v. Blinn*, 23 Vt. 151. See CONTRACTS, vol. 3, pp. 867, 868.

Knowledge of the Contents of Papers.—Men may be presumed to have read and to know the contents of the papers which they sign. In fact when such paper is offered in evidence against them they are estopped from denying such knowledge.

See *McKenzie v. Hesketh*, L. R., 7 Ch. Div. 675, and cases cited in Wharton's Evidence, § 1243.

When, however, a document is offered in evidence by those not parties to it, the fact that one has read what he has signed is a mere presumption of fact.

Rule as to Wills.—It is for the jury to say whether the document signed by the testator, and purporting to be his will, is his will.

To be his will, the testator must as a matter of fact intend at the time of signing, the particular distribution of his property provided for in the document. The fact that he has signed it is only strong presumptive evidence that it is his will.

These propositions were at one time doubted by Sir Creswell Cresswell.

See *Middlehurst v. Johnson*, 30 L. J. 14; and *Cunliffe v. Cross*, 3 S. & T. 37; 32 L. J. 68.

In *Attler v. Atkinson*, L. R., 1 P. & D. 670, Lord Penzance, Sir J. P. Wilde thus addressed the jury: "The question of fact is, did Mrs. Newcome really ever read the contents of this document? If you are satisfied that she read it, then, as a proposition of law, I feel bound to direct you that she must be taken to have known and approved of its contents." But Lord Chancellor Cairns, in case of *Fulton v. Andrew*, L. R., 7 H. L. Cas. 448, in commenting on the above said in substance that there was no unvarying rule of law on the matter, and that if the jury were satisfied that the instrument though read over to the testator was not fully comprehended by him, they should presume that it was not his will.

In *Fulton v. Andrew*, L. R., 7 H. L. Cas. 448, Lord Hatherley, speaking of the existence of the supposed rule of law, that when a testator of sound mind had a will read over to him, and then signed it, that all further inquiry concerning his intention was at an end, said: "No doubt those circumstances afford a very grave and strong presumption that the will has been duly and properly executed by the testator, still, circumstances may exist which may require that something further shall be done in the matter than the mere establishment of the fact of the testator having been a person of sound mind and memory, and also having had read over to him that which had been prepared for him and which he executed as his will."

Continuing and speaking of the strength of the presumption, he says: "One is strongly impressed with the consideration that, according to the natural habits and conduct of men in general, if a man signs any instrument, he being competent to understand that instrument, and having had it read over to him, there is a strong presumption that it has been duly executed, and that very strong evidence is required in opposition to it in order to set aside an instrument so executed."

See also *Hastilow v. Stobie*, 1 L. R. P. 64.

Presumption as to Knowledge of Condition on Railway Tickets.—A jury should not be instructed to infer from the fact that a man buys a railway ticket that he has read the conditions in small type on the back. *Parker v. South-Eastern R. Co.*, 25 W. R. 97 (Weekly Reporter, London).

The defendant asked the judge to rule that if the plaintiff had read part of the directions on the ticket he had read them all. The judge declined so to rule, and instructed the jury "That there was no such presumption, but that the question whether the notice of such limitation was brought home to the plaintiff was one of fact to be decided by them on all the evidence, and the inferences to be by them drawn and that the said reading of a part of the conditions on the ticket was a circumstance to be by them weighed in passing upon this question."

is written or executed by the person who purports to write or execute it, there is a presumption of fact that such person believed the truth of the statements which he set down as facts. The proof of the genuineness of a document reciting certain events is therefore evidence, from which may be inferred their actual occurrence.¹

d. PRUDENCE IN AVOIDING DANGER—WHEN PRESUMED.—It is usual for one who perceives danger to avoid it, and therefore the jury may presume that one in a dangerous situation will use more than ordinary care.² The degree of care which one may be presumed to exercise depends on the intelligence of the person. With adults the presumption of care is strong, but only a slight amount of prudence will be attributed to children.³

e. PRESUMPTIONS OF INTENT—(1) *In General.*—The intent with which one performs an act must be inferred from the act itself and from the surrounding circumstances. Like other presumptions of fact, the strength of such a presumption varies with each case.⁴ Intents can never become subject of presumptions of law, either rebuttable or irrebuttable. When it is said that from certain acts the law presumes an intent, what is meant is that the intention with which the act is done is immaterial.⁵

(2) *Adequate Purpose.*—Men, or bodies of men who are acting in concert, may be presumed to have a purpose in their acts. This purpose may be inferred from their situation and from their acts. Acts in business may be presumed to have their ordinary

On appeal exceptions to charge overruled. *Malone v. Boston etc. R. Co.*, 12 Gray (Mass.) 388; 74 Am. Dec. 598.

1. Paley's Evid. Introd. Chap.; Wharton's Evid., par. 1251.

The genuineness and the truth of the facts recited in the document are two distinct things. The latter is simply a logical inference from the former. *Quinct. V. 5*; *L. 4, D. xxii, 4*; *L. 26, § 2, D. xvi. 3*; *Endemann 258*.

2. *Clinton v. Root*, 88 Mich. 182; 55 Am. Rep. 671.

The jury may presume that one stopped, looked, and listened before crossing a railroad track. *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157; *Whitford v. Southbridge*, 119 Mass. 564. In the *Pennsylvania* case this was spoken of by Williams, J., as a presumption of law.

That the presumption is not absolute is shown by the case of *Wilcox v. Rome Sch. R. Co.*, 39 N. Y. 358; 100 Am. Dec. 440, where one having been struck by a train at a crossing of a country road, where the track could be seen for a long distance, was pre-

sumed not to have stopped, looked, and listened.

See also Whar. on Ev., § 1255 and cases cited; *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 91; *NEGLIGENCE*, vol. 16, p. 448.

3. Wharton's *Negligence*, §§ 310, 315, 322; *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 42.

4. For an example of a logical inference of an intent, see *Knapp v. White*, 23 Conn. 529. See also Wharton on Ev. 1258.

5. A good illustration of the above is found in the distinction between fraud in fact and fraud in law to which intent is immaterial. It is sometimes said that from certain facts fraud will be presumed. This is misleading. The practical disregard of the intent is shown in *Foster v. Charles*, 7 Bing. 105, where the judge having explained to the jury the distinction between fraud in fact and fraud in the legal acceptance of the term, the jury found for the plaintiff, and added that there was no fraudulent intention on the part of the defendant, but that he had committed a fraud in

object.¹ In an action of trover, demand and refusal are evidence of a conversion.²

From the passing of a new statute the legislature may be presumed to have intended to repeal all laws which conflict with or hinder the enforcement of its provisions.³

(3) *Presumption of Malice in Criminal Cases.*—From certain facts, such as the deliberate use of a deadly weapon, the presence of malice, or a wicked and corrupt heart can be presumed.

the legal acceptance of the term. The court refused a motion for new trial.

1. Wharton on Ev., § 1259.

2. Caunce v. Spanton, 7 M. & Gr. 903, action of trover for converting a cart. Refusal to deliver a cart on demand on the ground that a third person was part owner was considered evidence to go to a jury of conversion. On what is not evidence for which a jury may presume a conversion, see, Towne v. Lewis, 7 C. B. 608.

3. A subsequent act making a different provision on the same subject is not to be construed as explanatory but as an implied repeal of the former act. Columbian Mfg. Co. v. Vanderpoel, 4 Cow. (N. Y.) 556.

Of two repugnant statutes the last operates as a repeal of the other, so far as the repugnancy exists but no further. Harrington v. Rochester, 10 Wend. (N. Y.) 547; Bowen v. Lease, 5 Hill (N. Y.) 221; Williams v. Potter, 2 Barb. (N. Y.) 316; People v. Deming, 1 Hilt. (N. Y.) 271; Van Rensselaer v. Snyder, 9 Barb. (N. Y.) 302.

When a new statute is evidently intended to cover the whole of the subjects to which it relates, it repeals by implication all prior statutes. U. S. v. Barr, 4 Sawy. (U. S.) 254; Red Rock v. Henry, 106 U. S. 596; U. S. v. Clafilin, 97 U. S. 546; Dowdell v. State, 58 Ind. 333; State v. Rogers, 10 Nev. 319; Tafoya v. Garcia, 1 N. Mex. 480; Campbell v. Case, 1 Dakota 17; Andrews v. People, 75 Ill. 605; Clay Co. v. Chickasaw Co., 64 Miss. 534; Lyddy v. Long Island City, 104 N. Y. 218; Stingle v. Nevel, 9 Oregon 62; State v. Studt, 31 Kan. 245.

Repeals by implication are not favored in law, and are only allowed where inconsistency and repugnancy are plain and unavoidable.

Potters Dwaris, p. 156. See also, Cooley on Const. Lim., p. 182; Cape Girardeau Co. Ct. v. Hill, 118 U. S. 68; Henderson v. Tobacco, 11 Wall. (U. S.) 652; McCool v. Smith, 1 Black (U.

S.) 459; Tohen v. Texas Pac. R. Co., 2 Woods (U. S.) 346; Towle v. Marrett, 3 Me. 22; 14 Am. Dec. 206; Naylor v. Field, 25 N. J. L. 287; Evernham v. Hulit, 45 N. J. L. 53; Kilgore v. Com., 94 Pa. St. 495; Rounds v. Waymart, 81 Pa. St. 395; Somerset etc. Road, 74 Pa. St. 61; Lehman v. McBride, 15 Ohio St. 573; Dodge v. Gridley, 10 Ohio 173; Hirn v. State, 1 Ohio St. 20; Jeffersonville etc. R. Co. v. Dunlap, 112 Ind. 93; Water Works Co. v. Buckhart, 41 Ind. 364; Branham v. Lange, 16 Ind. 497; Spencer v. State, 5 Ind. 41; Connors v. Carp River Iron Co., 54 Mich. 168; *In re* Ryan, 45 Mich. 173; Swartwout v. Michigan A. L. R. Co., 24 Mich. 389; People v. Mahaney, 13 Mich. 481; East St. Louis v. Maxwell, 99 Ill. 439; Covington v. East St. Louis, 78 Ill. 548; Shields v. Bennett, 8 W. Va. 74; State v. Cain, 8 W. Va. 720; Home Ins. Co. v. Taxing District, 4 Lea (Tenn.) 644; Greeley v. Jacksonville, 17 Fla. 174; Parker v. Hubbard, 64 Ala. 203; Iverson v. State, 52 Ala. 170; Hearn v. Brogan, 64 Miss. 334; Swann v. Buck, 70 Miss. 268; New Orleans v. Southern Bank, 15 La. Ann. 89; State v. Bishop, 41 Mo. 16; State v. Smith, 44 Tex. 443; Scales v. State, 47 Ark. 476; 58 Am. Rep. 768; Baum v. Raphael, 57 Cal. 361; Denver Circle R. Co. v. Nestor, 10 Colo. 403; Sheridan v. Salem, 14 Oregon 328; State v. Wright, 14 Oregon 365; Fleischner v. Chadwick, 5 Oregon 152; State v. Berry, 12 Iowa 58; Attorney-Gen'l v. Brown, 1 Wis. 513; Attorney-Gen'l v. Chicago etc. R. Co., 35 Wis. 425; State v. Cross, 38 Kan. 696.

A law which merely re-enacts a former one does not repeal an intermediate act. Cooley Const. Lim. (6th ed.) p. 182, (n.) 4.

See Gaston v. Merriam, 33 Minn. 271.

A construction contrary to reason will not be presumed, unless the intention is indicated in express terms. Neenan v. Smith, 50 Mo. 525.

Like all other presumptions of intent, where there is a strong presumption of malice in fact, it has often been treated as a presumption of law. Malice, however, is a state of the mind. We can never positively assert that an act, such as killing after time for deliberation, was done after the actor had debated the matter with himself, or with malice, though from the facts in evidence it is extremely probable that both deliberation and malice were present. Again it is against the policy of the law for the judge to direct the jury to find the guilt of the accused from certain facts in evidence even if he fail to put in evidence other facts tending to shake the weight of the evidence against him. Neither in logic nor in the policy of the law, therefore, is there any call for treating presumptions of malice in criminal cases as presumptions of law either rebuttable or irrebuttable.¹

And it will not be presumed when another construction can be given that the legislature intended to pass unconstitutional laws. *Farnum v. Blackstone Canal Corp.*, 1 Sumn. (U. S.) 46.

Or to have discharged the public rights. *Bennett v. McWhorter*, 2 W. Va. 441.

1. See HOMICIDE, vol. 9, p. 725; MALICE, vol. 14, p. 5; INTENT, vol. 11, p. 377. For a full discussion of the fallacy in treating presumption of malice and other presumptions of intent, as presumption of law, see Wharton Crim. Ev., § 738. For opposite opinion see Taylor's Ev., p. 71.

Confusion in English Judicial Opinions.

—Great confusion has undoubtedly existed in the minds of the English judges on this question. In *Reg. v. Wallace*, 3 Tr. Com. L. R. 38, which was an indictment for publishing a libel, one of the jury asked the chief justice whether the word "malice" being in the indictment they were not to be satisfied that the traverser was actuated by a malicious intention toward the persons referred to in the publication, and the chief justice replied by stating that undoubtedly the jury must find the publication was malicious, but that *prima facie* it was a presumption of law; that if a man published a libel on another it was malicious. It is doubtful whether the learned judge thought that it was a presumption of law in the sense that if the jury had refused to adopt it a new trial would have been had as a matter of right. The subject is not made any clearer in the appellate court. *Crampton, J.*, commenting on the ruling said: "Now I do not mean to say that malice is not a question for the jury; undoubtedly it is a question for the jury;

but what we are now considering is, how is that question to be maintained in evidence? And if the primary evidence establish that the act is libelous and injurious, the jury are bound under the direction of the judge, to presume malice in the first instance."

See also the opinion of *Cresswell, J.*, in *Reg. v. Noon*, 6 Cox C. C. 137.

Of late years the presumption of malice has been treated as one of fact, in *Reg. v. Labouchere*, 14 Cox C. C. 419.

Presumptions of Malice in the Act of Killing.—In the *United States* this presumption has been treated uniformly as one of fact to be left to the jury. Thus an instruction which practically took the question whether the accused acted in self-defense from the jury has been declared erroneous. *Brown v. State*, 9 Neb. 157. See also *Hawthorne v. State*, 58 Miss. 788. In the latter case it was held that on a trial for murder, where homicide is conceded, and all attending circumstances appear in evidence, and no excuse or justification is shown, the burden of proving malice is still on the commonwealth.

In *U. S. v. Armstrong*, 2 Curt. (U. S.) 446, the court by *Curtis, J.*, said: "In the case *U. S. v. Mingo*, 2 Curt. (U. S.) 1, this court, after careful consideration laid down the rule, that whether the crime be murder or manslaughter is not to be decided upon any presumption arising from the mere fact of killing, but that the government having the burden of proving the homicide, must offer sufficient evidence that the killing was malicious." See, however, *Murphy v. Com.*, 23 Gratt. (Va.) 960, where the pre-

(4) *Presumption of Malice in Civil Cases.*—The presumption of malice in civil as in criminal cases, is a presumption of fact. The existence of ill-will towards a particular individual or set of individuals, whether considered on the criminal or civil side of the court, can only be the result of a logical inference.¹

f. NEGLIGENCE—WHEN PRESUMED.—Whether an accident occurred as the result of the careless and negligent conduct of an individual or individuals is a fact to be determined by the jury. But the jury have been allowed and even advised to presume such negligence from the mere happening of an accident whose real cause is unexplained except in so far as any explanation which does not presume negligence appears impossible.²

sumption that a man intended to kill from the deliberate use of a deadly weapon, was treated as a presumption of law. Also the charge to the jury in *State v. Hessenkamp*, 17 Iowa 27.

1. See *INTENT*, vol. 11, p. 377; *MALICE*, vol. 14, p. 5. Confusion frequently arises from the fact that the intent with which an act is performed is often spoken of as necessary to constitute an injury to the plaintiff, when in strictness the intent has nothing to do with the right of the plaintiff to recover.

In an action for libel the judge left it to the jury to say whether the defendant intended to injure the plaintiff. *Held*, that the direction was wrong, inasmuch as the tendency of the libel was injurious to the plaintiff and the defendant must be taken to have intended the consequences of his own act. *Haire v. Wilson*, 9 B. & C. 643. Also *Fisher v. Clement*, 10 B. & C. 472.

In these cases a libel was considered as a publication which was injurious to the plaintiff. The intention of the defendant was treated as immaterial. It was therefore necessary to state that it would be presumed. Whether the intention to injure the plaintiff is a necessary constituent of a libel in law need not here be discussed or decided. See *LIBEL* and *SLANDER*, vol. 13, pp. 426-431.

If a necessary constituent, it is undoubtedly a question for the jury; therefore, where in privileged communications actual malice must be found it is treated as a presumption of fact.

Whart. Crim. Ev., § 739; *Bromage v. Prosser*, 4 B. & C. 247; *Spill v. Maule*, L. R., 4 Ex. 232; *Taylor v. Hawkins*, 16 A. & E., N. S. 308; *Somerville v. Hankin*, 10 C. B. 583; *Toogood*

v. Spyrring, 1 C. M. & R. 181; 4 Tyr. 582; *Gilpin v. Fowler*, 9 Exch. 615.

Presumptions of Fraud.—The intent to defraud should not be imperatively inferred when one tells an untruth to another for the purpose of obtaining his goods. Whart. Crim. Ev., § 739.

For an opposing opinion concerning presumptions and of intent, see *Taylor's Ev.*, § 71.

2. That juries should be allowed to infer negligence from the mere happening of an accident has been severely criticised by Dr. Wharton (*Wh. Evid. Par.* 1263), though if they are not imperatively directed to make such a presumption as a rule of law, there seems to be no valid reason why they should not be allowed and even advised to make such a presumption of fact when, from the peculiar nature of the accident, it could not have occurred if due care had been used. Thus where the plaintiff was traveling in the defendant's train which left the rails resulting in injury to the plaintiff, and the defendant did not offer any evidence of its cause, it was held that the mere happening of such an accident, unexplained by the defendant, was evidence from which a jury might infer negligence. *Flannery v. Waterford etc. R. Co.*, 11 C. L. 30. See also *Skinner v. London etc. R. Co.*, 5 Exch. 786, and the remarks of Denman, C. J., in *Carpue v. London etc. R. Co.*, 5 Ad. & E. 751.

Byrne v. Boadle, 2 H. & C. 722; 33 L. J. Ex. 13, was a case in which a bag of flour fell from the defendant's warehouse and struck the plaintiff as he passed by on the sidewalk. *Pollock, C. J.*, said: "We are all of the opinion that the rule must be made absolute to enter the verdict for the plaintiff. The learned counsel was quite right in say-

g. PRESUMPTIONS FROM THE ALTERATION OF TESTIMONY.—It is a presumption of fact drawn from the general experience of mankind, that one who fabricates or attempts to fabricate evidence on his own behalf, or attempts to injure his adversary's case by destroying evidence which might be used in favor of such adversary, has a knowledge that his adversary's contention is, as a matter of fact, true, and, therefore, the jury may presume from such a circumstance that it is true.¹ To show that one party has

ing that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can negligence arise from the fact of the accident."

The law is very clearly set forth by Erle, C. J., in the following: "There must be reasonable evidence of negligence." But he continues, "where the thing is solely under the management of the defendant and his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." Opinion in *Scott v. London etc. Dock. Co.*, 34 L. J. Exch. 222; 3 H. & C. 596.

Cases in Which Mere Happening Was Not Sufficient to Raise a Presumption of Negligence.—In *Moffatt v. Bateman*, 3 L. R., P. C. 115, the defendant was gratuitously driving the plaintiff in his wagon when the king-bolt broke and the plaintiff was thrown out and injured. *Held*, that in the absence of any explanation there was not sufficient evidence from which the jury could presume gross negligence.

Higgs v. Maynard, 1 H. & R. 581. The defendant was owner of a house. One of the windows, in an upper story, looked into a passage or alley way. The plaintiff was lawfully in the passage, when a ladder inside a room on the second story of the defendant's house from some unexplained cause fell against, and broke the window pane. A piece of the glass fell into the plaintiff's eye. *Held*, that there was no *prima facie* evidence of negligence.

For another example of where the evidence of the accident was held not sufficient for negligence to be inferred, see *Welfare v. London etc. R. Co.*, 38 L. J., Q. B. 241; 4 L. R., Q. B. 493.

Limit of the Presumption.—A case

which is an example of how far the courts have gone in allowing juries to presume negligence is: *Kearney v. London etc. R. Co.*, 5 L. R., Q. B. 411; 39 L. J., Q. B. 200; *affirmed* on appeal in Exch., 6 L. R., Q. B. 759; 40 L. J. Q. B. 285.

The jury were allowed to presume, and did presume, negligence on the part of the plaintiff from the unexplained falling of a brick in a perpendicular wall supporting the railroad bridge of the defendants.

Negligence Not Strictly a Psychological Presumption.—Negligence from its very nature is seldom intentional. Its very definition implies absence of any intention and a carelessness as to results. Care is not forethought, but consists in acts which guard against danger and which are usually the result of such forethought. Thus to prove negligence, as in the case cited, the jury need not infer the specific intent. Some negligence, however, does involve an intent, as where one seeing his duty purposely fails to act through fear.

The presumption of negligence may be made a presumption of law by statute. Wh. Ev., § 1263.

See NEGLIGENCE, vol. 16, p. 448; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 76; FIRES BY RAILWAYS, vol. 8, p. 9; CARRIERS OF PASSENGERS, vol. 2, p. 768.

1. In *Com. v. Webster*, 5 Cush. (Mass.) 316, the court by Shaw, C. J., said: "All attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations and to cast suspicion, without just cause, on other persons . . . tend somewhat to prove consciousness of guilt, and, when proved, exert an influence against the accused."

It would seem, however, that in criminal cases the willingness of the accused to stand trial, coupled with his refusal to embrace an opportunity to escape, raises no presumption of fact in his favor. *People v. Rathbun*, 21

destroyed documentary evidence is not subsidiary proof of what such documents contain, or of the particular facts which would have been testified to by the witnesses who have been detained or made away with.¹

The several ways in which one can benefit his own case, whether it be on the legal or criminal side of the court, by tampering with the evidence, are as follows:

(1) *Mutilation or Destruction of Documentary Evidence.*—Though not an absolute presumption, the destruction of documentary evidence forms often the strongest kind of a presumption of fact that the destroyed documents would have failed to support the destroyer's contention.² But the mere fact of such de-

Wend. (N. Y.) 509. *Infra*, this title, note 1, p. 71.

1. Wharton on Ev., par. 1268.

"To say that, if you once prove spoliation, you will take it for granted that the contents of the thing spoliated are what they have been alleged to be, may be, in a great many instances, going a great length. It is a question of vast importance to decide, upon what grounds and upon what principles you are to take upon yourself to say what are the contents of a written will, . . . if there be one case upon which I should lay my finger and say that a new trial ought to be refused, where it was asked only upon the ground that some evidence had not been given which might have been given, I think it would be where you are obliged in the verdict to look for that which at best can be but a matter of guess and conjecture." Per Lord Eldon in *Baker v. Ray*, 2 Russ. 63.

If upon notice to produce books of account, they are not produced, this circumstance affords no legal inference respecting their contents, and merely entitles the opposite party to prove their contents by parol evidence. *Cooper v. Gibbons*, 3 Camp. 363; *Hanson v. Eustace*, 2 How. (U. S.) 653.

The admission of secondary evidence has nothing to do with our present purpose. If a document is destroyed or lost intentionally or unintentionally, secondary evidence of its contents can be given. This fact is treated elsewhere. See EVIDENCE, vol. 7, pp. 87, 88.

Many of the presumptions of fact, arising from the destruction of documents, form the basis for admission of secondary evidence. See *Bell v. Hearne*, 10 La. Ann. 515; *Leeds v.*

Cook, 4 Esp. 256; *Grimes v. Kimball*, 3 Allen (Mass.) 518.

One rule as to the admission of secondary evidence should be borne in mind in connection with any presumption of fact from such destruction—namely, that secondary evidence of a note or other document on which a claim is made cannot be introduced if the plaintiff has deliberately destroyed such document, unless he satisfactorily explains the destruction by showing that it was not intentional. *Blade v. Noland*, 12 Wend. (N. Y.) 173; 27 Am. Rep. 126; *Blake v. Flash*, 44 Ill. 302; *Price v. Tallman*, 1 N. J. L. 447.

On Defective Evidence as a ground for new trial, see NEW TRIAL, vol. 16, p. 554; Wharton & S. Med. Juris. par. 167.

2. *Destruction in Civil Cases.*—The presumption against a party who destroys evidence by which his claim or title may be impeached is a strong but not a conclusive presumption. *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638; *Winchell v. Edwards*, 57 Ill. 41.

Destruction of Accounts.—When an accounting party destroys the accounts before they have been finally adjusted, and especially when he destroys them pending litigation, the court will presume everything most unfavorable to him, consistent with the established facts. *Gray v. Maig*, 20 Beav. 219; *Bell v. Frankis*, 4 M. & G. 446.

Destruction of Wills.—Where an heir at law destroys a will, it raises a presumption in favor of one who claims as a legatee under it. *Manhood v. Manhood*, Ir. L. R., 8 Eq. 359.

Destruction of Evidence as to Trusts.—A trustee who voluntarily and without mistake or accident, destroys the written evidence of his trust, places

struction, even if unexplained, is not conclusive evidence that the document which was destroyed contained the specific statements which the other party chose to assert it contained;¹ and of course the destroyer is always at liberty to explain the circumstances of the destruction so as to remove the presumption raised against him.² What is true of the destruction of documents may also be affirmed of their alteration. He who deliberately alters documentary evidence is presumed to do so in his own interest.³

(2) *Presumptions from Holding Back Proof.*—The effectiveness of any proof to sustain the contention of the party producing it always, in a measure, depends on the proof which it was in the power of the party to produce. He who withholds some evidence, while introducing proof of a less satisfactory character, raises a presumption that the part which he has withheld would not

himself in a position where the court is bound to make every presumption against him. *Shortz v. Unangst*, 3 W. & S. (Pa.) 45.

Destruction in Criminal Cases.—A, when arrested for forgery, destroyed the notes alleged to be forgeries. This raised a strong presumption against him. *State v. Chamberlain*, 89 Mo. 129. See also *Pomeroy v. Benton*, 77 Mo. 64; *Henderson v. Hope*, 1 Dev. & B. Eq. (N. Car.) 119.

The presumption of innocence may be overthrown and the presumption of guilt raised by the misconduct of the party in suppressing or destroying evidence which he ought to produce, and to which the State is entitled. *Greenleaf on Ev.*, § 37.

1. Presumption from Destroying Ship Papers.—In the *Pizarro*, 2 Wheat. (U. S.) 241, the court by Story, J., says: "Concealment, or even spoliation of papers, is not itself sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance and justify the suspicions of the court," and adds, "it is a circumstance, open to explanation."

Destruction of Wills.—A will was destroyed by the universal legatee under it. One who claims to be a legatee must show that the universal legatee concealed or destroyed it for the purpose of defeating the bequests, in order to raise a presumption against him.

Lucas v. Brooks, 23 La. Ann. 117; *Jones v. Knauss*, 31 N. J. Eq. 609, the refusal to produce books, etc., does not warrant the presumption that if they were produced they would show the facts to be as alleged by the party giving notice to produce them. It simply

raises an unfavorable presumption and admits secondary evidence. *Life etc. Ins. Co. v. Mechanics' F. Ins. Co.*, 7 Wend. (N. Y.) 31.

By the law of European Maritime courts spoliation of papers not only excludes further proof, but is conclusive evidence of the truth of the contention of the other party. This harsh rule, however, is modified to the extent, that if all the other circumstances are clear, this circumstance alone will not be mandatory. *The Hunter*, 1 Dod. Adm. 480.

Where, however, the plaintiff brought an action for libel against the defendant it was in proof that the plaintiff had burnt the document which he contended was libelous, and he offered no explanation of such burning, the presumption was so strong against him, that the court refused to allow him to introduce secondary evidence of its contents. *The Count Joannes v. Bennett*, 5 Allen (Mass.) 169; *Blake v. Flash*, 44 Ill. 302.

2. *Lynch v. Coffin*, 131 Mass. 311.

3. In *Shiels v. West*, 17 Cal. 324, it was proved that an alteration had been made in an account from credit to debit. The alteration was unexplained. *Held*, that the jury might presume that the original entry was correct, especially as it was made at the time of the transaction, and it was against the parties' interest to make it.

As to alteration of public records see *Hommel v. Devinney*, 39 Mich. 522.

What Is an Alteration.—Entering on the margin or between lines, words which are simply inserted to fill up the sense, is not an alteration; but anything which incorporates new matter

sustain, but would rather tend to contradict, the evidence which he has offered. A case, therefore, which would be otherwise strong, may be rendered weak and practically unproven, by the fact that proof of a higher grade, which might have been produced, was withheld.¹ The principles here enunciated apply equally to withholding documentary evidence,² or preventing a

or alters the sense is an alteration. Wh. on Ev., par. 621.

Criminal Cases.—Alterations of *situs* after the alleged crime.

The case of *State v. Knapp*, 45 N. H. 148, was an indictment for rape. The jury viewed the premises which had been altered by the State. *Held*, that the burden was on the State to show that the alteration did not prejudice the defendant. The trial was set aside on this ground.

"No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction; . . . "when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offer no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends?" Remarks of Abbott, C. J., in *Reg. v. Burdett*, 4 B. & Ald. 314.

1. In *Wallace v. Harris*, 32 Mich. 394, the court by Graves, C. J., said: "Lord Mansfield forcibly observed in *Blanch v. Archer* (Cowp. 65.), that it is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." See also *Mordecai v. Beal*, 8 Port. (Ala.) 529.

The nonproduction of proof when in the power of the party to do so creates a strong presumption against him. *Heffleblower v. Detrick*, 27 W. Va. 16. See also *Clifton v. U. S.*, 4 How. (U. S.) 242, which supported the doctrine in 2 Ev. Pothier, that the presumption will be against him who produces the weakest evidence.

Where a party neglects to produce proof that may justly be presumed to be within his reach, and which is needed to make a satisfactory case, he cannot complain if the court refuse to extend his showing, by construction, to meet the defense. *Ruffe v. Steinbach*, 48 Mich. 465.

When withholding testimony raises a violent presumption that a fact not clearly proved or disproved exists, it is not error in the court to allude to the withholding as a circumstance strengthening the proof. *Frick v. Barbour*, 64 Pa. St. 120.

2. Suppression of Documents.—See *Attorney Gen'l v. Windsor*, 24 Beav. 679; *Paige v. Stephens*, 23 Mich. 357. The suppression of a series of documents admitted to be in the possession of the party who produces others, is evidence that the documents withheld contained proof unfavorable to that party. *Owen v. Flack*, 2 Sim. & St. 600. See also *Bate v. Kinsey*, 1 C. M. & R. 38; *Reg. v. Arundel*, Hob. 109.

Lord Mansfield, speaking of one who claimed land under a lease which withheld evidence, said that "it was an unfair attempt to recover, contrary to the real merits, and being a deliberate refusal, by the advice of counsel, contrary to the recommendation of the judge, warranted the strongest presumption that the deed would show that neither of the lessors of the plaintiff had any title. *Holdane v. Harney*, 4 Burr. 2487.

When in an action of ejectment by the heir against the devisee, testator's competency was disputed, and the defendant, after proving that the testator had given a reasonable account of the real property left to him by his father's will which was in court, but which was withdrawn on account of an objection to its admissibility on the part of the plaintiff, it was held that it was not error in the judge in his charge to tell the jury that they might infer from the plaintiff's objecting to the will being put in that it was in accordance with the statement made by the testator. *Sutton v. Davenport*, 27 L. J., C. P. 54.

Where a party, after notice, refuses to produce an agreement, the jury may presume that the agreement was properly executed. *Crisp v. Anderson*, 1 Stark. 35. And the inferences as to the contents of such document may be taken most strongly against the party

witness from giving his testimony as to facts within his special knowledge.¹

(3) *Presumption from the Fabrication of Testimony.*—The attempt to fabricate evidence either by bribing witnesses or otherwise fabricating evidence, raises the strongest kind of presumption of fact against the justice of the party's claim in civil suits, or his innocence of the charge against him in criminal.²

withholding them. *Barber v. Lyon*, 22 Barb. (N. Y.) 622.

In *Crescent City Ice Co. v. Ermann*, 36 La. Ann. 842, the court by Manning, J., says: "The presumption is always inevitably against a litigant who fails to furnish evidence within his reach, and it is stronger when the documents, writings, etc., would be conclusive in establishing his case."

It is error for the judge to refuse to instruct the jury, that the refusal of the plaintiff, who is also a witness, to produce the account books on which the claim or statement is made, is a presumption against him. *Davie v. Jones*, 68 Me. 393.

1. The refusal of a party to testify or his want of candor, raises a strong presumption against him. *Little v. Marsch*, 2 Ired. Eq. (N. Car.) 18; *Cross v. Bell*, 34 N. H. 82; *McDonough v. O'Neil*, 113 Mass. 92.

Withholding Witnesses.—A bark was run into at night by a vessel entering the harbor of New York. The officers of the vessel claimed that they saw no light on the bark. *Held*, that the failure, on the part of the bark, to call the persons whose duty it was to attend to the lights was sufficient to raise the presumption that no lights had been shown. *The Ville du Havre*, 7 Ben. (U. S.) 328. See also *Brown v. Schock*, 77 Pa. St. 471; *Rice v. Conn.*, 102 Pa. St. 408.

Where a prisoner charged with murder prevented his wife, who was an eye witness to the affray, from testifying, an unfavorable presumption is justified, and the submission of the fact to the jury for their consideration is not error. *People v. Hovey*, 92 N. Y. 554.

The attempt to throw a charge of murder on a witness or a claimant can be shown as indicating a fear of the testimony which he will give on the trial of the cause. *Craig v. Anglesea*, 17 How. St. Trials 1139.

But the failure to call a witness will not justify an arbitrary presumption of suppression. *Wharton on Ev.*, par. 1267.

In a conflict of testimony the non-introduction by either party of a witness who, if he was called, could shed light on the matter in controversy, does not warrant a presumption in favor of either plaintiff or defendant. It only warrants a presumption against both. *The Fred. M. Lawrence*, 15 Fed. Rep. 635. In *Scovill v. Baldwin*, 27 Conn. 318, the court by Hinman, J., said: "The circumstance that a particular person, who is equally within the control of both parties, is not called as a witness, is too often made the subject of comment before the jury. Such a fact lays no ground for a presumption against either party."

The refusal to allow a solicitor to testify as to matters which were discussed or occurred during his professional relation to the party who refuses does not raise a presumption against such party. *Wentworth v. Lloyd*, 10 H. L. Cas. 589.

Where a person is prevented from testifying by circumstances beyond his control, no presumption arises concerning the nature of his testimony. *Cramer v. Burlington*, 49 Iowa 213.

The failure to make a claim, when it might have been successfully asserted, often operates to create a presumption unfavorable to such a claim.

A, who claimed to have been the lawful wife of B, deceased, showed by her own statement that she had failed to make such a claim in 1852, at the time of a marriage of her alleged husband to another woman, and when the alleged witnesses of her own marriage were living. In a suit brought long after the witnesses were deceased this fact raised such a strong presumption against the claimant that the House of Lords concluded the alleged marriage never took place. *Dysart Peerage Cases*, 6 App. Cas. 489.

2. Bribing Witnesses.—*Moriarty v. London etc. R. Co.*, L. R., 5 Q. B. 314.

In *Chicago City R. Co. v. McMahon*, 103 Ill. 485, the plaintiff was injured on defendant's railway. The supreme court held that the testimony of a

The presumption, however, is by no means conclusive. The reminiscences of the courts contain many instances of suitors who have prosecuted just claims by unjust means, and of innocent persons charged with crime, who, fearful of their conviction, often under the unwise advice of counsel or friends, have manufactured evidence to break the force of accusing circumstances.¹

The presumption that a witness has been bribed from his offers of false testimony, is one which, while it may be legitimately made, should be made guardedly, and with a knowledge of all the circumstances of the case. The history of the courts prove that many men who would scorn to tell an untruth for their own ends, will be willing so to support a friend without any solicitation on his part.²

h. PRESUMPTIONS OF GUILT FROM ACTS INDICATING FEAR.

—Acts which indicate a consciousness of guilt may be introduced in evidence as a groundwork from which the guilt of the accused may be presumed. Such presumptions should be made with the same reservations as those which arise from the fabrication of testimony. The guilty do not always run away or turn pale when accused of their crime, neither are all those who flee from charges guilty.³

servant of the company that he had been offered \$300 to testify falsely was rightly received in evidence, as tending to raise a presumption that the defendants felt convinced of their own negligence.

In *Lyons v. Lawrence*, 12 Ill. App. 531, it was held to be error to refuse to admit evidence that an attempt had been made to suborn witnesses.

On the same principle a similar adverse presumption arises from the fact that a party has engaged a witness to testify, or persuaded him to refrain from so doing. *Snell v. Bray*, 56 Wis. 156; *Reg. v. Justices of Cornwall*, 20 W. R. 669.

On the same principle giving refreshment to juries though with apparently innocent intent, is sufficient ground for a new trial. *Knight v. Freeport*, 13 Mass. 218. See *NEW TRIAL*, vol. 16, p. 529, note 4.

1. On the guards to be placed to this kind of evidence, see *Coke 3rd Inst.* 104, p. 232; *Turner v. Com.*, 86 Pa. St. 54; 27 Am. Rep. 683; *Fitler's Case*, cited Ann. Reg. (1834), p. 115; *Reg. v. Westcombe*, Ann. Reg. (1829), p. 142; 3 Bush Jud. Ev. 39; Wh. Crim. Ev., §§ 743, 749.

2. *Luhrs v. Kelly*, 67 Cal. 289, Lord Cockburn in his reminiscences notes several cases in which witnesses have told an untruth to help the accused,

even in some cases without his knowledge. *Celebrated Trials*, p. 591; Bush Jud. Ev. 255.

3. "Flight."—In *Revel v. State*, 26 Ga. 275, the court by Lumpkin, J., says: "Flight has always been considered an admission of guilt, and he asks when culprits thus recklessly destroy human life in order to get away, is not the confession of conscious guilt greatly thereby strengthened." Undoubtedly such flight or any acts of fear on the part of the accused is always admissible in evidence against him. *State v. Williams*, 54 Mo. 170.

But when an escape by the prisoner is put in evidence to raise the presumption of conscious guilt, it is competent for the accused to rebut it showing that it was attributable to fear of personal violence. *Golden v. State*, 25 Ga. 527.

The interval, however, between the perpetration of the crime and the flight of the accused may be so short that it can raise no presumption of an apprehension of personal violence. *State v. Phillips*, 24 Mo. 475.

And until the government introduces evidence of flight, it is not competent for the accused to explain a flight. *Welch v. State*, 104 Ind. 347.

It seems that evidence that the accused refused to escape when he had ample opportunity to do so is inad-

3. Physical Presumptions, Presumptions of Regularity and Title.—

a. CONTINUANCE OF LIFE.—A state once shown to have existed is presumed to continue;¹ so that after proof of existence there is a presumption of a continuance of life.² This presumption must, however, give way to the stronger presumption in favor of innocence.³ Usually, the absence of a party for seven or more years without his being heard of creates a presumption of death.⁴ But this rule is subject to various modifica-

missible. *People v. Rathbun*, 21 Wend. (N.Y.) 509.

1. *Greenleaf on Ev.*, (14th ed.), § 41; *Russell on Crimes*, p. 218; *State v. Wilner*, 40 Wis. 304; 1 *Wharton on Ev.*, § 1284; *Brown v. Burnham*, 28 Me. 38; *Brown v. King*, 5 Met. (Mass.) 173; *Farr v. Payne*, 40 Vt. 615; *Saxon v. Whittaker*, 30 Ala. 237; *Titlers v. Titlow*, 54 Pa. St. 216; *Eames v. Eames*, 41 N. H. 177; *INSANITY*, vol. 11, p. 160; *Kidder v. Stevens*, 60 Cal. 414; *People v. Feilen*, 58 Cal. 218; *Eaton v. Woydt*, 26 Wis. 383.

But the nature of the circumstances may create a presumption which will overcome this one of continuance. See *Scott v. Wood*, 81 Cal. 398.

2. 1 *Greenleaf on Ev.* (14th ed.), § 41 and cases cited; *Stevens v. McNamara*, 36 Me. 176.

All the authorities on this point are collected in *ABSENCE*, vol. 1, pp. 40, 41.

In the case of *Scott v. Wood*, 81 Cal. 398, the jury were instructed that this presumption existed. But on appeal it was said "we think this was error. There is no such presumption regardless of the nature of the fact. Suppose a man were shown to be living at a certain time; would it be presumed that he continued to live for a hundred years? Or suppose a man was shown to be insolvent at a particular time; would it be presumed that the insolvency continued through several years?" *California Code Civ. Proc.*, § 1963, par. 32; *Lux v. Haggin*, 69 Cal. 418.

3. *In re Nesbit*, 3 Dem. (N. Y.) 329; *Murray v. Murray*, 6 Oregon 18; *Rex v. Twynning*, 2 B. & Ald. 386; 1 *Greenleaf on Ev.* (14th ed.), § 41; *Reg. v. Willshire*, 62 Q. B. D. 118; 29 *Moake's Rep.* 660.

These questions arose upon the question as to whether certain marriages were bigamous; it was held that the presumption that the first wife continued to live must yield to the presumption of defendant's innocence. A

somewhat different view is taken in *Com. v. McGrath*, 140 Mass. 296. See the whole subject discussed in *MARRIAGE*, vol. 14, p. 521.

4. See *ABSENCE*, vol. 1, p. 37; *DEATH*, vol. 5, p. 140; *Henderson v. Bonar* (Ky. 1889), 11 S. W. Rep. 809; *Ferry v. Sampson*, 112 N. Y. 415; *In re Tobin's Estate* (Supreme Ct.), 4 N. Y. Supp. 59; *French v. McGinnis*, 69 Tex. 19; *Stockbridge, Petitioner*, 145 Mass. 517; *Whiteley v. Equitable L. Assur. Soc.*, 72 Wis. 170; 30 *Solic. J.* 247, 263, 280; *Bank of Louisville v. Board of Trustees*, 83 Ky. 219; *Chapman v. Kimball*, 83 Me. 389; *Davie v. Briggs*, 97 U. S. 628.

A law relating to escheats is not invalid merely because it authorizes a presumption of death after an absence of seven years. *Louisville School Board v. Bank of Kentucky*, 86 Ky. 150; *Bank of Louisville v. Board of Trustees*, 86 Ky. 742.

There is no presumption that death did not occur until the end of the seven years. *Whiteley v. Equitable L. Assur. Soc.*, 72 Wis. 170; *Waite v. Coaracy*, 45 Minn. 159; *Cambreling v. Purton*, 58 610; *aff'd* 125 N. Y. 610; *Davie v. Briggs*, 97 U. S. 628.

It is incompetent, in order to establish the death of a person who long since disappeared, to show the common belief of the people of his town as to his death, and the general opinion of his family on the subject. *Vought v. Williams*, 46 Hun (N. Y.) 638.

Evidence to Rebut.—To rebut the presumption of death from absence for more than seven years without being heard from, evidence of a general report among the missing person's friends and acquaintances that he is alive, and in the United States army, is admissible. So also of evidence by a witness that he had been informed by another that he had seen the missing person, and that he was alive. *Dowd v. Watson*, 105 N. Car. 476.

As to evidence to support the pre-

tions and restrictions.¹ Other circumstances may also create a presumption of death in particular cases.²

b. SURVIVORSHIP IN A COMMON DISASTER.—There is properly no presumption in such a case; the fact of survivorship is to be proved by the party alleging it and from the evidence.³

c. A RELATIONSHIP ONCE ESTABLISHED IS PRESUMED TO CONTINUE.—A relationship once proved to have existed between parties is presumed to continue until some change is shown to have occurred.⁴

sumption, see *Williams v. State* (Ga. 1891), 12 S. E. Rep. 743.

1. Thus in the case of *In re Miller's Estate*, 9 N. Y. Supp. 639, it is said that where a woman eighteen years of age, illiterate, with vicious propensities, and abandoned by her parents when quite young, escapes from an orphan asylum in which she is confined, no presumption of death arises from the fact that she has failed to answer advertisements inserted in various papers, and that for more than seven years since her escape all trace of her whereabouts has been lost.

In *Watson v. England*, 14 Sim. 28, the vice-chancellor remarked of this presumption that it was "daily becoming more and more untenable."

The *Kentucky* statute creates a presumption of death after seven years' continuous absence when the party has left the State. Where it is not shown that he left the State, the presumption does not apply, but in such case the statute does not exclude all presumptive evidence of death. *Bank of Louisville v. Board of Trustees*, 83 Ky. 219.

Under this same statute it is held that the fact that a man has not heard from his brothers and sisters for fifty years does not raise the presumption of their death if they were young when last heard from by him. *Falkner v. Williams* (Ky. 1891), 16 S. W. Rep. 352.

2. In one case a party attempted to commit suicide by jumping overboard, and when arrested offered his captor \$25 if he would allow him to jump. The next day he disappeared and was never heard of afterward. It was held that a presumption would arise that he died about the day of his disappearance. *In re Ketcham's Estate*, 5 N. Y. Supp. 566.

In another case a woman sixty-seven years old, and infirm in mind and body, disappeared from her house near the North river, on a stormy night. Every effort was made for several

months to ascertain if she was living, but nothing could be learned. According to the medical testimony she could not, in all probability, have survived under the most favorable circumstances the period that had elapsed since her disappearance. It was held that her death would be presumed. *In re Buckingham's Will*, 5 N. Y. Supp. 565.

See also for similar cases *In re Stewart's Will*, 3 N. Y. Supp. 284; 1 Con. Sur. (N. Y.) 86; *Chapman v. Kimball*, 83 Me. 389; *Cambreleng v. Purton*, 58 Hun (N. Y.) 610; aff'd 125 N. Y. 610.

3. See ABSENCE, vol. 1, p. 42, where this doctrine is reviewed and numerous authorities collected. See also *Newell v. Nichols*, 12 Hun (N. Y.) 604; *Johnson v. Merithur*, 80 Me. 111; 1 *Greenleaf on Ev.* (14th ed.), §§ 29, 30; *Cowman v. Rogers* (Md. 1891), 21 Atl. Rep. 64, (member of a benefit association perished in a flood with his wife and children—no presumption of survivorship).

2 *Wharton on Ev.*, § 1180-81.

Compare *Ehle's Will*, 73 Wis. 445.

A different rule prevails by statute in *California*. Code Civ. Proc., § 1963, par. 40; *Hollister v. Cordero*, 76 Cal. 649; ABSENCE, vol. 1, p. 44.

4. *Eames v. Eames*, 41 N. H. 177; 1 *Greenleaf on Ev.* (14th ed.), § 41, note; *Smith v. Smith*, 4 Paige (N. Y.) 432; 27 Am. Rep. 75 (adulterous relations); *Caujolle v. Ferrie*, 26 Barb. (N. Y.) 177; aff'd 23 N. Y. 90; *Lepout v. Todd*, 23 N. J. L. 124 (relation of landlord and tenant); *Body v. Jewsen*, 33 Wis. 402; 2 *Wharton on Ev.*, § 1284; *Sullivan v. Goldman*, 19 La. Ann. 12.

A party elected to an office is presumed to continue in it, unless the contrary is shown. *Steward v. Dunn*, 12 M. & W. 655.

A seisin once proved is presumed to continue. *Brown v. King*, 5 Met. (Mass.) 173.

The relation of partnership once established is presumed to continue.

d. RESIDENCE PRESUMED CONTINUOUS.—It is presumed that the residence of a person continues to be in the place where it is proved to have been, until the contrary is shown; the same is true as to domicile.¹

e. OCCUPANCY PRESUMED CONTINUOUS.—Occupancy once proved is presumed to continue until the contrary is shown.² So also of dispossession.³

f. HABITS AND APPEARANCE PRESUMED UNCHANGED.—Proof having been made as to the habits and general personal appearance of any person, it is presumed that such habits and appearance continue the same unless proven to be otherwise.⁴

Eames v. Eames, 41 N. H. 177; *Cooper v. Dedrick*, 22 Barb. (N. Y.) 516; *Clark v. Alexander*, 8 Scott N. R. 147; *Alderson v. Clay*, 1 Stark. 121; 2 E. C. L. 157; 2 Starkie's Ev. 590; *Greenleaf on Ev.* (14th ed.), § 42.

In the case of *Barelli v. Lytle*, 4 La. Ann. 557, it was held that a certificate by proper authority that a certain individual "is" a justice of the peace raises no presumption whatever that the individual was such an officer before the date of the certificate. A contrary principle is upheld in *Rex v. Burdett*, 4 B. & Ald. 124; 6 E. C. L. 404; *Doe v. Young*, 8 A. & E. 63; 55 E. C. L. 63; *Smelt v. Fuchan*, 15 East 286; *Russell on Crimes*, p. 219.

1. See DOMICILE, vol. 5, p. 865.

Mitchell v. U. S., 21 Wall. (U. S.) 350; *Randolph v. Easton*, 23 Pick. (Mass.) 242; *Killum v. Bennett*, 3 Met. (Mass.) 109; *Prather v. Palmer*, 4 Ark. 456; 2 Wharton on Ev., § 1285, and cases cited; DOMICILE, vol. 5, p. 870; *Church v. Rowell*, 49 Me. 367; *Greenfield v. Camden*, 74 Me. 56; *Nixon v. Palmer*, 10 Barb. (N. Y.) 175; *Daniels v. Hamilton*, 52 Ala. 105; *Walker v. Walker*, 1 Mo. App. 404.

The same is true of a pauper settlement. *Randolph v. Easton*, 23 Pick. (Mass.) 242; *Rex v. Budd*, 5 Esp. 230; POOR AND POOR LAWS.

But continuity of residence is not presumed in case of a wandering tramp. *Ripley v. Hebron*, 60 Me. 379.

Non-residency once proven is presumed to continue. *State Bank v. Seawell*, 18 Ala. 616.

A resident is presumed to be a citizen of the United States. *Zantzen v. Arizona Copper Co.*, (Ariz. 1889), 20 Pac. Rep. 93; *Blight v. Rochester*, 7 Wheat. (U. S.) 535.

2. 2 Wharton on Ev., § 1286; *Mars-ton v. Rowe*, 43 Ala. 271; *Currier v.*

Gale, 9 Allen (Mass.) 523; *Hanson v. Chiatorich*, 13 Nev. 395; *Armstrong v. Hinds*, 8 Minn. 254; *Rhone v. Gale*, 12 Minn. 54; *Smith v. Stapleton*, Plowd. 103; *Magee v. Scott*, 9 Cush. (Mass.) 148; 55 Am. Dec. 49; *Hood v. Hood*, 2 Grant's Cas. (Pa.) 229.

3. *Sanders v. Springsteen*, 4 Wend. (N. Y.) 429.

4. 2 Wharton on Ev., § 1287; IDENTITY, vol. 9, p. 863 *et seq.*; *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256; 94 Am. Dec. 65 (habit of giving receipts); *Ashe v. De Rosset*, 8 Jones (N. Car.) 240; *Vaughn v. Raleigh etc. R. Co.*, 63 N. Car. 11 (habit of marking cotton for shipment); *Smith v. Clark*, 12 Iowa 32; *Meighen v. Bank*, 25 Pa. St. 288; *Shore v. Wiley*, 18 Pick. (Mass.) 558; *Lawson on Presumptive Ev.* 184 *et seq.*; *Wood v. Matthews*, 73 Mo. 482 (bad character).

Thus a habit of prompt payment of taxes is presumed to continue. *Coxe v. Deringer*, 82 Pa. St. 236. So of habits of negligence. *Pittsburg etc. R. Co. v. Ruby*, 38 Ind. 294; 10 Am. Rep. 111; *Mobile etc. R. Co. v. Ashcraft*, 48 Ala. 15. Compare, however, NEGLIGENCE, vol. 16, p. 455, *et seq.* So of the habit of a writer to use certain words in particular senses. 2 Wharton on Ev., § 962. So of an attorney's peculiar methods. *Hine v. Pomeroy*, 39 Vt. 211, and of the habit of gambling. *McMahon v. Harrison*, 6 N. Y. 443.

See generally IDENTITY, vol. 9, p. 863; *Stebbins v. Duncan*, 108 U. S. 32. But in *Delano v. Goodwin*, 48 N. H. 205; 97 Am. Dec. 601, it is said that "the fact that a person has once or many times in his life done a particular act in a particular way does not prove that he has done the same thing in the same way upon another and different occasion." See also *Hollingham v. Head*, 4 C. B., N. S. 388; 93 E. C. L. 387;

g. COVERTURE AND COHABITATION PRESUMED CONTINUOUS.

—In pursuance of the general presumption of continuity, the law presumes that the marriage relation once entered into by certain parties continues to exist between them.¹ The same is true of adulterous or other illicit intercourse.²

h. SOLVENCY AND INSOLVENCY PRESUMED CONTINUOUS.—

A presumption exists of the continuance of solvency when it is proven to have existed.³ So also of a state of insolvency.⁴

i. CONSTANCY OF NATURE.—There is a presumption in favor of the constancy of nature.⁵

j. PHYSICAL SEQUENCES.—Where experience has shown that certain sequences follow from certain actions or states of fact it is presumed whenever such actions or states of fact are shown that such sequences follow.⁶

Jackson v. Smith, 7 Cow. (N. Y.) 177.

The opinions of individuals once entertained and expressed presumed to continue unchanged. 1 Greenleaf on Ev. (14th ed.), § 42; Attorney Gen'l v. Baruther, 3 Bro. Ch. Cas. 443.

1. Erskine v. Davis, 25 Ill. 251; MARRIAGE, vol. 14, p. 520; 2 Wharton on Ev., § 1289; Yardley's Estate, 75 Pa. St. 207.

See also Blackburn v. Crawford, 3 Wall. (U. S.) 176.

But in the absence of proof that coverture once existed, it is not presumed. Erskine v. Davis, 25 Ill. 251; unless created by the presumption in favor of innocence. Blanchard v. Lambert, 43 Iowa 228; 22 Am. Rep. 245. MARRIAGE, vol. 14, p. 520-521 (where the whole subject of presumptions in regard to coverture is discussed); 2 Wharton on Ev., § 1297; Williams v. Williams, 63 Wis. 68; 53 Am. Rep. 253; Foster v. Hawley, 8 Hun (N. Y.) 68; Clayton v. Wardell, 4 N. Y. 230.

2. Smith v. Smith, 4 Paige (N. Y.) 432; 27 Am. Rep. 75; Foster v. Hawley, 8 Hun (N. Y.) 68; Hunt's Appeal, 86 Pa. St. 294; Appeal of Reading F. Ins. etc. Co., 113 Pa. St. 204; 57 Am. Rep. 448; Clayton v. Wardell, 4 N. Y. 230; People v. Squires, 49 Mich. 487 (reformation of a loose woman not presumed); State v. Worthingham, 23 Minn. 528.

3. Wallace v. Hull, 28 Ga. 68; Walrod v. Ball, 9 Barb. (N. Y.) 271.

As to circumstances creating a presumption of solvency or insolvency, see Ansley v. Carlos, 9 Ala. 979; Beeson v. Wiley, 28 Ala. 575; Bilberry v. Mobley, 20 Ala. 260.

4. Mullen v. Pryor, 12 Mo. 307; Body v. Jewsen, 33 Wis. 402; Donahue v. Coleman, 49 Conn. 464.

In Coghill v. Boring, 15 Cal. 219, it is said, however, "it does not follow because a man is insolvent on one day that he was insolvent at any subsequent or antecedent period."

See also Safford v. Gront, 120 Mass. 20; Brown v. Brooks, 25 Pa. St. 210; 1 Whart. on Ev., § 834.

But the presumption is one of fact, and its effect depends upon the extent to which the quality of permanency enters into the nature of the matter in question; so that where a debtor went into bankruptcy the presumption of continued bankruptcy five months afterward is very slight. Donahue v. Coleman, 49 Conn. 464.

5. 2 Whart. on Ev., § 1293; Brooks v. Acton, 117 Mass. 204.

Thus if ice always forms over ponds in a certain locality the burden of proof is upon a party alleging that during a certain year no ice formed. 2 Whart. on Ev., § 1293.

6. Thus it is presumed that the extinguishment of a fire will follow the abundant application of water. Metallic etc. Casting Co. v. Fitchburg R. Co., 109 Mass. 277; 12 Am. Rep. 689.

So also the spread of fire once started in the midst of inflammable material is presumed. Perley v. Eastern R. Co., 98 Mass. 414; 96 Am. Dec. 645; Higgins v. Dewey, 107 Mass. 494; 9 Am. Rep. 63; Calkins v. Barger, 44 Barb. (N. Y.) 424; Collins v. Groseclose, 40 Ind. 414; Gagg v. Vetter, 41 Ind. 228; 13 Am. Rep. 322; Cleland v. Thornton, 43 Cal. 437; Filliter v. Phippard, 11 A. & E. 346.

There is a presumption that the shock

k. PROBABLE HABITS OF ANIMALS.—The presumption exists that the actions of animals are in conformity with what common observation and experience have shown to be their habits.¹

l. CONDUCT OF MEN IN EMERGENCIES.—That men placed in positions of sudden and unexpected danger will act instinctively and convulsively will be presumed.²

m. PROPER NEGOTIATION OF NEGOTIABLE PAPER.—A presumption always exists in favor of the validity of negotiable instruments.³

caused by a railway train's meeting an obstacle is proportioned to the momentum of the train. 2 Whart. on Ev., § 1294 and cases cited; Reg. v. Pargeter, 3 Cox C. C. 191.

See also Caswell v. Boston etc. R. Co., 98 Mass. 194; 93 Am. Dec. 151.

1. Thus it is presumed that certain animals when unrestrained will stray. Lawrence v. Jenkins, L. R., 8 Q. B. 274. That a dog accustomed to kill sheep or to be vicious will continue to do and be so when opportunity affords. Marsh v. Jones, 21 Vt. 378; 52 Am. Dec. 97; Read v. Edwards, 17 C. B., N. S. 245; 112 E. C. L. 244; Swift v. Applebone, 23 Mich. 252; Woolf v. Chalker, 31 Conn. 121; 81 Am. Dec. 175. Compare Rowe v. Bird, 48 Vt. 576; Carlton v. Hiscox, 107 Mass. 410. That a cow will go through an opening in a fence rather than jump over the fence. *Quare* as to a goat in such a case. Jantzen v. Wabash etc. R. Co., 83 Mo. 171.

That horses will take fright at unusual or extraordinary sights and noises. Jones v. Housatonic R. Co., 107 Mass. 261; Lake v. Milliken, 62 Me. 240; Mooreland v. Mitchell Co., 40 Iowa 401; Darling v. Westmoreland, 52 N. H. 401; 13 Am. Rep. 55. Compare Hawks v. Charlemount, 110 Mass. 110; NEGLIGENCE, vol. 16, p. 457.

In Gilbert v. Flint etc. R. Co., 51 Mich. 488; 47 Am. Rep. 592, judicial notice was taken of the fact that a certain obstruction, a freight car, would frighten horses.

So also the presumption exists that shying horses will continue to shy. Chamberlain v. Enfield, 43 N. H. 356; Maggi v. Cutts, 123 Mass. 535.

"When the character of an animal comes into question, the general inference is that he will follow the natural bent of the species to which he belongs." 2 Wharton on Ev., § 1295, note; Wharton on Neg., §§ 923-5.

But evidence of general reputation as to character and habits is not evidence of the value of a horse. Heath v. West, 26 N. H. 191. See also Caldwell v. Snook, 35 Hun (N. Y.) 73.

2. This presumption usually arises in cases of willful or negligent injury. See Colter v. American etc. Express Co., 5 Lans. (N. Y.) 67; Frink v. Potter, 17 Ill. 406; Sears v. Dennis, 105 Mass. 310; Greenleaf v. Illinois Cent. R. Co., 29 Iowa 47.

The conduct of men in a mass, in certain situations may be presumed. Guille v. Swann, 19 Johns. (N. Y.) 381; 10 Am. Dec. 234; Fairbanks v. Kerr, 70 Pa. St. 86.

3. Bank of Orleans v. Barry, 1 Den. (N. Y.) 116; 1 Greenleaf on Ev. (14th ed.), § 38.

Therefore it is presumed that they were regularly issued. 2 Whart. on Ev., § 1301.

See BILLS AND NOTES, vol. 2, pp. 381-395, 416.

And the holder of an unimpeached promissory note is presumed to be a *bona fide* holder for value. Scott v. Williamson, 24 Me. 343; Earbee v. Wolfe, 9 Port. (Ala.) 366; Ellicott v. Martin, 6 Md. 509; Curtiss v. Martin, 20 Ill. 557; Lathrop v. Donaldson, 22 Iowa 234.

But where the consideration is illegal or fraudulent the *onus* is upon the holder to show that he holds *bona fide* and for value. Paton v. Coit, 5 Mich. 505; Ellicott v. Martin, 6 Md. 509; Perrin v. Noyes, 39 Me. 384; 63 Am. Dec. 33; Tucker v. Morrill, 1 Allen (Mass.) 528; Perkins v. Prout, 47 N. H. 387; 93 Am. Dec. 449.

A valuable consideration is presumed both for the execution and the indorsement. Clark v. Schneider, 17 Mo. 295; 3 Kent's Com. 77; 4 Minor's Insts. (2nd ed.), p. 24-5; Leonard v. Vrendenburg, 8 Johns. (N. Y.) 37; 5 Am. Dec. 317;

n. REGULAR APPOINTMENT OF OFFICERS AND AGENTS—(See also PUBLIC OFFICERS).—It is a presumption of fact that officers and agents are presumed to have been regularly appointed.¹

o. REGULARITY OF BUSINESS MEN.—It is a presumption of fact that the transactions among business men will be conducted with business regularity.²

Miller v. McIntyre, 9 Ala. 638; Goodman v. Simonds, 20 How. (U. S.) 343; Witte v. Williams, 8 S. Car. 590; 28 Am. Rep. 294; Bank of Orleans v. Barry, 1 Den. (N. Y.) 116; Fuller v. Hutchings, 10 Cal. 523; 70 Am. Dec. 746, (presumption in case of a check); Lathrop v. Donaldson, 22 Iowa 234.

This presumption of a valuable consideration is *prima facie* as between the original parties and conclusive as to subsequent holders for value. 4 Minor's Insts. (2nd ed.), 24-5; Peasley v. Boatright, 2 Leigh (Va.) 198; Garland v. Lacombe, L. R., 8 Ex. 216; Phelan v. Moss, 67 Pa. St. 59.

1. OFFICERS AND AGENTS, vol. 17, p. 39; public officers, 2 Whart. on Ev., § 1315, and cases cited; Lawson on Presumptive Ev. 60; Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 64.

It is a presumption of fact determining the burden of proof. It lacks one essential of a presumption of law, viz., universal equality of application to all cases. 2 Whart. on Ev., § 1315.

See also Hilliard v. Gould, 34 N. H. 230; 66 Am. Dec. 765; Alexander v. State, 56 Ga. 478; Cabot v. Given, 45 Me. 144; Hutchins v. Van Bokkelen, 34 Me. 126 (officer presumed to have been properly appointed and to have qualified in all cases in which he is a party to the record).

The presumption does not apply, however, to private special agents. Short v. Lee, 2 Jac. & W. 468; Whart. on Agency, §§ 42-44; 2 Whart. on Ev., § 1316; Best on Ev., § 357.

Nor to executors and administrators. Hathaway v. Clark, 5 Pick. (Mass.) 490.

The presumption also exists that a public officer has been duly sworn. Nelson v. People, 23 N. Y. 293.

2. 2 Whart. on Ev., § 1320; Lawson on Presumptive Ev., p. 69, *et seq.*

Thus a party is presumed to have read a paper to which his signature is attached. Hartford L. Ins. Co. v.

Gray, 80 Ill. 28; Knickerbocker L. Ins. Co. v. Pendleton, 115 U. S. 339.

Where a bond is in the name of a company by its agent with a scrawl for its seal, it will be presumed that the seal was the proper and only seal of the company. Miller v. Superior Mach. Co., 79 Ill. 450. See also Leckart v. Bell, 90 N. Car. 499. A note indorsed is presumed to have been indorsed while current. Leland v. Farnham, 25 Vt. 553. A bill of exchange is presumed to have been accepted within a reasonable time after its date, and before its maturity. Roberts v. Bethell, 12 C. B. 778; 74 E. C. L. 778.

Partnership.—It is presumed that two men doing business together are partners. McMullan v. Mackenzie, 2 G. Greene (Iowa) 368; Ferris v. Kilmer, 47 Barb. (N. Y.) 411.

Partnership books produced in evidence are presumed to be correct. Rousten v. Bostwick, 59 Ala. 360; Desha v. Smith, 20 Ala. 747.

A note executed by B, a member of the firm of A and B, is presumed to be a firm note and will bind the firm. Jones v. Rives, 3 Ala. 13.

The members of a partnership are presumed to be equally interested. Farrar v. Beswick, 1 M. & R. 527; Brewer v. Brown, 68 Ala. 210; Moore v. Bare, 11 Iowa 198.

Letters written by a person in the name of a firm and entries made by him in the firm books—*held*, presumptive evidence that such person was a member of the firm in a particular case. Lewis v. Post, 1 Ala. 65.

See also 1 Greenleaf on Ev. (14th ed.), § 42.

Other Cases.—Mr. Lawson, in his excellent work on Presumptive Evidence, furnishes a great number of other illustrative cases, some of which may be mentioned.

Notes and accounts past due are received by an attorney. It is presumed that he receives them for collection. Mardis v. Shackelford, 4 Ala. 493.

p. NON-EXISTENCE OF CLAIM PRESUMED FROM NON-CLAIMER.
—See LACHES, vol. 12, p. 533, *et seq.*

q. LETTER POSTED PRESUMED TO ARRIVE AT USUAL TIME
—(See also LETTERS, vol. 13, p. 260).—The posting of a letter duly addressed and stamped creates a *prima facie* presumption of its receipt by the party addressed within the usual time.¹ The strength of the presumption must, of course, depend greatly upon circumstances of time, place, and the character of the mail routes.²

A sells goods to B. The presumption is that the goods are to be paid for on delivery. *Roberts v. Wilcoxson*, 36 Ark. 364.

A accepts a draft drawn on him by B. It is presumed that A at the time had funds of B's in his hands with which to pay it. *Trego v. Lowery*, 8 Neb. 238; *Kendall v. Galvin*, 15 Me. 131; 32 Am. Dec. 141.

Freight earned by a vessel is presumed to belong to the owners of the vessel. *Williams v. Insurance Co.*, 1 Hilt. (N. Y.) 345.

A sells goods to B on credit. It is presumed that A believed B to be solvent at the time of the sale. *O'Brien v. Norris*, 16 Md. 122; 77 Am. Dec. 284.

Where two persons sign a note it is presumed that they are equally bound. *Orvis v. Newell*, 17 Conn. 97.

In a bill for relief it was alleged that a certain agreement was in writing. The presumption is that it was signed. *Rist v. Hobson*, 1 Sim. & Stu. 543.

Where it is proved that there are unsatisfied judgments against A personally it raises the presumption of his insolvency. *Ansley v. Carlos*, 9 Ala. 973; *Lawson v. Orear*, 7 Ala. 784; *Beason v. Wiley*, 28 Ala. 575.

So where a man cannot collect his debt from a person, a presumption of such person's insolvency arises. *Dilberry v. Mobley*, 20 Ala. 260.

For many other instances, see *Lawson on Presumptive Evidence*, p. 69 *et seq.*

An account tendered or sent to a merchant who keeps it without any objection being made for a long time, is presumed to be correct. And the same doctrine applies in the case of any person between whom there are accounts current, or accounts in the ordinary course of business. *Shepard v. Bank of Missouri*, 15 Mo. 143; *Freeland v. Heron*, 7 Cranch (U. S.) 147. *Com-*

pare Robertson v. Wright, 17 Gratt. (Va.) 524.

Where a lease is to take effect *in presenti* and possession under the lease is covered, the presumption is that the lease and possession under it were delivered on the day of the date of the lease. *Rhone v. Gale*, 12 Minn. 54.

1. *Hastings v. Brooklyn L. Ins. Co.*, 53 Hun (N. Y.) 631; *McCoy v. Mayor etc. of N. Y.*, 46 Hun (N. Y.) 268; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446; 53 Am. Rep. 221 (addressed to party at his place of residence); *Steiner v. Ellis* (Ala. 1890), 7 So. Rep. 803 (same); *Rosenthal v. Walker*, 111 U. S. 185; *Breed v. First Nat. Bank*, 6 Colo. 235; *Huntley v. Whittier*, 105 Mass. 391; 7 Am. Rep. 536; *Munn v. Baldwin*, 6 Mass. 316; *Groton v. Lancaster*, 16 Mass. 110; *Stocken v. Collen*, 7 M. & W. 515; *Lawson on Presumptive Ev.* 69; 1 *Greenleaf on Ev.* (14th ed.), § 40; 2 *Whart on Ev.*, §§ 1323, *et seq.*; *Powell on Ev.* (4th ed.) 81; 1 *Taylor on Ev.* § 179.

A postmark is presumptive evidence of the mailing of a letter, and this rule is not affected by showing that envelopes not mailed have been stamped with a given postmark. *U. S. v. Noelke*, 17 Blatchf. (U. S.) 554.

But it is said that there is no presumption that a letter reached its destination within two weeks after it was mailed in the absence of any proof as to the place where it was mailed. *Boon v. State Ins. Co.*, 37 Minn. 426; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129.

2. *U. S. v. Babcock*, 3 Dill. (U. S.) 571; *Boon v. State Ins. Co.*, 37 Minn. 426; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447 (no presumption at all existing).

Proof of addressing and posting a letter raises no legal presumption that it came into the hands of the party addressed so as to make secondary evi-

The presumption is not rebutted by the affidavit to the contrary of the party addressed.¹ The post-mark and date of a letter afford *prima facie* evidence of the time and place at which it was mailed.²

r. LETTER SENT BY SPECIAL MESSENGER—TELEGRAMS.—The same presumption, though perhaps not so strong, applies to these as to letters posted.³

s. ACQUIESCENCE IN POSSESSION MAY RAISE A PRESUMPTION OF GRANT.—Acquiescence by the person against whom the title is to be established, in the possession of property by the person endeavoring to show title in himself, together with other circumstances, will raise a presumption of a grant.⁴

dence of its contents admissible. *Freeman v. Morey*, 45 Me. 50; 71 Am. Dec. 527.

In *U. S. v. Babcock*, 3 Dill. (U. S.) 571, the court by Dillon, J., said: "It is not a conclusive presumption; it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters."

In some cases it is said there is no presumption at all. *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Walter v. Haynes*, Ry. & M. 149; 21 E. C. L. 402 (in correct address); *Allen v. Blunt*, 2 Woodb. & M. (U. S.) 121; *Tanner v. Hughes*, 53 Pa. St. 289.

And no presumption arises where there is no mail delivery, or where the sender has no business address. *Freeman v. Morey*, 45 Me. 50; 71 Am. Dec. 527; *First Nat. Bank v. McMaingh*, 69 Pa. St. 156; 8 Am. Rep. 236; *Billgerry v. Branch*, 19 Gratt. (Va.) 393.

1. *Steiner v. Ellis* (Ala. 1890), 7 So. Rep. 803; *Snider v. Burks*, 84 Ala. 53.

2. *New Haven Co. Bank v. Mitchell*, 15 Conn. 206; *U. S. v. Noelke*, 17 Blatchf. (U. S.) 554.

3. 2 Whart. on Ev., § 1328; *Crandall v. Clark*, 7 Barb. (N. Y.) 169; *Hetherington v. Kemp*, 4 Camp. 193; *Thalhimer v. Brinckerhoff*, 6 Cow. (N. Y.) 96.

See also *Dana v. Kemble*, 19 Pick. (Mass.) 112, a case in which a letter was deposited in an urn in a hotel office from which it was customary to distribute letters to guests.

As to telegrams, see *Oregon Steamship Co. v. Otis*, 100 N. Y. 446; 53 Am. Rep. 221; 2 Whart. on Ev., § 1329; *Gray on Telegraphs*, § 76; *U. S. v. Babcock*, 3 Dill. (U. S.) 573.

As to telephones see *Sullivan v. Kuykendall*, 82 Ky. 403; 56 Am. Rep. 901; *Hawley v. Whipple*, 48 N. H. 488.

4. *Hughes v. Hughes*, 72 Ga. 173; *Carter v. Tinicum Fishing Co.*, 77 Pa. St. 310.

In *Georgia*, exclusive possession of lands of the father by the son for seven years is conclusive presumption of a gift, in the absence of a disclaimer, or evidence showing a loan, or claim of dominion by the father acknowledged by the son. *Hughes v. Hughes*, 72 Ga. 173.

Title to a fishery was in Sanderlin in 1748; partition of his estate was had, James, the husband of Mary, one of his heirs, deceased, being a party; it was adjudged in 1754 to "the representatives of Mary, late wife of James," subject to a ground-rent, the whole estate being divided into five shares. Elizabeth and others, reciting that they were heirs of "James, who was an heir of Sanderlin," conveyed in 1805 to Carter; the deed also recited the proceedings in partition, also, prior deeds reciting the partition, and that the grantors were heirs of other heirs of Sanderlin, and conveying to Carter their interest in two-fifths of the fishery. There was no other evidence of the pedigree of the grantors, nor of any claim by the descendants of Sanderlin for the fishery. Held, sufficient to raise a presumption of any grant, etc., to make a good title to Carter of the fishery. *Carter v. Tinicum Fishing Co.*, 77 Pa. St. 310.

PRETENSE.—See FALSE PRETENSES, vol. 7, p. 699.

PRETERMITTED.—See LEGACIES AND DEVISES, vol. 13, p. 138; STATUTES OF DESCENT AND DISTRIBUTION.

PRETEXT.—An ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance; pretense.¹

PREVAILING PARTY.—He is the prevailing party within the meaning of a statute entitling such party to costs, who prevails on the main issue to a greater extent than admitted by his adversary, though not to the full extent of his claim.²

PREVENT.—See note 3.

PREVIOUS.—Compares an act or state named to another act or state subsequent in order of time for the purpose of asserting the priority of the first.⁴

"PRICE" generally means the sum of money which an article is sold for, but is often used as the equivalent of compensation, in whatever form received, for property sold. The Latin word from which price is derived sometimes means "reward," "value," "estimation," "equivalent," and Webster shows that "price" is sometimes used in the same sense.⁵

1. Webster's Dict. followed in *State v. Ball*, 27 Neb. 601.

2. Anderson's Law Dict. *Weston v. Cushing*, 45 Vt. 537.

To be a prevailing party does not depend upon the degree of success at different stages of the suit, but whether at the end of the suit or proceeding the party who has made a claim against the other has successfully maintained it. *Bangor etc. R. Co. v. Chamberlain*, 60 Me. 286; *Hawkins v. Nowland*, 53 Mo. 330. See also *New Haven etc. R. Co. v. Northampton*, 102 Mass. 120; *Henry v. Miller*, 61 Me. 105; *Rogers v. St. Charles*, 54 Mo. 229.

When a party wrongfully enters upon the docket of an appellate court what purports to be an action appealed from a lower court, and a motion for dismissal is sustained, upon the ground that no appeal has been duly taken, and the action dismissed, the party obtaining the dismissal must be regarded as the "prevailing party" entitled to costs. *Pomroy v. Cates*, 81 Me. 377. See also *COSTS*, vol. 4, p. 315.

3. The word "prevent" as used in the *Arkansas* statute of limitations was held to mean, following Webster's Dict., to hinder; to obstruct; to intercept. Promises to pay, though broken, appeals to the sympathies of the cred-

itor for indulgence, or untrue statements, are not such acts on the part of the debtor as can be said to have "prevented" the commencement of an action within the meaning of the statute. *Burr v. Williams*, 20 Ark. 185.

Where plaintiff alleged that defendant "prevented and discharged" plaintiff from fulfilling his contract to supply certain goods, it was held that "prevent" in such a case does not mean "an obstruction by physical force," and that the allegation is sufficiently sustained by proof that defendant gave notice that he would not accept the goods if delivered. *Cort v. Ambergate etc. R. Co.*, 17 Q. B. 145.

4. *Lebrecht v. Wilcoxon*, 40 Iowa 94.

Previous Demand.—Means a demand made on a substantially different occasion. *Tyler v. Bland*, 9 M. & W. 340.

"Previous Chaste Character."—See *CHARACTER*, vol. 1, p. 110; *CHASTE*, vol. 3, p. 156; *SEDUCTION*.

5. *Hudson Iron Co. v. Alger*, 54 N. Y. 177. So, it was held, in *State v. Sparks*, 30 W. Va. 101, where an indictment charged the larceny of a horse of the "price" of \$100, that the word "price" was equivalent to the word "value" as used in a statute providing that if a person commits simple larceny

PRIMA FACIE CASE OR EVIDENCE.—A *prima facie* case or evidence is that which is received or continues until the contrary is shown.¹ It is such as, in judgment of law, is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose.²

PRIMAGE.—The word *primage* denotes a small payment to the master, by the owners of merchandise shipped upon his vessel, for his care and trouble, which he is to receive to his own use, unless he has otherwise agreed with his owners.³

PRIMARY ELECTION.—A popular election held by members of a particular political party for the purpose of choosing delegates to a convention empowered to nominate candidates for that party to be voted for at an approaching election.⁴

PRIME.—See note 5.

PRINCIPAL AND ACCESSORY.—See **ACCESSORY**, vol. 1, p. 61.

PRINCIPAL AND AGENT.—See **AGENCY**, vol. 1, p. 331.

PRINCIPAL AND SURETY.—See **SURETYSHIP**.

PRINCIPLES.—(See also **PATENT**).—The term principle is equivocal. It may denote either the radical elementary truths of a

of goods, "of the value of \$20 or more." he shall be deemed guilty of grand larceny.

"Price," the value which a seller places upon his goods for sale. *Scott v. People*, 62 Barb. (N. Y.) 62.

Cost Price.—Defendant agreed to pay in merchandise a certain sum to the plaintiff, "said merchandise to be sold and delivered at not above 25 per cent. of the cost price." *Held*, that the words "cost price" obviously meant the price paid for the goods by the defendant. *Buck v. Burk*, 18 N. Y. 337.

1. *Troy v. Evans*, 97 U. S. 3.

2. *Kelly v. Johnson*, 6 Pet. (U. S.) 622.

3. *Peters v. Speights*, 4 Md. Ch. 381; *citing*, *Abbott on Shipping* 492.

Primage is no longer a gratuity to the master, unless specially stipulated, but it belongs to the owners or freighters, and is nothing but an increase of the freight rate. *Carr v. Austin etc. R. Co.*, 14 Fed. Rep. 421.

4. *Rap. & Law. Law Dict.*, followed in *State v. Hirsch*, 125 Ind. 207, where it was held that a prohibition against the sale of intoxicating liquors "on the day of any election," applied as well to a primary election as to a legal election. The court said: "The words

any election clearly include primary elections." And in *Strasburger v. Burk*, 13 Am. L. Reg. 607, it was held that the principles of public policy which make void all contracts tending to the corruption of elections held under authority of law apply equally to what are called "primary or nominating elections."

But see *Commonwealth v. Wells*, 17 W. N. C. (Pa.) 164, where it was held that a "primary election" was not within the meaning of the *Pennsylvania* statute prohibiting wagers upon the result of "any elections." See also *Leonard v. Commonwealth*, 112 Pa. St. 622. And see generally **ELECTIONS**, vol. 6, p. 372.

5. "Prime," in a contract for the delivery of "prime barley," will be understood according to its use among merchants. *Whitmore v. Coates*, 14 Mo.

9. See generally *Spring v. Cockburn*, 19 U. C. C. P. 63; *Yates v. Pym*, 16 Taunt. 445.

"**Prime Cost**," as used in a revenue act, was held to be equivalent to "actual cost" and "real cost," and means the true and real price paid for goods upon a genuine *bona fide* purchase. *United States v. Sixteen Packages of Goods*, 2 Mason (U. S.)

science, or those consequential axioms which are founded on radical truths, but which are used as fundamental truths by those who do not find it expedient to have recourse to first principles.¹

PRINT, PRINTER, ETC.—(See also MANUFACTURING CORPORATIONS, vol. 14, p. 270; NEWSPAPER NOTICE, vol. 16, p. 822; WRITING).—A print is a mark or form made by impression; anything printed; that which, being impressed, leaves its form, as cut in wood or metal, to be impressed on paper; the impression made; a picture; a stamp; the letters in a printed book; an impression from an engraved plate; a picture impressed from an engraved plate, etc.²

PRINTS AND LABELS.—See LABELS, vol. 12, p. 531; TRADE-MARK.

PRIORITY—(See also DEBTOR AND CREDITOR, vol. 5, p. 204; DEBTS OF DECEDENTS, vol. 5, p. 236; EXECUTORS AND ADMINISTRATORS, vol. 7, pp. 165, 308, 315; LIENS, vol. 13, p. 574; MECHANICS' LIENS, vol. 15, p. 86; PREFERENCES; RECORDING ACTS).—A legal precedence or preference; as in saying that certain debts are paid in priority to others, or that certain incumbrances of an estate are allowed priority over others; that is, they are to be allowed to satisfy their claims out of the estate before the others can be admitted to any share therein.³

53. See also *Tappan v. United States*, 2 Mason (U. S.) 399.

1. *Boulton v. Bull*, 2 H. Bl. 478.

The words "principles of justice and good faith" in a special act authorizing the complainant to file a bill, as in chancery, against the State, and requiring the cause to be decided upon principles of justice and good faith, were construed as intending to relieve complainant from all technical objections that might arise in a proceeding according to the known usages of law and chancery. *Seely v. State*, 11 Ohio 501.

Conscience and Principle Distinguished.

—See CONSCIENCE, vol. 3, p. 661.

2. Webster's Dict. followed in *Yuenling v. Schile*, 20 Blatchf. (U. S.) 463, 464; *Wood v. Abbott*, 5 Blatchf. (U. S.) 325; *Arthur v. Moller*, 97 U. S. 365.

"It means, apparently, a picture, something complete in itself, similar in kind to an engraving, cut or photograph." *Rosenbach v. Dreyfuss*, 2 Fed. Rep. 217, 221.

Print, undoubtedly, in its broadest sense may be an impression of either figures, characters or letters. *United States v. Harman*, 38 Fed. Rep. 829.

Although the law recognizes a distinction between a "painting" and a "print," a copyright for the former will protect its owner in the sale of copies hereof, even though they may appropriately be called prints. *Schumacher v. Schwencke*, 30 Fed. Rep. 690.

It cannot be contended that a "print" is any the less a "print" because struck off in different colors; and it has been held that playing cards printed in colors are "p-rints." *Richardson v. Miller*, 3 Law & Eq. R. (Am.) 614; 12 Pat. Off. Gaz. 3.

Printer.—The word printer in a statute may include the publisher of a newspaper. *Bunce v. Reed*, 16 Barb. (N. Y.) 350. See also *Quivey v. Porter*, 37 Cal. 458; *Reynolds v. Schmidt*, 20 Wis. 381. See also MANUFACTURER, vol. 14, p. 267.

3. *Abbott's Law Dict.*

PRISONS.—(See also ARREST, vol. 1, p. 719; BAIL, vol. 2, p. 1; ESCAPE, vol. 6, p. 844; IMPRISONMENT, vol. 10, p. 197; IMPRISONMENT FOR DEBT, vol. 10, p. 212; SHERIFFS.)

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| <p>I. Definition, 85.
 II. Authority to Erect and Maintain Prisons, 86.
 III. Care of Property of Convicts, 88.
 IV. Convict Labor System, 88.
 V. Prison Keepers, 90.</p> | <p>VI. Maintenance of Prisoners, 90.
 VII. Prison Bounds or Rules of Prison, 91.
 1. Definition, 91.
 2. How Bounded, 91.
 3. Persons Entitled, 92.
 4. Bond for Prison Bounds, 93.</p> |
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I. DEFINITION.—A general term for all the various buildings maintained for the confinement of persons in judicial custody.¹

1. Abbott's L. Dict., p. 314.

Other Definitions.—A public building in which may be confined persons charged with or convicted of a crime, and persons who can give important testimony on the trial of criminal cases. Anderson's L. Dict. 811.

A public building for confining persons either to insure their production in the courts as accused persons and witnesses, or to punish as criminals. Originally it was distinguished from jail, which was a place for confinement, not for punishment, but at present there is no such distinction. Bouvier's L. Dict. 462.

Penitentiary.—A prison or place of punishment. Any place designed for the confinement of convicts. A State prison. Anderson's Law Dict.

Jail.—A house or building used for the purposes of a public prison or where persons under arrest are kept. State v. Bryan, 89 N. Car. 533.

Meaning in Statutes.—By the Penal Code of Texas the word "jail" means "any place of confinement used for detaining a prisoner." Texas Penal Code, art. 226.

The words "State jail or penitentiary," used in § 5543 of the U. S. Rev. Sts., refer to the jails and penitentiaries within a State, whether State, city or county institutions, which are permitted by the State to be used for the confinement of the prisoners of the United States. U. S. v. Schroeder, 14 Blatchf. (U. S.) 344. See also *Ex parte* Brooks, 29 Fed. Rep. 83.

Imprisonment as Cause for Divorce.—Among the causes of divorce enumerated in the *New Hampshire* statutes is: "Conviction of crime and actual imprisonment in the State prison." In

this statute, the term "the State prison" is limited in meaning to the prison established and maintained by this State at Concord, and does not include a prison in another State though called there "the State prison." Conviction and imprisonment in another jurisdiction is not a cause of divorce in this State. Martin v. Martin, 47 N. H. 52. See also Leonard v. Leonard, 151 Mass. 151.

Alternative Sentence.—A sentence to the "State penitentiary or State prison" in *Florida* is not ambiguous or in the alternative, there being but one institution for the confinement of convicts, and the statute uses both forms of words to indicate the same place of confinement. Potsdamer v. State, 17 Fla. 895.

A "State prison" in its general sense means a place of confinement for State prisoners, that is, for persons charged with political offenses and confined for reasons of State; but in some States, the term designates the penitentiary maintained by the State for the confinement of prisoners convicted of certain crimes, in distinction from other prisons maintained and used by counties and cities. Anderson's L. Dict., p. 811; Martin v. Martin, 47 N. H. 52.

What Constitutes Question for Jury.—

Where the evidence on an indictment for carrying instruments and arms into a jail with intent to facilitate the escape of a prisoner, showed that the instruments and arms were carried inside a wall which was constructed about the house in which the prisoners were confined, it was a question for the jury to decide whether the inclosure between the house and wall constituted a part of the jail under the definition contained

II. AUTHORITY TO ERECT AND MAINTAIN PRISONS.—The authority to erect and maintain prisons is conferred by statute in the various States, or by State constitutions.¹ A county is not liable in the absence of statutory provisions, for injuries to pris-

in the Penal Code of *Texas*, art. 226. *Welch v. State*, 25 *Tex. App.* 580.

Origin of Penitentiaries.—The system of confinement of persons convicted of crime in public prisons, penitentiaries, or workhouses, was the result of the attempt to do away with the stupid common law doctrine of benefit of clergy. It originated in the statute of 5 Anne, ch. 6, and was carried to perfection by a series of statutes including 4 Geo. I, ch. 11; 6 Geo. I, ch. 23, and was finally perfected in 19 Geo. III, ch. 74, which statute was the work of Sir William Blackstone and John Howard.

This statute provided that all offenders liable to transportation might, in lieu thereof, at the discretion of the judges, be employed, if males, except in the case of petty larceny, at hard labor for the benefit of some public navigation, or, whether males or females, might, in all cases, be confined at hard labor in certain penitentiary houses to be erected by virtue of the same act for the several terms therein specified, but in no case exceeding seven years, with the power of subsequent mitigation and even of reward in case of their good behavior. 4 *Bl. Com.* (3 Cooley's ed.) 370.

There are two systems of penitentiaries in the *United States*, each of which is claimed to be the best by its partisans; the *Pennsylvania* system, and the *New York* system.

By the former, convicts are lodged in separate, well lighted, and well ventilated cells, where they are required to work during stated hours during the whole time of their confinement; they are never permitted to see or speak with each other; their usual employments are shoemaking, weaving, winding yarn, picking wool, and such like business. The only punishment to which convicts are subject are the privation of food for short periods and confinement without labor in dark but well aired cells, and this discipline has been found sufficient to keep perfect order. The whip and all other corporal punishment is prohibited.

The *New York* system adopted at Auburn, which was probably copied from the penitentiary at Ghent in the Netherlands, is founded on the system of isolation and separation, as well as that of *Pennsylvania*, but with this difference; that in the former the prisoners are confined to their separate cells during the night only, during the working hours in the daytime they labor together in workshops appropriated to their use. The discipline of the prison is enforced by stripes inflicted by the assistant keepers, though this punishment is rarely exercised. *Bouvier's L. Dict.* 399.

Arson.—A jail is an inhabited dwelling house, and a house within the statutes against arson. *People v. Cotteral*, 18 *Johns.* (N. Y.) 118; *Childress v. State*, 86 *Ala.* 77. See also *People v. Van Blaricum*, 2 *Johns.* (N. Y.) 105. In some States this is expressly provided. *Code Alabama*, 1886, § 3780.

1. *Felts v. Mayor etc.* of Memphis, 2 *Head* (Tenn.) 650; *Mississippi* Constitution, 1868, art. 12, § 16; *De Witt v. San Francisco*, 2 *Cal.* 290; *Sharp v. Wike* (Pa. 1887), 9 *Atl. Rep.* 454; *V. C.* 73, ch. 50, § 12; 1 *Minor's Insts.* (3rd ed.), vol. 1, p. 114; 1 *Rev. Stat. Indiana*, 1876, p. 601; *Marion Co. v. Reissner*, 58 *Ind.* 260.

In *Tennessee*, jails are usually built by the county courts out of funds from the county treasury, but the legislature may authorize them to be constructed by the towns and cities, and unless they are by law restricted to the confinement of a particular class of offenders, they will become upon common law principles, the public prisons of the State, and no county, town, or city can exclude the city officers therefrom. *Felts v. Mayor etc.* of Memphis, 2 *Head* (Tenn.) 650.

The authority by act of the legislature to erect a court house and jail, would necessarily embrace the authority to purchase the land on which to erect them. *De Witt v. San Francisco*, 2 *Cal.* 296. See *Sharp v. Wike* (Pa. 1887), 9 *Atl. Rep.* 454.

Ohio.—In *Ohio* a county is liable to make good a damage sustained by the sheriff for an escape, by reason of the

oners in its jail, caused by the insalubrious condition of the jail.¹ This is only an application of a well settled principle of the law, that counties partake of the governmental functions of the State and enjoy a like immunity from actions, without the consent of the legislature.² If a person has been maltreated he must sue personally those who have mistreated him.³ Provision is made by the U. S. Rev. Stat. for the confinement of prisoners in such State penitentiaries or jails as may be allowed by the legislatures of those States, and in case such use is not permitted then the marshal is empowered under the direction of the judge of the district to hire or otherwise procure within the limits of such State a convenient place to serve as a temporary jail, and to make any other provision that he may deem necessary for the safekeeping of the prisoners until permanent provision may be made for their keeping. When a convict is confined according to the provisions of these statutes in any State jail or penitentiary such convict shall be subject to the rules established for the government of State prisoners, and shall be under the exclusive control of the State officers having charge of the State jail or penitentiary.⁴

insufficiency of the jail, or by imprisoning a debtor in the same apartment with criminals—it being the duty of the county to furnish a sufficient jail. *Campbell v. Hampson*, 1 Ohio 119; *Brown Co. v. Butt*, 2 Ohio 349; *Richardson v. Spencer*, 6 Ohio 13. But see *Kepler v. Barker*, 13 Ohio St. 177. *Hamilton Co. v. Mighels*, 7 Ohio St. 109, in which the above doctrine was virtually overruled.

Constitutional Law.—Ch. 74 of the laws of *Kansas* of 1886, entitled, "An act authorizing and directing the county commissioners of Shawnee County to levy an assessment to build a jail and jailer's residence" is constitutional and valid. *Washburn v. Shawnee Co.*, 37 Kan. 217.

Indiana.—It is the duty of every county in *Indiana* to provide a common jail. *Huber v. Robinson*, 23 Ind. 137.

Cases Adjudicating this Question.—The following cases have been decided with regard to the erection and maintenance of prisons: *Ransom v. Gentry Co.*, 48 Mo. 341; *Marion Co. v. Reissner*, 58 Ind. 260; *Marion Co. v. Reissner*, 66 Ind. 568; *Bynum v. Greene Co.*, 100 Ind. 90; *Schenck v. Mayor etc. of N. Y.*, 40 N. Y. Super. Ct. 165; *Roach v. O'Dell*, 33 Hun (N. Y.) 320; *State v. Board of Freeholders (N. J. 1888)*, 13 Atl. Rep. 173; *State v. Justices of Lenoir*, 4 Hawks. (N. Car.) 194.

1. *Pfefferle v. Lyon Co.*, 39 Kan. 342; *Manuel v. Cumberland Co.*, 98 N. Car. 9.

See also *Curran v. Boston*, 151 Mass. 505; *Moffit v. Asheville*, 103 N. Car. 237; *LeClef v. Concordia*, 41 Kan. 323.

The county is not responsible in damages for the tort of one of the guards in unlawfully beating a convict in the chain gang, nor for the negligence of the rest of the guards in not protecting the convict from the unlawful beating. *Hammond v. Richmond Co.*, 72 Ga. 188. Cases cited in that case: 2 T. R. 667; 15 Ga. 316; 18 Ga. 475; 19 Ga. 100; 20 Ga. 346.

2. 1 *Minor's Insts.* (3rd ed.) 636.

COUNTIES, vol. 4, p. 359.

3. *Wilson v. Fannin Co.*, 74 Pa. St. 818.

4. U. S. Rev. Stat., §§ 5542, 5537, 5538, 5539, 5540, 5541, 5543 and 5536.

The State officers of *Michigan* having charge of any penal institution may contract with the *United States* for the confinement in such institution of persons committed or sentenced to confinement by the circuit or district courts of the *United States*. Pub. Acts, 1889, No. 172, p. 198.

A similar provision exists in *New York*. Birdseye's Rev. Stats. p. 2324.

Where a prisoner is sentenced to confinement in a penitentiary outside the limits of the State in which he was

III. CARE OF PROPERTY OF CONVICTS.—Provision is made by statute in some of the States for the appointment of committees or trustees to take charge of the property of persons confined in the State prison.¹

IV. CONVICT LABOR SYSTEM.—The State acquires an ownership in the services of convicts sentenced to confinement in the penitentiary under the clause of the various constitutions abolishing involuntary servitude except as a punishment for crime.² In some States the leasing or farming out of convicts is forbidden either by the constitution³ or by statute.⁴ Where a State has leased the

tried, it is not necessary that the record of his conviction should show that there was no penitentiary within that State suitable for the confinement of prisoners from the Federal courts, or that the attorney-general had designated the penitentiary in question for such purposes. *In re Wilson*, 18 Fed. Rep. 33.

State Jailer United States Officer.—For the purpose of safely keeping, properly caring for, and humanely treating prisoners committed to his custody by a court of the *United States*, the keeper of a county jail of the State who received such prisoners and is paid for their maintenance, is an officer of the *United States* court. *In re Birdsong*, 39 Fed. Rep. 599.

By the Penal Code of *California*, §§ 1601, 1602, the sheriff is required to receive and keep in the county jail any prisoner committed by authority of the *United States*, "provision being made by the *United States* for the support of such prisoner." *Held*, that the amount *per diem* fixed by the board of supervisors of the county for the support of State prisoners must be presumed to be a reasonable compensation, and for a refusal of the sheriff to receive a *United States* prisoner upon being tendered such amount, he is liable for contempt. *In re Kays*, 35 Fed. Rep. 288.

If a debtor escape from a State jail to which he has been committed under process from the courts of the *United States*, the marshal is not liable. *Randolph v. Donaldson*, 9 Cranch (U. S.) 76.

Where a prisoner is committed to a State jail, the use of which is permitted to prisoners committed by authority of the *United States* courts, a copy of the writ of commitment showing the grounds thereof should be left with the jailer. *Erwin v. U. S.*, 37 Fed. Rep. 470.

1. Provision is made by the *New York* statutes for the appointment of trustees to take charge of the property of convicts when said convicts are imprisoned in a State prison for a less term than for life, or in a penitentiary or county jail for a criminal offense for a longer term than one year. *Bliss's New York Ann. Code*, vol. 3, §§ 2219-2229.

Place of Imprisonment.—Under this general head the following cases may be consulted:

Illinois.—*Keedy v. People*, 84 Ill. 569; *Dyer v. People*, 84 Ill. 624; *Mullinix v. People*, 76 Ill. 212.

Indiana.—*Tippecanoe Co. v. Lafayette*, 7 Ind. 614.

South Carolina.—*State v. Welch*, 29 S. Car. 4.

New York.—See *Bliss' Ann. C.*, §§ 122-3.

Ohio.—*Campbell v. Hampson*, 1 Ohio 119.

Wisconsin.—*Davies v. State*, 72 Wis. 54.

California.—*Ex parte Flood*, 64 Cal. 251; *Ex parte Moon Fook*, 72 Cal. 10.

2. U. S. Const., art. 13, § 1; Const. *Alabama*, 1875, art. 1, § 33; Const. *Mississippi*, art. 1, § 19; *Comer v. Bankhead*, 70 Ala. 493.

3. *California.*—*Stimson's Stat. Law*, § 141.

4. *Birdseye's Rev. Stats. New York*, p. 2319. See *Jones v. Lynds*, 7 Paige (N. Y.) 301.

North Carolina.—In *North Carolina* no convict sentenced for murder, manslaughter, rape, or arson shall be farmed out. *North Carolina Constitution*, art. 11, §§ 1-2; *Stimson's Stat. Law*, § 141.

Under the proviso to Code of *North Carolina*, § 3448, that it shall not be lawful to farm out convicts unless the court before whom the trial is had shall in its judgment so authorize, the court

State prison and its inmates, it can resume possession of the State prison and control of the convicts, only by compensation, as is required in all cases where private property is taken for public use.¹ The lessee, however, holds his lease subject to the right of the governor to pardon and release the prisoners, and to the power of future legislatures to modify the punishment.²

at a term other than that at which the conviction was had cannot authorize the farming out of a convict. *State v. Pearson*, 100 N. Car. 414.

The statute of *Michigan* 1842, p. 130, requires the agent of the State prison to give notice in a newspaper for sealed proposals for letting the convicts. The agent of the prison without giving such notice, hired convicts to defendant for a term of years, the contract was held to be void, the mode of letting prescribed by the statute being a limitation on the power itself, and not merely directory to the agent of the prison. *Agent of the State Prison v. Lathrop*, 1 Mich. 438. See also *In re South Western Car Co.*, 9 Ind. 76; *Reed v. Seymour*, 24 Minn. 273; *Holland v. State*, 23 Fla. 123; *Trusk v. State*, 32 N. J. L. 478.

Massachusetts.—Under the *Massachusetts* Stats. of 1827, ch. 118, providing "that all contracts on account of the State prison shall be made with the warden, and when approved by the inspectors, shall be binding in law," the contracts are not required to be in writing. *Austin v. Forest*, 9 Pick. (Mass.) 341.

Alabama.—Under the *Alabama* statute, the order of the commissioners' court for the hiring of convicts sentenced to hard labor for the county, is not impaired by a failure to transcribe the order on the final record of the court. The order need not recite the fact that the interest of a county requires a hiring of the prisoners to work outside of a county, nor need it recite in what manner or on what particular works the convicts shall be employed. *Ex parte White*, 81 Ala. 80; *Ex parte Small*, 81 Ala. 85. See *Wynn v. State*, 83 Ala. 55.

New York.—Where judgment was rendered against contractors for convict labor, they cannot restrain a suit brought for collection of such judgment on the grounds that the contract is not in conformity with law, where they themselves violate the contract by neglecting to pay for the services of the convicts the amounts coming due from

time to time subsequent to giving of the judgment. *Young v. Beardsley*, 11 Paige (N. Y.) 93.

Discipline of Convicts.—Under the statutes of *Tennessee*, convicts in the penitentiary cannot be punished except as authorized by statute, except by authority of the board of inspectors of the prison. The warden of the penitentiary has no power to inflict corporal punishment, unless the board in its discretion authorizes such punishment in each particular case. The board has no authority to delegate to the warden this discretion to inflict such punishment. *Boone v. State*, 8 Lea (Tenn.) 739; *Smith v. State*, 8 Lea (Tenn.) 744. See also *Werner v. State*, 44 Ark. 123.

State Prison Directors.—For cases governing the powers and duties of State prison directors, see *Porter v. Haight*, 45 Cal. 631; *People v. Chapman*, 61 Cal. 262; *Chapman v. Stoneman*, 63 Cal. 490; 78 N. Car. 464; *State v. Directors etc.*, 5 Ohio St. 234.

1. *McCauley v. Brooks*, 16 Cal. 11. Where the defendant made a contract with the warden of the State prison for the labor of some of the convicts, and his shop within the prison yard was willfully set on fire by convicts, whereby materials belonging to the defendant were injured more than the services of the hired convicts were worth, the loss not being occasioned by the fault or negligence of the officers of the prison, it was held that the defendant was liable to pay for the labor at the price stipulated. *Austin v. Foster*, 9 Pick. (Mass.) 341.

2. *State v. McCauley*, 15 Cal. 429; *Hancock v. Ewing*, 55 Mo. 101.

If parties contracting with the State sustain loss by such action of the legislature, they have a claim against the State, but such is not in the province of the courts to allow. *Hancock v. Ewing*, 55 Mo. 101.

A prayer in a petition for a *mandamus* against the penitentiary commissioners to compel the performance of a contract with them for convict labor that they be compelled to assign to the

The lessee of a penitentiary with the prisoners therein confined, has no authority to sublet the contract to another person.¹

V. PRISON KEEPERS.²—At common law the sheriff was ex-officio the jailer of his county.³ In some States it is provided by statute that the sheriff shall have the keeping of the jail.⁴

VI. MAINTENANCE OF PRISONERS.—The State is bound to support all prisoners convicted of crimes.⁵ And persons to be tried for crime must also be maintained at the public expense pending their trial.⁶ At common law, however, a person imprisoned for

relator two hundred convicts of the "kind and quality" called for and specified in the agreement, renders the petition uncertain and indefinite, as it cannot be told what specified act is sought to be coerced. *People v. Dulaney*, 96 Ill. 503.

1. *State v. Neel*, 48 Ark. 283; compare *Horner v. Wood*, 23 N. Y. 350.

Where a lessee of convicts has sublet them to another person, his successor may reclaim their custody by *habeas corpus*. *State v. Neel*, 48 Ark. 283.

2. **Jailer.**—A keeper of a jail, formerly a servant of the sheriff. He keeps safely persons committed to him by lawful authority. *Anderson's Law Dict.* 571.

Warden.—A guardian or keeper. 2 *Bouvier's Law Dict.* 798.

3. *Broom & Had.* *Blackstone*, vol. 1, 266; 1 *Minor's Insts.*, vol. 1 (3rd ed.), 113; *Felts v. Memphis*, 2 *Head (Tenn.)* 650.

4. *Rev. Code Mississippi*, 1880, § 342; *New York Code of Civil Proc.* §§ 120, 121.

Rev. Stats. Idaho, § 8503.

The following cases defining the rights and powers of prison keepers as established by the statutes of the various States, may be consulted:

Minnesota.—*State v. McIntyre*, 25 *Minn.* 383.

Connecticut.—*Burr v. Norton*, 25 *Conn.* 103.

Tennessee.—*Felts v. Mayor etc. of Memphis*, 2 *Head (Tenn.)* 650.

New Jersey.—*Daubman v. Smith*, 47 *N. J. L.* 200; *Stiles v. Union Co.*, 50 *N. J. L.* 9.

Indiana.—*Sate v. Mayne*, 68 *Ind.* 285; *Wood v. Selly*, 24 *Ind.* 183; *Boaz v. Tate*, 43 *Ind.* 60.

California.—*Sacramento v. Hardy*, 18 *Cal.* 412.

Massachusetts.—*Bradford v. Rowe*, 2 *Pick. (Mass.)* 17.

Compensation of Prison Keepers.—The compensation which prison keepers

are to receive is regulated by statute. The following cases are adjudications on the statutes of the various States:

Hare v. Sebastian Co., 35 *Ark.* 90; *Randall v. Lyon Co.*, 20 *Nev.* 35; *State v. McIntyre*, 25 *Minn.* 283; *Adams v. Hampden Co.*, 15 *Gray (Mass.)* 439; *Commissioners of Sinking Fund v. Theobald*, 17 *B. Mon. (Ky.)* 459.

In *Indiana*, a sheriff is entitled to no compensation in addition to the amount allowed by law for the boarding of prisoners, for services rendered by him in keeping the county jail and taking care of the prisoners confined therein. *Bynum v. Greene Co.*, 100 *Ind.* 90.

5. *State v. McCauley*, 15 *Cal.* 429. See *McCauley v. Brooks*, 16 *Cal.* 11.

In *State v. McCauley*, 15 *Cal.* 429, the court by Field, C. J., said: "The support of the convicts is as much the duty of the State as to provide for the salaries of her officers. It constitutes one of the ordinary sources of the State's expenditures."

The support of a woman sentenced to the reformatory prison for women and removed to a State lunatic hospital, is not a commonwealth charge within the *Pub. Sts. of Massachusetts* 1883, ch. 148, § 1, making the support of a State prison convict committed to a State lunatic hospital a commonwealth charge to the expiration of his term of sentence to the State prison, though under *Pub. Sts.*, p. 215, § 15, women cannot be sent to the State prison for offenses for which men would be sent there, but may be sent to the reformatory prison. *Beard v. Boston*, 151 *Mass.* 96. See *Tippecanoe Co. v. Chissom*, 7 *Ind.* 688.

See *Atchison Co. Judge v. Lucas*, 83 *Ky.* 451; *People v. Columbia Co.*, 67 *N. Y.* 330; *Sheriff v. Taylor*, 2 *Brev. (S. Car.)* 482; *Harris v. Sullivan Co.*, 15 *N. H.* 81.

6. *People v. Green*, 47 *How. Pr. (N. Y.)* 382; *Brian v. Ellis, Dudley (S.*

debt was not entitled to any other support than that which his own private property or exertions would supply him;¹ but this doctrine has been held to be repugnant to the institutions and customs of this country,² and the plaintiff has been held bound to support a person imprisoned at his suit if such person is unable to support himself.³ At present provision is usually made by statute for the support of prisoners confined on civil process, by the party at whose suit they are confined in case of their inability to support themselves.⁴ A nursing infant of a woman imprisoned is not a commonwealth's charge, but must be supported by the town in which the mother is imprisoned.⁵ The commonwealth, however, is liable for any extra expenses incurred for articles furnished the mother on account of her condition.⁶

VII. PRISON BOUNDS OR RULES OF PRISON—1. **Definition.**—A district around a prison within which a debtor released from confinement under bond may go at large.⁷

2. **How Bounded.**—It is only necessary to describe the prison limits by mathematical lines. Monuments are not necessary to de-

Car.) 71; *Thomasson v. Kerr*, 2 McMull. (S. Car.) 340; *State v. Shropshire*, 4 Yerg. (Tenn.) 52.

1. *Dive v. Maningham*, 1 Plowd. 60; *People v. Green*, 47 How. Pr. (N. Y.) 382; *McLain v. Hayne*, 3 Brev. (S. Car.) 291.

2. *Moore v. Benbow*, 3 Brev. (S. Car.) 390.

3. *Moore v. Benbow*, 3 Brev. (S. Car.) 390.

4. See generally **POOR DEBTORS**.

Virginia.—In *Virginia*, it is provided by statute that the expense of providing for prisoners is to be defrayed by the party at whose suit the prisoner is confined, *i. e.*, if confined at the suit of the commonwealth, by the State; if at the suit of an individual in a civil cause, by such person. *Virginia Code* 1873, ch. 50, §§ 16-19; 1 *Minor's Insts.* (3rd ed.) 114.

New York.—It is provided in *New York* by statute that if a prisoner confined in jail makes oath before the sheriff, jailer, or deputy jailer, that he is unable to support himself during his imprisonment, his support shall be a county charge. *Bliss's Ann. Code*, § 112.

South Carolina.—See *Thomasson v. Kerr*, 2 McMull. (S. Car.) 340; *Brian v. Ellis, Dudley* (S. Car.) 71; *Furth v. Deloach*, 2 Spears. (S. Car.) 400; *Black v. Hyams*, 4 M'Cord (S. Car.) 508.

Pennsylvania.—*Apple v. Crawford Co.*, 105 Pa. St. 300; *Peeling v. York Co.*, 113 Pa. St. 108.

Montana.—*Lloyd v. Silver Bow Co.*, 7 Mont. 562.

Michigan.—*Dorsey v. People*, 37 Mich. 382; *Humphrey v. People*, 39 Mich. 207.

Oregon.—*Kelly v. Multnomah Co.*, 18 Oregon 356.

Massachusetts.—*Taunton v. Westport*, 12 Mass. 355; *Adams v. Wiscasset*, 5 Mass. 328.

Maine.—*Scammon v. Wells*, 50 Me. 584.

The account of the *United States* marshal for the care and subsistence of territorial prisoners sentenced to the penitentiary is a public account and one that the territory ought to pay. *Nelson v. Clayton*, 2 Utah 299.

5. *Watson v. Cambridge*, 18 Pick. (Mass.) 470; *Adams v. Hampden Co.*, 13 Gray (Mass.) 439.

6. *Watson v. Cambridge*, 18 Pick. (Mass.) 470.

7. *Anderson's Law Dict.*, p. 811.

Jail Limits.—A limited region of liberty for a person imprisoned for debt. Equivalent expressions are "prison bounds" and "rules of the prison." *Anderson's L. Dict.*, p. 571.

Jail liberties are but an enlargement of the limits or outer walls of the jail. *Chamberlain v. Campbell*, 39 N. Y. 642; *Peters v. Henry*, 6 Johns. (N. Y.) 121.

fine them.¹ No change which may be made in the original boundaries to which jail liberties were extended, will affect the original extent of the jail liberties, unless provision had been made in assigning the original limits, for such change.² Where certain boundaries have been considered as the bounds of the prison for a sufficient length of time to establish a usage with regard to them, a prisoner keeping within those boundaries will not be held to have committed an escape, although they are not the true boundaries of the prison limits;³ but where the bounds have not been long established, no evidence of usage will be admitted as a defense.⁴

3. Persons Entitled.—A party who is committed to jail for the non-payment of costs or other sums of money is entitled to the jail liberties.⁵ Where a party is committed for the non-pay-

Jail limits are to be deemed a part of the jail itself. *Wemple v. Glavin*, 57 How. Pr. (N. Y.) 109.

1. *Lucky v. Brandon*, 1 Ohio 49; *Allen v. Smith*, 12 N. J. L. 159.

In requiring the court of common pleas to "mark and lay out the bounds and rules of the prisons in their several counties," the legislature of *New Jersey* did not intend to use the word "mark" in a literal sense; they meant by it to point out and settle, to define, to describe; and the bounds, therefore, may be sufficiently marked and laid out by course and distances without fixing any visible marks or boundaries on the ground. *Allen v. Smith*, 12 N. J. L. 159.

An order of the county court, fixing the limits of the prison, and making the line of a street one of the boundaries, must be construed to mean the practical line, in contradistinction to an air line specified in the laying out or alteration of the street. *Ely v. Parsons*, 2 Conn. 382.

See *Cowden v. Kerr*, 6 Blackf. (Ind.) 280.

Under the act of 1875, the board of supervisors has power to fix jail liberties as a purely administrative act, or by the exercise of its legislative functions, as provided for in § 18 of subdivision 1 thereof. In acting upon the subject of jail liberties in the exercise of its legislative functions, the board is subject to the limitations contained in § 147, of the Code of Civil Procedure, and cannot establish liberties exceeding five hundred acres in quantity. But in exercising legislative power conferred upon it by said § 18, of sub-division 1, of ch. 482 of 1875, it is not subject to the said limitations, and may

establish jail liberties exceeding five hundred acres in extent. *Roach v. O'Dell*, 33 Hun (N. Y.) 320.

2. *Bolton v. Cummings*, 25 Conn. 410; *Chamberlain v. Campbell*, 39 Barb. (N. Y.) 642.

Act of Congress.—The act of Congress of May 19, 1828, gives the debtors imprisoned under execution from the courts of the *United States* the privilege of jail limits in the several States as they were fixed by the laws of the several States at the date of that act. *U. S. v. Knight*, 14 Pet. (U. S.) 301; *U. S. Rev. Stats.*, § 992.

An act of the legislature either establishing, enlarging or contracting the prison bounds, does not impair the obligation of contracts, and is therefore constitutional, and the prisoner must conform to the new limits although not the same that existed when he was first imprisoned. *Reed v. Fullum*, 2 Pick. (Mass.) 158; *Locke v. Dane*, 9 Mass. 360; *Holmes v. Lansing*, 3 Johns. Cas. (N. Y.) 73.

3. *Downer v. Dana*, 19 Vt. 338.

If the jail limits in a county are capable of being ascertained by a resort to the records of the county court as is ordinarily the case, then such resorts must be had. If not proof of general understanding and acquiescence of all concerned for thirty years and probably for fifteen years in certain recognized and well defined boundaries is equivalent to record proof. *Downer v. Dana*, 19 Vt. 338.

4. *Trull v. Wheeler*, 19 Pick. (Mass.) 240.

5. *People v. Bennett*, 4 Paige (N. Y.) 282; *Jackson v. Billings*, 1 Cai. (N. Y.) 252; *In re Watson*, 3 Lans. (N. Y.)

ment of a fine imposed upon him by the court for a breach of an injunction or other contempt, he must be confined by the sheriff within the walls of the prison.¹

4. Bond for Prison Bounds.—When the limits have been defined, the sheriff is bound to take the bond from the prisoner without any precept to that effect from the court committing the prisoner,² but the sheriff is not compelled to take the bond until they have been well defined.³ A person who has given bond for the liberties is bound to take notice at his peril of the extent of those liberties, and to keep within them.⁴ Any, even the slightest overstepping of the limits, is equivalent to an escape.⁵

408; *Patrick v. Warner*, 4 Paige (N. Y.) 397. See also *Levy v. Kaim*, 55 How. Pr. (N. Y.) 136.

1. *People v. Bennett*, 4 Paige (N. Y.) 282; *Allen v. Allen*, 58 How. Pr. (N. Y.) 381; *State v. Gee*, 1 Bay. (S. Car.) 163; *In re Clark*, 20 Hun (N. Y.) 551; *In re Watson*, 3 Lans. (N. Y.) 408.

Before the prisoner can be deprived of the privilege of giving bond for prison liberties, the order of commitment must show that he was convicted of a contempt. *People v. Bennett*, 4 Paige (N. Y.) 282.

See also *Warren v. Russel*, 1 D. Chip. (Vt.) 193.

The surety of a person who has been confined on civil process and has given bonds for the jail liberties, is not liable where the prisoner has afterwards been arrested on a charge of felony, committed to close confinement and has broken jail. *Bradford v. Conanslus*, 3 Cow. (N. Y.) 128.

2. *Kip v. Brigham*, 7 Johns. (N. Y.) 168; *Ford v. Ford*, 10 Abb. Pr. N. S. (N. Y.) 74; 41 How. Pr. (N. Y.) 169; *Holmes v. Lansing*, 3 Johns. Cas. (N. Y.) 73; See also *Dole v. Moulton*, 2 Johns. Cas. (N. Y.) 205.

The security required by the *South Carolina* prison bounds act, is a bond. *Cantey v. Duren*, Harp. (S. Car.) 434.

Compare Ward v. Ward, 6 Abb. Pr. N. S. (N. Y.) 79; *Ex parte Bradley*, 4 Ired. (N. Car.) 543.

3. *Bissell v. Kip*, 5 Johns. (N. Y.) 89.

A bond given for prison bounds by a debtor who has been arrested is not invalid because the records of the inferior court did not show at the time that a plan of the bounds had been returned by the sheriff or that a survey of them had been made under the direction of said court as required by law. *Galloway v. Camp*, 31 Ga. 586.

On the admission of a prisoner to the liberties of a prison who is confined under process from a court of the *United States*, the bond must be taken payable to the marshal of the district; if taken payable to the sheriff of the county, it is void and no action can be maintained upon it. *Warren v. Russel*, 1 D. Chip. (Vt.) 193.

4. *Kip v. Brigham*, 7 Johns. (N. Y.) 168.

After the several jail limits were extended to the boundaries of the counties in which the jails were respectively situated in regard to debtors committed in execution for debts contracted after April 2, 1834, a debtor imprisoned on execution for a debt contracted before that date gave bond conditioned that he would remain within the precincts of the prison. It was held that such debtor by going without the original jail limits but not without the county had committed a breach of the condition for which his surety was liable, although the limits were not set out in the bond or the time when the debt was contracted noted on the execution, and although the jailer upon being inquired of by the obligors when the bond was executed had informed the debtor that he might go anywhere within the county without breaking the condition of the bond. *Farley v. Randall*, 22 Pick. (Mass.) 146.

Compare Rondolph v. Simon, 29 Kan. 406.

5. *Bissell v. Kip*, 5 Johns. (N. Y.) 89; *Downer v. Dana*, 19 Vt. 338.

See also *Trull v. Wheeler*, 16 Pick. (Mass.) 241.

Where a judgment debtor enlisted into the army of the *United States* and was afterwards committed to prison in execution, and having obtained the liberty of the yard by giving bond according to the statute was

To support an action for an escape from prison bounds, the fact that the prisoner was off the limits must be affirmatively and specifically proved. Nothing will be left to inference.¹ A bond for jail liberties may be good as a common law bond, though it does not conform to the statutes upon the subject.² The bond for prison liberties is merely for the indemnity of the sheriff.³ If the debtor is in custody of an officer, a bond for prison liberties is good, though the debtor be not actually imprisoned;⁴ but if the bond contain a condition not authorized by statute or varies materially from the one prescribed, it is void.⁵ A joint bond for prison limits, where the prisoner is confined in several separate suits, is void.⁶

PRIVATE.—(*Compare* PUBLIC.) See note 7.

forcibly carried without the limits of the prison by a party of soldiers, he was holden to have committed an escape within the condition of his bond. *Cargill v. Taylor*, 10 Mass. 206. See *Patterson v. Philbrook*, 9 Mass. 151; *Baxter v. Taber*, 4 Mass. 360.

1. *Visscher v. Gansevoort*, 18 Johns. (N. Y.) 496; *Cosgrove v. Bowe*, 10 Daly (N. Y.) 353.

2. *Burroughs v. Lowder*, 8 Mass. 372; *Clap v. Cofran*, 7 Mass. 98; *Freeman v. Davis*, 7 Mass. 200; *Pratt v. Gibbs*, 9 Cush. (Mass.) 82.

See also *Thacher v. Williams*, 14 Gray (Mass.) 324.

3. *Dole v. Moulton*, 2 Johns. Cas. (N. Y.) 205; *Holmes v. Lansing*, 3 Johns. Cas. (N. Y.) 73.

A sheriff may permit a prisoner under execution to go within the liberties of the jail without taking security, and if the prisoner without his knowledge goes beyond the limits but returns again before suit brought, he is not liable for an escape. *Peters v. Henry*, 6 Johns. (N. Y.) 121.

The jailer is liable for an escape if he permit a prisoner committed to jail on execution, to go at large without giving a bond approved as required by Rev. Stats. of *Maine*, ch. 113, § 24-42.

The mere sending by the plaintiff's attorney for a bond in accordance with the statute and its retention without suit upon it or any action in regard to it, is not a waiver of its want of legal approval. *Hotchkiss v. Whitten*, 71 Me. 577.

A bond for jail liberties which has been forfeited, is assignable. *Kellogg v. Manro*, 9 Johns. (N. Y.) 300.

To an action of debt for the penalty

of a bond given to a sheriff as security for the liberties of the jail *non damnificatus* is not a good plea. *Woods v. Rowan*, 5 Johns. (N. Y.) 42; *Camp v. Allen*, 12 N. J. L. 1.

An imprisoned debtor being dangerously sick, the creditor gave a writing addressed to the jailer in these words: "We hereby consent that H (the debtor) be removed from the jail limits during such time as may be necessary to his recovery in the opinion of his physicians, you being answerable for his return whenever he shall be deemed in a suitable situation as relates to his health." H was removed, and in an action afterwards brought on the bond given for the liberties of the prison, it was held that such writing was not a license to depart the prison—the language of it importing a condition according to which the jailer was not authorized to suffer the departure of H without at the same time making himself responsible for his return. *Seymour v. Harvey*, 11 Conn. 275.

4. *Doyle v. Boyle*, 10 Kan. 168.

Compare *Lytle v. Davies*, 2 Ohio 277.

5. *Lyon v. Ide*, 1 D. Chip. (Vt.) 46; *Camp v. Allen*, 12 N. J. L. 1; *Sullivan v. Alexander*, 19 Johns. (N. Y.) 233.

Where the penalty of a bond for the jail liberties was taken for more than double the debt and costs for which the prisoner was committed, but the excess consisted of the officer's fees on the execution, this was held a good bond within the statute. *Smith v. Jansen*, 8 Johns. (N. Y.) 111.

6. *Lytle v. Davies*, 2 Ohio 277.

Compare *Smith v. Jansen*, 8 Johns. (N. Y.) 111.

7. **Private bankers** are persons or firms

PRIVATE WAYS.—(See also EASEMENTS, vol. 6, p. 139; WAYS.)

- I. Definition, 96.
- II. Classification, 96.
- III. Ways of Necessity, 96.
- IV. Ways Created by Grant, 99.
- V. Ways Acquired by Prescription, 103.
- VI. Rights to Locate Way, 105.
- VII. When a Private Way Becomes Public, 106.
- VIII. How Ways May be Used, 107.
- IX. Rights of the Parties, 110.
- X. Repairs, 111.
- XI. Obstructions, 111.

1. *Generally*, 111.
2. *Erecting Gates*, 114.
- XII. Right to Go Extra Viam, 115.
- XIII. How Right of Way Lost or Extinguished, 115.
- XIV. Revival of Lost Right of Way, 116.
- XV. Statutory Private Ways, 118.
1. *In General*, 118.
2. *Establishment*, 118.
3. *Petition or Application*, 119.
4. *Notice*, 120.
5. *Damages*, 120.

engaged in banking without having any special privileges or authority from the State. *People v. Doty*, 80 N. Y. 225, 228; *Perkins v. Smith*, 116 N. Y. 441.

Private Conveyance.—See TRAVEL.

Private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case, for hire or reward. *Pennemwill v. Cullen*, 5 Harr. (Del.) 242. See also CARRIERS OF GOODS, vol. 2, p. 775.

Private Chapels.—See CHAPELS, vol. 3, p. 109, n.

Private Dwelling-house.—A covenant requiring a house to be used as a "private" dwelling-house only, is broken by its being used as a school or dancing academy, *Wickenden v. Webster*, 6 E. & B. 387, or as an institution for educating the daughters of missionaries, or as a club, *German v. Chapman*, 7 Ch. D. 271; or as an hotel or lodging-house, *Rolls v. Miller*, 27 Ch. D. 71; or by using it as an office for receiving orders, putting a trade-blind in one of the windows, *e. g.*, "*Coal Office*," *Wilkinson v. Rogers*, 2 De G. J. & S. 62; and in *Wickenden v. Webster*, 6 E. & B. 387, it was held that the use of the dwelling as a school was a violation of a like covenant. See also *Evans v. Davies*, 10 Ch. D. 747. But a public auction of the furniture of the house is not a breach of such a covenant. *Reeves v. Cattell*, 24 W. R. 485.

An art studio erected away from the house in such a way as not to be an adjunct thereto is a breach of a covenant that only "private dwelling-houses" shall be erected. *Patman v. Harland*, 17 Ch. D. 353; so is the erection of a wall. *Bowes v. Law*, L. R., 9 Eq. 636; *secus*, of a stable with a bedroom over it. *Russell v. Baber*, 18 W. R. 1021.

See also DWELLING HOUSE, vol. 6, p. 101.

Private House; Public House.—A public house is for the entertainment of all who come lawfully and pay regularly. A boarding-house is for the accommodation only of those who are accepted as guests by the proprietor. Such an establishment is as much a private house as if there were no boarders. *Commonwealth v. Cuncannon*, 3 Brews. (Pa.) 344. But see *Gannett v. Albree*, 103 Mass. 372. See also LEASE, vol. 12, p. 1025.

Private Room.—A Texas statute provides that a "private room" in an inn or tavern shall not be within the meaning of public places unless such room is commonly used for gaming. It was held in *Comer v. State*, 26 Tex. App. 509, that a room in a tavern that was engaged by a party, not for the purposes of lodging or abode, was not a "private room." The court said: "To make a 'guest room' in a hotel—that is, one appropriated to public use as such—a 'private room,' it must have been taken by a guest or a lodger seeking rest for a night or day, or a residence for a time, or one desiring to use it for a temporary habitation—that is 'a place of abode.' Until so appropriated by a guest, it is part of the public house known as 'tavern or inn.'"

Private institutions are those which are created or established by private individuals for their own private purposes. *Toledo Bank v. Bond*, 1 Ohio St. 643.

"Private person" (as used in 2 R. S. of New York 678, § 59, relative to embezzlement) does not include a person holding moneys in an official capacity; *e. g.*, a county superintendent of poor. *Coats v. People*, 22 N. Y. 245.

I. DEFINITION.—A private way is an incorporeal hereditament; an easement; a right of way over the land of the owner of the soil.¹ The law of the subject is a branch of the law of easements.

II. CLASSIFICATION.—Rights of way may be classified into those arising from necessity, and those created by grant, or by a reservation in a grant, or by prescription, which pre-supposes a grant.² Rights of way, again, are in gross, where they are purely personal and not assignable, nor descendable,³ and appurtenant or appurtenant to an estate, in which case they may pass by assignment when the land is sold to which the right of way is appurtenant.⁴ There is a class of private ways, so called, which is not related especially to the law of easements, but which are thus named in the various statutes, which, in many of the States, authorize and regulate their laying out. Strictly speaking, these statutory ways are public ways of a character more limited than common highways.⁵

III. WAYS OF NECESSITY.—A way of necessity arises where the owner sells land to another which is wholly surrounded by the

1. 2 Blackstone's Com. 35; 3 Kent's Com. 419; Washburn on Easements 160, 161; Kister v. Reeser, 98 Pa. St. 5; 42 Am. Rep. 608.

It is simply an easement or a privilege conferring no interest in the land. 1 Crabb's Real Property; Garrison v. Rudd, 19 Ill. 563; Cook Co. v. Chicago etc. R. Co., 35 Ill. 460; Snyder v. Warford, 11 Mo. 513; 49 Am. Dec. 94. "Road" and "way" are not synonymous terms. The former is used to mean the land over which a public or private way is established. Chollar-Potosi Min. Co. v. Kennedy, 3 Nev. 361; 93 Am. Dec. 409.

The old authorities classified ways as foot-ways, horse-ways, foot, horse, and carriage ways, and drift-ways. See Co. Litt. 56 a; Woolr. Ways 1. A carriage-way includes a foot-way. Davies v. Stephens, 7 C. & P. 570. So a carriage-way includes a horse-way. Ballard v. Dyson, 1 Taunt. 279. A drift-way is said to be a common way for driving cattle, and to intend a way for the passage of teams. Smith v. Ladd, 41 Me. 320. A carriage-way does not include a drift-way. Ballard v. Dyson, 1 Taunt. 279; and a foot-way, or a way for horses, oxen, cattle and sheep, has been held not to include a right to carry manure in a wheelbarrow. Brunton v. Hall, 1 Q. B. 792.

Under the civil law, the division of ways was into; *iter*, a way on foot or horseback; *actus*, a right of walking or riding, driving cattle or a cart, although

not always the latter, and *via* or *aditus*, equivalent to a highway. Ayl. Pand. 307; Inst. 2, 3. As to the various classes of ways under the law of France, and the mode of use, see 1 Fournel, Traite Du Voisinage.

2. Washburn on Easements, p. 158, *et seq.*; 3 Kent's Comm. 419, *et seq.*; 2 Bl. Comm. 35, *et seq.*

3. 3 Kent's Comm. 420. See Garrison v. Rudd, 19 Ill. 563; Moore v. Crose, 43 Ind. 30; Junction R. Co. v. Ruggles, 7 Ohio St. 1. Compare White v. Crawford, 10 Mass. 183; Sauxay v. Hunger, 42 Ind. 44; Huffman v. Savage, 15 Mass. 130.

A granted to B a right of way to be held so long as B should occupy the building for the grocery business then carried on by him. B failed, and a corporation purchased B's stock and employed him as chief manager in the grocery business. Held, that the right of way ceased to exist on B's failure. Hall v. Armstrong, 53 Conn. 554.

So an agreement by the owner of land that another may use a way over the same during the latter's life, confers no rights upon the latter's heirs. Hill v. Hagaman, 84 Ind. 287.

4. Moore v. Crose, 43 Ind. 30; Louisville etc. R. Co. v. Koelle, 104 Ill. 455; Dennis v. Wilson, 107 Mass. 591; Wagner v. Hanna, 38 Cal. 111; 99 Am. Dec. 354; Kuecken v. Voltz, 110 Ill. 264; Moore v. Crose, 43 Ind. 30.

5. See *infra*, this title, *Statutory Private Ways*.

land of the grantor,¹ or partly by land of the grantor, and partly by land of a stranger,² in which case purchaser has the right of way through the grantor's land to arrive at his own.³ The same rule will apply if the grantor retains the interior and grants away the exterior land,⁴ or if a judgment creditor extends his execution on a part of his debtor's land so as to leave him no passage from the remainder of the land to the highway.⁵ A way of necessity derives its origin from a grant.⁶ It is an implication from

1. *Taylor v. Warnaky*, 55 Cal. 350; *Collins v. Prentice*, 15 Conn. 39; 38 Am. Dec. 61; *Kuhlman v. Hecht*, 77 Ill. 570; *Lore v. Stiles*, 25 N. J. Eq. 381; *New York L. Ins. etc. Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 353; *Brigham v. Smith*, 4 Gray (Mass.) 297; 64 Am. Dec. 76; *Snyder v. Warford*, 11 Mo. 513; 49 Am. Dec. 99.

2. *Bass v. Edwards*, 126 Mass. 445; *New York L. Ins. etc. Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 353.

If a person owning a lot of land fronting on a highway conveys the rear part of the lot, which is entirely surrounded by land of persons other than the grantee, the latter has a right of way by necessity to the highway over the main land of the grantor. *Wheeler v. Gilsey*, 35 How. Pr. (N. Y.) 139; *Bass v. Edwards*, 126 Mass. 445; *Sonyles v. Hastings*, 22 N. Y. 217; *Kimball v. Cochecho R. Co.*, 27 N. H. 448; 59 Am. Dec. 387; *Brown v. Berry*, 6 Coldw. (Tenn.) 98; *Osborn v. Wise*, 7 C. & P. 761; *Kawika v. Paklokeo*, 5 Hawaiian R. 293.

A right of way of necessity may be acquired over the land of another, although the road to which the way leads is not a country road, but a mere by-road open to the public. *Cheney v. O'Brien*, 69 Cal. 199.

The lessee of an inner close has by necessity a right of way suitable to the business for which the lease was made, over an outer close which belongs to the same landlord. *Gayford v. Moffat*, 4 L. R. Ch. 133.

Where one as a trustee conveys land to another, to which there is no access but over the trustee's land, a right of way passes of necessity as incidental to the grant. *Howton v. Frearson*, 8 T. R. 50. See *Collins v. Prentice*, 15 Conn. 39; 38 Am. Dec. 61.

But if the owner of land bounded on one side by a highway, and on all other sides by lands of other owners, has a prescriptive right of way over one of the adjoining lots, by which he

can reach the highway, and sells that portion of his land which is next to the highway, he retains no right of way by necessity over the same. *Leonard v. Leonard*, 2 Allen (Mass.) 543.

3. *Collins v. Prentice*, 15 Conn. 39; 38 Am. Dec. 61; *Bass v. Edwards*, 126 Mass. 445.

4. *Ogden v. Grove*, 38 Pa. St. 487; *Brigham v. Smith*, 4 Gray (Mass.) 297; 64 Am. Dec. 76; *Seymour v. Lewis*, 14 N. J. 444; 78 Am. Dec. 108; *Clark v. Cogge*, Cro. Jac. 170; *White v. Boss*, 7 H. & N. 732; *Alley v. Carleton*, 29 Tex. 74; 94 Am. Dec. 260; *Pingree v. McDuffie*, 56 N. H. 306.

5. *Pernam v. Wead*, 2 Mass. 203; *Taylor v. Townsend*, 8 Mass. 411; 5 Am. Dec. 107; *Russell v. Jackson*, 2 Pick. (Mass.) 574; *Schmidt v. Quinn*, 136 Mass. 575.

Where by a levy on part of a debtor's land, the remainder was divided into two lots, one of which, lying north, was thereby shut out from the highway, but the other, lying northerly as well as westerly, was bounded on the highway, it was held that a way reserved in the levy from the land "north of the land extended on, adjoining the same," was appurtenant to the north lot only. *Russell v. Jackson*, 2 Pick. (Mass.) 574.

G extended an execution on the land of K, taking the whole front of his farm, except a strip of five rods in width on one side, connecting the back land with the county road, but which could not be made passable for carriages at an expense less than from \$250 to \$300. Held, that this did not create a way of necessity over any part of the land levied on. *Allen v. Kincaid*, 11 Me. 155.

6. *Stewart v. Hartman*, 46 Ind. 331; *Proctor v. Hodgson*, 24 N. J. Exch. 195.

Numerous cases favor the idea that a right of way may be created by the necessity, irrespective and independent of any grant or reservation, either express

a grant, and an application of the principle that whenever one conveys property he also conveys whatever is necessary for the beneficial use of that property.¹ As to what constitutes a necessity, sufficient to raise an implied grant of a right of way, some courts have been inclined to hold that it need not be an absolute and irresistible necessity, and that a mere inconvenience may be so great as to raise such an implication.² But in most instances, mere convenience or usefulness is held not sufficient;³ there must be an absolute indispensable necessity to give the right.⁴ As a

or implied; but in most instances, however, it has been upheld on the ground of a grant or reservation implied from the necessity. *Woodworth v. Raymond*, 51 Conn. 70; *Tracy v. Atherton*, 25 Vt. 52; 82 Am. Dec. 621.

1. *Collins v. Prentice*, 15 Conn. 39; 38 Am. Dec. 61; *Nichols v. Luce*, 24 Pick. (Mass.) 105; 35 Am. Dec. 302; *Snyder v. Warford*, 11 Mo. 513; 49 Am. Dec. 99; *Tracy v. Atherton*, 35 Vt. 52; 82 Am. Dec. 621; *Bullard v. Harrison*, 4 M. & S. 387; *New York L. Ins. etc. Co. v. Milnor*, 1 Barb. Ch. (N.Y.) 353.

2. *Wash. on Eas.* 259; *Lawton v. Rivers*, 2 McCord (S. Car.) 445; 13 Am. Dec. 741; *Morris v. Edgington*, 3 Taunt. 24; *Dodd v. Burchell*, 1 H. & C. 122; *Peysey v. Vicary*, 16 M. & W. 484; *Alley v. Carleton*, 29 Tex. 78; 94 Am. Dec. 260.

Lord Mansfield seems to favor the view that a way from necessity can arise from convenience and the better use of the property. And in *Morris v. Edgington*, 3 Taunt. 24, he says: "That it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises, could not be had." So in *Pettingill v. Porter*, 8 Allen (Mass.) 1; 85 Am. Dec. 671, it was held, that the right arises though there is no insuperable physical obstacle to prevent access by another way if the construction of such a way would involve unreasonable expense as compared with the value of the property. See *Cihak v. Klekr*, 117 Ill. 643.

3. *Carey v. Rae*, 58 Cal. 159; *Anderson v. Buchanan*, 8 Ind. 133; *Nichols v. Luce*, 24 Pick. (Mass.) 102; 35 Am. Dec. 302; *Parker v. Bennett*, 11 Allen (Mass.) 392; *Turnbull v. Rivers*, 3 McCord (S. Car.) 131; 15 Am. Dec. 622; *Ogden v. Grove*, 38 Pa. St. 487; *Screven v. Gregorie*, 8 Rich. (S. Car.) 158; 64 Am. Dec. 747; *Alley v. Carle-*

ton, 29 Tex. 78; 94 Am. Dec. 260; *Woodworth v. Raymond*, 51 Conn. 70; *Wiswell v. Minogue*, 57 Vt. 666; *White v. Bradley*, 66 Me. 255; *Martin v. Patine*, 16 La. 57; *Cooper v. Maupin*, 6 Mo. 624; 25 Am. Dec. 456; *Trask v. Patterson*, 29 Me. 499; *Stuyvesant v. Woodruff*, 21 N. J. L. 134; 47 Am. Dec. 156.

The necessity from which a grantee derives a right of way is when the lands purchased are surrounded on all sides by the lands of the grantor. If the land can be reached by water, or by a distant or difficult road, the grantee is not entitled to a way across lands of the grantor; for it is necessity, and not inconvenience, that gives the right. *Turnbull v. Rivers*, 3 McCord (S. Car.) 131; 15 Am. Dec. 622.

4. *Hall v. McLeod*, 2 Metc. (Ky.) 98; 74 Am. Dec. 400; *Gayetty v. Bethune*, 14 Mass. 49; 7 Am. Dec. 188; *Ward v. Farwell*, 6 Col. 66; *O'Rourke v. Smith*, 11 R. I. 259; 23 Am. Rep. 448; *McDonald v. Lindall*, 3 Rawle (Pa.) 492; *Ogden v. Grove*, 38 Pa. St. 487; *Plimmons v. Frisby*, 1 Winst. (N. Car.) 201.

In *McDonald v. Lindall*, 3 Rawle (Pa.) 492, the court said: "The right of way from necessity over the land of another is always of strict necessity, and this must not be created by the party claiming the right of way. It never exists where a man can get to his own property through his own land. That the way through his own land is too steep or too narrow, does not alter the case. It is only where there is no way through his own land that the right of way over land of another can exist. That a person claiming a way of necessity has already one way, is a good plea, and bars the plaintiff." See *Morgan v. Meuth*, 60 Mich. 238; *Alley v. Carleton*, 29 Tex. 78; 94 Am. Dec. 260; *Screven v. Gregonie*, 8 Rich. (S. Car.) 158; 64 Am. Dec. 749; *Jeter v. Mann*, 2 Hill (S. Car.) 641; *Hyde v. Gamaica*, 27 Vt. 457.

way of necessity is founded on a grant, it cannot exist where neither the party claiming under the grant, nor the owner of the land over which the right of way is claimed, nor the predecessor of either, was ever seised at the same time of both tracts.¹ A way of necessity is limited by the necessity which creates it, and ceases when that necessity no longer exists. So where the owner of such a way acquires, by purchase of other land or otherwise, a way of access from a highway over his own land to the land to which the way belongs, the way of necessity is at an end.²

IV. WAYS CREATED BY GRANT.—A way created by grant is a right of way granted by express mention in a conveyance, or arising by

So in *Smyles v. Hastings*, 22 N. Y. 223, the court by Wright, J., said: "There can be no implication of a grant of a right of way of necessity where the grantees have the means of obtaining access to the lands granted without trespassing on the adjoining lands of the grantor, or the property of a stranger. If they can be approached from a public highway, or by passing through adjoining lands of the grantee, no right of way of necessity will be implied."

1. *Proctor v. Hodgson*, 10 Exch. 822; *Woodworth v. Raymond*, 51 Conn. 70; *Oliver v. Hook*, 47 Md. 301; *Tracy v. Atherton*, 35 Vt. 52; 82 Am. Dec. 621.

One cannot have a right of way of necessity over land which the grantor never owned, except as tenant in common. *Collins v. Prentice*, 15 Conn. 39; 38 Am. Dec. 61; *Gayetty v. Bethune*, 14 Mass. 49; 7 Am. Dec. 188; *Marshall v. Trumbull*, 28 Conn. 183; 73 Am. Dec. 667; *Brice v. Randall*, 7 Gill & J. (Md.) 349; 1 Wms. Saund. 323, note; *Crippen v. Morss*, 49 N. Y. 63.

2. *Collins v. Prentice*, 15 Conn. 39; 38 Am. Dec. 61; *Pierce v. Selleck*, 18 Conn. 321; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Morris v. Edgington*, 3 Taunt. 23; *Viall v. Carpenter*, 14 Gray (Mass.) 126; *Lawton v. Rivers*, 2 McCord (S. Car.) 445; 15 Am. Dec. 741; *Holmes v. Goring*, 2 Bing. 76; *Nichols v. Luce*, 24 Pick. (Mass.) 102; 35 Am. Dec. 302; *New York L. etc. Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 333; *Staple v. Heydon*, 6 Mod. 1; *Seely v. Bishop*, 19 Conn. 128; *White v. Leeson*, 5 H. & N. 53; *Screven v. Gregorie*, 8 Rich. (S. Car.) 158; 64 Am. Dec. 747; *Gayetty v. Bethune*, 14 Mass. 49; 7 Am. Dec. 188; *Woolr. Ways* 72; *Alley v. Carleton*, 29

Tex. 78; 94 Am. Dec. 260; *Pin-gree v. McDuffie*, 56 N. H. 306; *Baker v. Crosby*, 9 Gray (Mass.) 421; *Wheeler v. Gilsey*, 35 How. Pr. (N. Y.) 139; *Pheysey v. Vicary*, 16 M. & W. 484; *Wissler v. Hershey*, 23 Pa. St. 333; *Abbott v. Stewartstown*, 47 N. H. 230; *Schmidt v. Quinn*, 136 Mass. 577; *Pearson v. Spencer*, 1 B. & S. 571.

It is a fallacy to suppose that a right of way of necessity is a permanent right and the way a permanent way attached to the land, and which may be conveyed by deed irrespective of the continuing necessity of the grantee. *Alley v. Carlington*, 29 Tex. 74; 94 Am. Dec. 260.

A being the owner of a certain tract of land, conveyed it, except a small wood lot to B, under whom the plaintiff claimed. After its conveyance, A had no other means of access to such wood lot only over the *locus in quo*. He then sold the wood lot to C, under whom the defendant claimed did not reside in the vicinity of A. A new public highway was afterwards laid out across the wood lot, by means of which the defendant could conveniently transport his wood therefrom to market, but it was not convenient for him to use it in conveying the wood to his dwelling-house, as the distance that way would be greater than across the *locus in quo*; but still he had, by means of such highway, free access at all times to the wood lot from his dwelling-house. *Held*, that upon the laying out of the new highway, the defendant's necessity ceases and with it his right of way over the *locus in quo*. *Pierce v. Selleck*, 18 Conn. 322.

A right of way by necessity ceases when the owner acquires a new way by a judgment in partition. Such judgment is binding on all parties to

implication.¹ The grant of an estate with "ways heretofore used," or "ways in use," or the like, passes all existing ways in actual possession at the time, whether used by the grantor over other parts of his own estate and so not properly appurtenant to such granted parcel, or appurtenant to the same by having been in use over the land of another.² But a mere reference in a deed to an intended way without an express grant will not pass such way.³ A way held by grant will pass by a conveyance of the land with which it is used and enjoyed as an appurtenance,⁴ but a mere license to use a right of way, which has not ripened into a right, but which may be revoked, is not an appurtenance and will not so pass to the grantee of the land.⁵ A way over other land of the grantor in a deed may pass as appurtenant to the land granted, although there are no insuperable physical obstacles to prevent access by another way, if such other way cannot be made without unreasonable labor and expense; and, in determining this question, a jury may consider the comparative value of the land and the probable cost of such a way.⁶

If the way granted is not definitely located, the practical location and use of such way by the grantee, under his deed, acquiesced in by the grantor at the time of the grant, and for a long time subsequent thereto, may operate as an assignment of the right, and may be deemed that which it was intended to convey, and the same in legal effect as if fully described by the terms of the grant.⁷ And when a way is thus located by usage for a length of time, it cannot afterwards be changed by the grantor.⁸

it, and their legal representatives and all persons claiming from them, and is not the subject of collateral impeachment. *Carey v. Rae*, 58 Cal. 159.

1. *Taylor v. Dyches*, 69 Ga. 455; *Collins v. Prentice*, 15 Conn. 39; 38 Am. Dec. 61.

2. Washburn on Easements 264; *Plant v. James*, 5 B. & A. 791; *Harding v. Wilson*, 2 B. & C. 96; *Staple v. Heydon*, 6 Mod. 1. Compare *Thompson v. Waterlow*, L. R., 6 Eq. Cas. 36.

3. Washburn on Easements 265; *Harding v. Wilson*, 2 B. & C. 96; *Roberts v. Carr*, 1 Taunt. 495; *Hopkinson v. McKnight*, 31 N. J. L. 427.

4. *Kuhlman v. Hecht*, 77 Ill. 573; *Junction R. Co. v. Ruggles*, 7 Ohio St. 8; *Randall v. Chase*, 133 Mass. 210; *Kent v. Waite*, 10 Pick. (Mass.) 138; see *Townsend v. Bissell*, 6 Thomp. & C. (N. Y.) 1565.

A, being the owner of a tract of land, conveyed a portion thereof to B, granting also to the said B the free use and privilege of a road through the remaining part of said tract. Held, that the right of way granted as afore-

said was appendant or annexed to the land conveyed, and that it might be used and enjoyed by all owning or lawfully occupying said tract, for any purpose to which it might from time to time be legitimately applied. *Gunsong v. Healy*, 100 Pa. St. 42.

5. *Kuhlman v. Hecht*, 77 Ill. 573.

6. *Pettingill v. Porter*, 8 Allen (Mass.) 1; 85 Am. Dec. 671.

7. *Bannon v. Angier*, 2 Allen (Mass.) 128; *French v. Hayes*, 43 N. H. 32; 80 Am. Dec. 127; *Osborn v. Wise*, 7 C. & P. 761. See *Krant's Appeal*, 71 Pa. St. 64.

8. *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222; *Bannon v. Angier*, 2 Allen (Mass.) 128; *Jennison v. Walker*, 11 Gray (Mass.) 426; *Jones v. Percival*, 5 Pick. (Mass.) 487; 16 Am. Dec. 415; *Warner v. Railroad Co.*, 39 Ohio St. 70; *Bangs v. Parker*, 71 Me. 458; *Marsh v. Haverhill Aqueduct Co.*, 134 Mass. 106.

Where the grantor of a lot reserves in his deed of it, for the use of his adjoining lot, "a free passage to and from the well" on the land granted, and the

If it be uncertain from the words of the grant which of two ways was meant, parol evidence may be introduced to remove the doubt.¹ Or if the words in a deed creating or reserving a right of way be ambiguous as to the extent of the right, the acts and uses of the parties are admissible in evidence to explain the language of the deed.² But the apparent intention is not to be controlled, nor the terms of the grant contradicted by parol testimony, where the deed granting the way defines its course.³ If the grant of a right of way be general and unlimited, parol evidence that the parties understood or even agreed at the time, that the way should be used only for some particular purpose, is not competent to control or limit the words of the grant.⁴ A convey-

particular way to the well has been fixed by agreement and use, or by use so exclusive and continued as to afford presumptive evidence of agreement, neither the grantor nor his successor in the title, can, without consent of the owner of the servient lot, change the way thus fixed, or by blocking up the old way by an addition to his house, acquire a right to open a new way to the well. *Garraty v. Duffy*, 7 R. I. 476.

In *Jennison v. Walker*, 11 Gray (Mass.) 426, the court by Bigelow, J., said: "Where an easement in land is granted in general terms, without giving definite location and description to it, so that the point of the land over which the right is to be exercised cannot be definitely ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed. When the right granted has been once exercised in a fixed and defined course, with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of the grantee. If it be admitted that he has the right originally to select the place in which the easement is to be enjoyed, he cannot afterwards alter it. Convenience and justice both require this limitation on the right; otherwise, it would be open to questions of great doubt and difficulty, and would make the servient estate in great measure subject to the unrestrained control of the owner of the easement. It has therefore been held that the course of a way, when once established, cannot be altered by either party without the consent of the other (Com. Dic. *Chemin*, D. 5. *Jones v. Percival*, 5 Pick. (Mass.) 485; 16 Am. Dec. 415; *Wynkoop v. Burger*, 12

Johns (N. Y.) 222). This rule rests on the principle that where the terms of a grant are general or indefinite, so that its construction is uncertain and ambiguous, the acts of the parties, contemporaneous with the grant, giving a practical construction to it, shall be deemed to be a just exposition of the intent of the parties."

1. *Osborn v. Wise*, 7 C. & P. 723; *French v. Hayes*, 43 N. H. 32; 80 Am. Dec. 127. See *O'Brien v. Schayer*, 124 Mass. 211.

2. *Choate v. Burnham*, 7 Pick. (Mass.) 274.

3. *Shepherd v. Watson*, 1 Watts (Pa.) 35; *Ballard v. Dyson*, 1 Taunt. 279.

In *Comstock v. Van Deusen*, 5 Pick. (Mass.) 165, it is said that parol evidence cannot be admitted to explain the intention of the parties or the terms of the deeds conveying the right of way. If a deed be defective or ambiguous on its face it may be void for uncertainty, but the defect cannot be supplied or the ambiguity removed by parol evidence. Facts and circumstances existing at the time of a conveyance may become important and may be proved by parol evidence, but evidence offered to show the agreement of parties and the intention of the grant as to the location of the way, is clearly inadmissible. See *Osborn v. Wise*, 7 C. & P. 761.

4. *Wateman v. Johnson*, 13 Pick. (Mass.) 261; *Bond v. Fay*, 12 Allen (Mass.) 88; *Miller v. Washburne*, 117 Mass. 371.

A deed contained the following reservation, "The right of way over my land as usually occupied." The land referred to in this reservation had been usually occupied for the purpose of getting hay and other crops therefrom, but hay had never been carried

ance of a lot, made in reference to a map designating a strip as an alley, gives the grantee a right of way over the alley to the rear of the lot, as against his grantors and their subsequent grantee of the alley.¹ So where one sells land bounding on a highway, whereof the fee is in him and the highway is afterwards discontinued by act of law, so that the ownership reverts, the grantee is not thereby deprived of his right to use it for a private way.² If the highway has never been dedicated to the public and the lots conveyed are described as bounded on such highway, it is held, that such conveyances create an easement in the land in favor of the grantees of the lots abutting thereon.³ A conveyance of land bounded by a private way, of a defined width, carries the title to the middle of the strip described as a way, with an easement of

across the granted premises, though the way had been used for agricultural purposes, such as carting manure and potatoes. It was held that the grantor had a right to cart hay over the way in loads not of unusual size or shape, and to cut down the limb of a tree which obstructed the use of the way for that purpose. *Sargent v. Hubbard*, 102 Mass. 380.

1. *Cox v. James*, 45 N. Y. 562. See *Rhea v. Forsyth*, 37 Pa. St. 503; 78 Am. Dec. 441; *Walker v. Gerhard*, 9 Phila. (Pa.) 116.

"A right of way of an alley" included in a deed implies *ex vi termini* a passage leading away from the land conveyed." *McConnell v. Rathbun*, 46 Mich. 303.

The extent of the grantee's rights beyond the limits of his land will depend, however, upon the nature and character of the way and its connection with the public streets as affording a convenient outlet from his land. *Langmaid v. Higgins*, 129 Mass. 356.

The mere fact that the grantor had for a long time used a particular route to the rear land will not justify the implication that he intended to convey a right to this way, and exclude him from assigning any other practical and convenient way to the highway. *Bass v. Edwards*, 126 Mass. 445.

2. *Parker v. Framington*, 8 Met. (Mass.) 260.

3. *In re Eleventh Avenue*, 81 N. Y. 436; *Storey v. New York El. R. Co.*, 90 N. Y. 122.

A tract of land was surveyed and laid out into streets and squares for building lots, and some of the lots were leased according to the map of this survey. The lots were bounded on one side by a street, as described on the

map, though not actually opened, but the plan of these streets was never accepted nor approved by the city. The commissioners appointed under an act of the legislature, laid out this tract in a different manner, and their act was declared to be conclusive. The defendant, who had, after giving a lease, partially opened the street proposed by him and mentioned in the lease, after the report of the commissioners, shut up the street by a fence. *Held*, that the lessee could not maintain an action against him for obstructing his right through the proposed street, there being another reasonable and convenient way left open from the premises to an old established public highway or street; especially as by an act of the legislature no streets in the city laid out by individuals, could be established as public streets until they were approved and accepted by the corporation. *Underwood v. Stuyvesant*, 19 Johns. (N. Y.) 181. See *Billinger v. Burial-Ground Soc.*, 10 Pa. St. 135.

A conveyance of land by a deed bounding it on a private way not defined in the deed, but shown upon a plan referred to therein and recorded in the registry of deeds, estops the grantor to deny the existence not only of that way, but of any connecting ways, represented on the plan, which will enable the grantee to reach public ways in any direction, as far as the grantor's title extends. *Fox v. Union Sugar Refinery*, 109 Mass. 202. See also *Boston Water Power Co. v. Boston*, 127 Mass. 374.

It can make no difference that the way is called by another name. The question is whether the thing intended as a boundary was in fact a way; if it was, it is immaterial whether it is

way in the other half, and subject to a like easement reserved to the grant or in the half conveyed as well, as to whatever rights of way existed in others at the time.¹

V. WAYS ACQUIRED BY PRESCRIPTION.—A right of way may be acquired by prescription. This mode of acquisition of the right depends on principles which are not in any sense peculiar to ways, but which constitute a branch of the law of easements generally. These principles are defined, discussed, and illustrated at length elsewhere.² It may be said generally that a claim by prescription is founded on the supposition or presumption of an ancient grant, and of immemorial usage, adverse, uninterrupted, and continuous. The term prescription is applied to incorporeal hereditaments, as the term adverse possession is applied to the land itself as distinguished from an easement claimed therein. At the present day, the length of time sufficient to create a right of way founded on prescription is frequently, if not always, defined by statute, or fixed in analogy to the length of time sufficient to confer a title to land by adverse possession. Usually the period is twenty years.³ In some of the States of the Union a shorter period suf-

called a way or a street, avenue, lane, road, place, or court. *Franklin Ins. Co. v. Cousens*, 127 Mass. 258; *Gaw v. Hughes*, 111 Mass. 296; *Stetson v. Dow*, 16 Gray (Mass.) 372.

If one grants land as bounded on a street and owns a strip of land so described as a street, he cannot be compelled in equity, at the suit of the grantee, to grade and make it fit for travel. *Hennesey v. Old Colony etc. R. Co.*, 101 Mass. 540.

When Grantor Is Estopped from Denying Existence of Way.—In *Stetson v. Dow*, 16 Gray (Mass.) 372, the court by Merrick, J., said: "When a grantor conveys land bounded on a street or way, he and his heirs are estopped to deny the existence of such a street or way, and the grantee acquires, by the deed, a perpetual easement to a right of passage upon and over it from the full enjoyment, of which he can never afterwards be excluded." See *Loring v. Otis*, 7 Gray (Mass.) 563; *Thomas v. Poole*, 7 Gray (Mass.) 83; *Rodgers v. Parker*, 9 Gray (Mass.) 445; *Dawson v. St. Paul F. & M. Ins. Co.*, 15 Minn. 136; 2 Am. Rep. 109.

1. *Lewis v. Beattie*, 105 Mass. 410; *Winslow v. King*, 14 Gray (Mass.) 323; *Walker v. Worcester*, 6 Gray (Mass.) 548. See *Harding v. Wilson*, 2 B. & C. 96. Compare *Howe v. Alger*, 4 Allen (Mass.) 206.

Where one sells property lying within the limits of a city, and in the

conveyance bounds such property by streets designated as such in the conveyance or on a map made by the city or by the owner of the property, such sale implies a covenant that the purchaser shall have the use of such streets. *Moale v. Mayor etc. of Baltimore*, 5 Md. 314; 61 Am. Dec. 276; *White v. Flannigin*, 1 Md. 540; 54 Am. Dec. 668.

But in *Hopkinson v. McKnight*, 31 N. J. L. 422, where a lot of land was described as being bounded a certain length along an eight foot alley, and certain additional length along a continuation of said alley or street, the street being thirty feet wide, which alley and street if opened would have been on the land of the grantor, but which in fact were not opened and used, it was held that it did not amount to a grant of a way, nor to a covenant that the grantee shall have a right of way along the alley and street referred to.

So in *Howe v. Alger*, 4 Allen (Mass.) 206, it is held that if land be conveyed as bounding on a street and the land owner has no interest in the adjacent land so described, this does not amount to an implied covenant, that there is such a street legally laid out. *Howe v. Alger*, 4 Allen (Mass.) 206.

2. See PRESCRIPTION.

3. *Turnbull v. Rivers*, 3 McCord (S. Car.) 131; 15 Am. Dec. 622; *Lansing v. Winsall*, 5 Den. (N. Y.) 213; *Miller*

fices.¹ The only difficulty in the subject consists in the application of the rules of law to the facts of particular cases in determining, for example, whether, as matter of fact, the user has been adverse, uninterrupted, and continuous.²

v. Garlock, 8 Barb. (N. Y.) 153; *Hill v. Crosby*, 2 Pick. (Mass.) 466; 13 Am. Dec. 448; *Cuthbert v. Lawton*, 3 McCord (S. Car.) 194; *Blake v. Everett*, 1 Allen (Mass.) 248; *Sibley v. Ellis*, 11 Gray (Mass.) 417; *Gibson v. Durham*, 3 Rich. (S. Car.) 85; *Townsend v. Bissell*, 6 Thomp. & C. (N. Y.) 565; 4 Hun (N. Y.) 297; *Boyden v. Archenbach*, 86 N. Car. 397; *Cox v. Forrest*, 60 Md. 74; *Jeter v. Mann*, 2 Hill (S. Car.) 641; *Butt v. Napier*, 14 Bush (Ky.) 39; *Com. v. Low*, 3 Pick. (Mass.) 408; *Barnes v. Haynes*, 13 Gray (Mass.) 188; 74 Am. Dec. 734; *Bowman v. Wickliffe*, 15 B. Mon. (Ky.) 84; *Denning v. Roome*, 6 Wend. (N. Y.) 651; *Driscoll v. Newark etc. Co.*, 37 N. Y. 637; 97 Am. Dec. 761; *Day v. Allender*, 22 Md. 512; *Hill v. Hagaman*, 84 Ind. 287; *McElhorne v. McManes*, 118 Pa. St. 600; *Garrett v. Jackson*, 20 Pa. St. 458; *Pierce v. Cloud*, 42 Pa. St. 102; 82 Am. Dec. 496; *Dare v. Heathcote*, 25 L. J. Exch. 245; *Wright v. Rattray*, 1 East 377; *Parker v. Mitchell*, 3 P. & D. 655; *Dodd v. Burchall*, 31 L. J. Exch. 364; *Street v. Griffiths*, 50 N. J. L. 656; *Tracy v. Atherton*, 36 Vt. 503; 82 Am. Dec. 621; *Puryear v. Clements*, 53 Ga. 233; *Aaron v. Gunnells*, 68 Ga. 526.

In *Pennsylvania* the time required is twenty-one years. *Worrall v. Rhoades*, 2 Whart. (Pa.) 427; *Krier's Private Road*, 73 Pa. St. 109; *Workman v. Curran*, 89 Pa. St. 226; *Steffy v. Carpenter*, 37 Pa. St. 41.

1. In *California*, five years. *Thomas v. England*, 71 Cal. 460. So in *Nevada*, *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361; 93 Am. Dec. 409. In *Connecticut* to entitle one to a private right of way by prescription over an abandoned public road, fifteen years of adverse user dating from the abandonment is necessary. *Black v. O'Hara*, 54 Conn. 17. In *Georgia*, in the case of improved lands, the time required is seven years. *Brown v. Marshall*, 63 Ga. 657; in the case of wild lands, twenty years. *Georgia Code*, 731, 2235. In *Iowa* ten years may be enough, but the adverse use must be proved independently of the possession. *Iowa Code* 2031. And consult generally the statutes of the various States.

2. **User Must be Adverse.**—The universal custom of traveling over unclosed woodland without asking permission of the owners, will tend to repel the presumption of a grant of a right of way, which otherwise might attach. *Bowman v. Wickliffe*, 15 B. Mon. (Ky.) 84.

Proof of an adverse and uninterrupted use of a way for twenty years, with the knowledge and acquiescence of the owner of the land, is sufficient to establish an incumbrance upon land, without proof of an express claim of the right by the persons using the way, or of an express admission of the right by the owner of the land. *Blake v. Everett*, 1 Allen (Mass.) 248.

Evidence that the party claiming the right of way at one time removed some saplings that had been felled across the road, is not sufficient evidence that the use was adverse. *Gibson v. Durham*, 3 Rich. (S. Car.) 85.

Where A's enjoyment of a way over B's land began under a contract, and was continued under a claim of right for the statutory period without objection by B, it was held that A's right was perfect. *House v. Montgomery*, 19 Mo. App. 170.

And see generally on the question of adverse user, *Cuthbert v. Lawton*, 3 McCord (S. Car.) 194; *Connor v. Sullivan*, 40 Conn. 26; 16 Am. Rep. 10; *Kana v. Bowlen*, 36 N. J. Eq. 21; *Lawton v. Rivers*, 2 McCord (S. Car.) 445; 13 Am. Dec. 741; *Golding v. Williams*, *Dudley* (S. Car.) 92; *Zigefoose v. Zigefoose*, 69 Iowa 391; *Garrett v. Jackson*, 20 Pa. St. 331; *Pierce v. Cloud*, 42 Pa. St. 102; 82 Am. Dec. 496; *Reimer v. Stuaer*, 20 Pa. St. 458; 59 Am. Dec. 744; *Barry v. Lowry*, 11 Ir. R. C. L. 483; *Johnson v. Lewis* (Ark. 1885), 14 S. W. Rep. 466; *Howard v. O'Neill*, 2 Allen (Mass.) 210; *Curtis v. Angier*, 4 Gray (Mass.) 547.

Nature of Use Generally.—Where it is shown that a party claiming a way by prescription has not kept such way in repair, has not used the road-bed for the length of time prescribed by statute, and has allowed the way to become blocked by fallen trees, using another way, he is not entitled to a way

VI. RIGHTS TO LOCATE WAY.—Where one is entitled to a right

by prescription. *Russell v. Napier*, 82 Ga. 770.

To acquire a right of way over land of another by use, the way must be definite. *Golding v. Williams, Dudley* (S. Car.) 92.

The use of a way for more than twenty years over an academy common, with occasional repairs of the way, does not, as a matter of law, establish a right by prescription. *Burnham v. McQuesten*, 48 N. H. 446.

Acquisition of a right of way by prescription is not affected by the fact that occasionally, when the ground was soft, the adverse users turned out of the way at a certain point, and made several distinct tracks there. *Cheney v. O'Brien*, 69 Cal. 199.

Mere frequency of passage across one's land, not continuing in the same track for the requisite time, and with no repairs or work done on the alleged way will not suffice. *Aaron v. Gunnels*, 68 Ga. 528.

In *Arnold v. Gorman*, 50 Pa. St. 367, it was held that a right of way by adverse user could not be acquired by passing over the land in a loose and rambling way; sometimes in one way and then in another. See *Johnson v. Lewis* (Ark. 1885), 14 S. W. Rep. 466.

Permissive Use.—If the use has been permissive, prescription does not attach. See generally on this head *Ingraham v. Hough*, 1 Jones (N. Car) 39; *Burnham v. McQuesten*, 48 N. H. 446; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500; 22 Am. Rep. 112; *Morrissey v. Eastern R. Co.*, 126 Mass. 377; 30 Am. Rep. 686; *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Sweeney v. Old Colony etc. R. Co.*, 10 Allen (Mass.) 373; 87 Am. Dec. 644; *Gillis v. Pennsylvania R. Co.*, 59 Pa. St. 129; 98 Am. Dec. 317; *Philadelphia etc. R. Co. v. Hummel*, 44 Pa. St. 375; *Hickey v. Boston etc. R. Co.*, 14 Allen (Mass.) 429; *Bowman v. Wickliffe*, 15 B. Mon. (Ky.) 84; *Medford v. Pratt*, 4 Pick. (Mass.) 222; *Gloucester v. Beech*, 2 Pick. (Mass.) 60; *Kirk v. Smith*, 9 Wheat. (U. S.) 241; *Tracy v. Atherton*, 36 Vt. 503; 82 Am. Dec. 621.

Interruption of User.—The fact that the owner of the close had within twenty years plowed up the way, declaring that the person claiming the use had no right, although such person was not present, will rebut the presump-

tion of a grant from the uninterrupted use of the way through such close for more than twenty years. *Barker v. Clark*, 4 N. H. 380; 17 Am. Dec. 428.

A plea of twenty years' right of way is not defeated by proof of an agreed alteration of the line of way, nor by a temporary non-user under an agreement of the parties. *Payne v. Shedden*, 1 M. & R. 382.

In order to prevent the perfecting of a right of way by adverse user for twenty years, there must be an actual and substantial suspension of the use by intervention of the owner, either by adverse occupancy or suit. *Ferrell v. Ferrell*, 10 Heisk. (Tenn.) 329.

And see generally on this head, *Deerfield v. Connecticut River R. Co.*, 144 Mass. 325; *Thomas v. England*, 71 Cal. 460; *Powman v. Wickliffe*, 15 B. Mon. (Ky.) 84; *Brinck v. Collier*, 56 Mo. 160; *Ward v. Farwell*, 6 Col. 66; *Dodge v. Stacy*, 39 Vt. 558.

Continuity of User.—In *Leonard v. Leonard*, 7 Allen (Mass.) 277, it was urged that the rule that the disseisin of an heir, devisee, or grantee may be tacked to that of an ancestor, deviser or grantor to create title by adverse possession, did not apply to the adverse use of easements; but the court held that there was no reason for making any difference, and that privity of user should be deemed to tend as strongly to prove the presumed grant as privity of seisin, and cited 3 Kent's Com. 443, where the doctrine is stated as follows: "To render the enjoyment of any easement for twenty years a presumption *juris et de jure*, or conclusive evidence of right, it must have been continued, uninterrupted or pacific, and adverse, that is, under a claim of right, with the implied acquiescence of the owner. The term of enjoyment requisite for the prescription is deemed to be uninterrupted, when it is continued from ancestor to heir, and from seller to buyer."

In *Lamb v. Crosland*, 4 Rich. (S. Car.) 536, it was declared that if, during a part of the time of the adverse use for twenty years, the land was owned by infants, though after the commencement of the adverse use, that period must be deducted in the computation of time, and if twenty years do not remain, the right is not established.

of way over the land of another, the owner of the land may lay off the way in such a manner as is least inconvenient to himself;¹ if he refuses, the party having the right to use the way may select a suitable route for the same, having regard to the interest and convenience of the owner of the land.² The location of ways arising from necessity may be made and changed by the concurrence of the parties.³ Such location or change need not be in writing or agreed to formally. It may be inferred from the acts or acquiescence of the parties.⁴ Where a change is thus made, the owner of the dominant estate cannot claim greater rights in the new way than he had in the old way.⁵ The course of the way, when once established, cannot be altered by either without the consent of the other.⁶ Where the owner of land, and a person having a right of way over it, have changed the route or location of the way by mutual consent or agreement, it may be left to the jury to determine whether such change or location was intended to be permanent, and for the purpose of substituting the new way for the old, or whether it was for a temporary purpose, and by the mere permission of the owner of the land; and in the latter case, the party using the new way would be a trespasser, if he should continue to use it after having been forbidden to do so; but in the former case it would be otherwise.⁷ If a right of way is reserved by grant and the grantor opens it in a direction not authorized by the reservation, he may be required to make a new designation of the way.⁸

VII. WHEN A PRIVATE WAY BECOMES PUBLIC.—In *England*, there may be a dedication of a private way to the public by throwing it open and permitting the public to use it as a public way, without putting up a bar or the like to signify that the owner retains his

1. *Capers v. Wilson*, 3 McCord (S. Car.) 170; *Russell v. Jackson*, 2 Pick. (Mass.) 573; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Hart v. Conner*, 25 Conn. 331; *Littlejohn v. Cox*, 15 La. Ann. 67; *Kupp v. Curtis*, 71 Cal. 62.

2. The defendant owned a farm, who leased small parcels to laboring men for cultivation. The plaintiff, a child of one of the tenants, was injured while passing over one of these parcels to reach his father's estate. Upon the question whether he was a trespasser, the court held that the defendant had the right to make out the line on which the right of way should run, and on his failure to do so, the right of defining it passed to his tenant. When it was once defined, both parties would be bound by the line so fixed. *Powers v. Harlow*, 53 Mich. 507; 51 Am. Rep. 154.

3. *Rumill v. Robbins*, 77 Me. 193; *Garraty v. Duffy*, 7 R. I. 476; *Bangs v. Parker*, 71 Me. 458; *Jennison v.*

Walker, 11 Gray (Mass.) 426. The defendants had acquired by prescription a right of way over land of the plaintiff; the latter closed it up, for his own convenience, and opened another for the use of the former, to which they assented, and used the new way for ten years or more. *Held*, that the defendants were entitled to the use of the new way until the old way was restored to its former condition. *Hamilton v. White*, 5 N. Y. 9.

4. *Lawton v. Tison*, 12 Rich. (S. Car.) 88; *Miller v. Garlock*, 8 Barb. (N. Y.) 153. See *infra*, this title, *Ways Created by Grant*.

5. *Bean v. Coleman*, 44 N. H. 539.

6. *Jennison v. Walker*, 11 Gray (Mass.) 427; *Jones v. Percival*, 5 Pick. (Mass.) 485; 16 Am. Dec. 415; *Wynkoop v. Buerger*, 12 Johns. (N. Y.) 222.

7. *Hamilton v. White*, 4 Barb. (N. Y.) 60.

8. *Hart v. Conner*, 25 Conn. 331.

right over it.¹ This is the rule in some of the States,² while in others, a private way cannot be converted into a public highway by the use thereof by the public, no matter how long that use may be continued,³ but, there must be a dedication⁴ and acceptance.⁵

VIII. HOW WAYS MAY BE USED.—The purposes for which a private way, created by grant, may be used, depend upon the terms of the grant. If it is in general terms, it gives the grantee free use of the whole and every part of the way,⁶ and it may be used in any manner and for any purpose reasonably necessary;⁷ and where the way is granted for all purposes; it cannot be restricted to one purpose because the owner thereof has had occasion for a long series of years to use it for that purpose only.⁸ If the way is granted for particular purposes, its use would be confined

1. *Lade v. Shepherd*, 2 Str. 1004; *Woodyer v. Hadden*, 5 Taunt. 125; *Rugby Charity v. Merryweather*, 11 East 376; *Wood v. Veal*, 5 B. & A. 454; *Rex v. Wright*, 3 B. & A. 681; *Jarvis v. Dean*, 3 Bing. 447; *Rex v. Leake*, 2 N. & M. 583; 5 B. & A. 469; *British Museum v. Finnis*, 5 C. & P. 460; *Hinckley v. Hastings*, 2 Pick. (Mass.) 164.

2. *Commonwealth v. Newbury*, 2 Pick. (Mass.) 57; *Hinckley v. Hastings*, 2 Pick. (Mass.) 164.

If a way is constructed and kept in repair by a private corporation upon its own land for its own use and convenience, and the use and convenience of tenants occupying its houses on both sides of the way, opening into a public street, with a sign "private way" upon the corner, it will not become a public way by prescription, although left open to public travel for more than twenty years without interruption. *Durgin v. Lowell*, 3 Allen (Mass.) 398.

3. *Hall v. McLeod*, 2 Metc. (Ky.) 98; 74 Am. Dec. 400; *Davis v. Ramsey*, 5 Jones (N. Car.) 236.

Proof that a way was used for forty years will not render it a common way. *Bordeau v. Williamson*, 2 Hayw. (N. Car.) 301.

In *New York* a private way opened by the owners of the land through which it passes, for their own use, does not become a public highway merely because the public are also permitted for many years to travel over it. *Speir v. New Utrecht*, 121 N. Y. 420.

4. Where the issue before the court was whether a road was public or private, and it was proved that it was

laid out by the owner and opened to public use some time before, and the court instructed the jury that "if this strip of land so thrown out was dedicated to the public use without any intention of resuming the exclusive right to the use of the ground, and if, from that time to this, the public has used the same as a public road, then it has become public," it was held not to be error. *Pittsburgh etc. R. Co. v. Dunn*, 56 Pa. St. 280.

5. See *Nute v. Boston etc. Bldg. Co.*, 149 Mass. 465.

6. *Cousens v. Rose*, L. R., 12 Eq. 366; 24 L. T. 820; *South Metropolitan Cemetery Co. v. Eden*, 16 C. B. 42.

7. *Abbott v. Butler*, 59 N. H. 317; *Dand v. Kingscote*, 6 Mees. & W. 174; *Senhouse v. Christian*, 1 T. R. 560; *Watts v. Kelson*, L. R., 6 Ch. 166; 40 L. J. Ch. 126; 24 L. T. 209. See *Springer v. McIntire*, 9 W. Va. 196; *Sargant v. Hubbard*, 102 Mass. 380; *South Metropolitan Cemetery Co. v. Eden*, 16 C. B. 42; *French v. Great Western R. Co.*, 19 Am. Law Rev. 470.

Proof that a right of way, which exists only by adverse enjoyment, was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate, while substantially in the same condition. *Parks v. Bishop*, 120 Mass. 340; 21 Am. Rep. 519.

8. *Holt v. Sargant*, 15 Gray (Mass.) 97.

When in a deed relating to mines there is a grant of "a free and con-

strictly to those purposes.¹ Under a grant of a right of way across a parcel of land, the grantee has not a right to enter at one place, go partly across, and then come out at another place on the

venient way," as in *Senhouse v. Christian*, 1 T. R. 560, or of a sufficient way-leave" as in *Dand v. Kingscote*, 6 M. & W. 174, or probably, of a "necessary wayleave" or the like "to convey coals" as in *Bishop v. North*, 11 M. & W. 418, the grantee *prima facie* may for his better accommodation, make wagon roads or tram roads on the site over which such a right of way extends. He may even make a railroad if in the deed, there be a clause requiring him to compensate for damage, and if such a road would not be a nuisance or a source of danger. *Bishop v. North*, 11 M. & W. 418.

Under the words "sufficient way-leave" a party is not confined to such description of way as was in use at the time of the grant. *Dand v. Kingscote*, 6 M. & W. 174.

1. *Myers v. Dunn*, 49 Conn. 71; *Seeley v. Bishop*, 19 Conn. 128; *Emans v. Turnbull*, 2 Johns. (N. Y.) 313; *Cowling v. Higginson*, 7 L. J. Ex. 265; *Burton v. Hall*, 10 L. J., Q. B. 258.

In *French v. Marstin*, 24 N. H. 440; 57 Am. Dec. 294, the court by Bell, J., said: "The grantee of a right of way is limited to the use of the way for the purpose and the manner specified in his grant. He cannot go out of the limits of the way, nor use it to go to any other place for any other purpose than that specified, if the use in this respect is restricted." See Washb. on Easements 283; *Reg. v. Pratt*, 4 E. & B. 860; *Knight v. Moore*, 3 Bing. N. Cas. 3; *Bakeman v. Talbot*, 31 N. Y. 366; 88 Am. Dec. 275; *Colchester v. Roberts*, 4 M. & W. 774.

"Foot-Way."—A grant of way on foot or for horses, oxen, cattle and sheep does not authorize the grantee to carry manure over the way in a wheelbarrow. *Brunton v. Hall*, 1 Q. B. 792.

A "carriage-way" always includes a "foot-way." *Davis v. Stephens*, 5 C. & P. 570, and a "horse-way." *Ballard v. Dyson*, 1 Taunt. 284.

"Drift-way."—A drift-way is a common way for driving cattle, and also a way for the passage of teams. *Smith v. Ladd*, 41 Me. 314.

Way Granted for Carting Wood.—The owner of land between two highways granted a tract near the west

road to A, reserving a right of way across it "for the purpose of carting wood, etc.," and subsequently granted a center lot to B, with the right of way across A's lot, as previously reserved. *Held*, that the right of way through A's lot was limited to the purpose of carting wood, and was not enlarged by the "etc." *Myers v. Dunn*, 49 Conn. 71.

A right of way, used for the purpose of taking away wood only, cannot be extended to other purposes, upon the dominant estate being occupied by dwellings and cultivated. *Atwater v. Bodfish*, 11 Gray (Mass.) 150.

For Repairing Mill Dam.—A right of way to repair a race and dam is confined to the use necessary for repairing the race and dam, and not for ordinary purposes. *McTavish v. Carroll*, 7 Md. 352.

So a deed of a right of way from a highway to the grantee's mill gives him the right to the free and unobstructed use of the road as a way for the accommodation of his mill privilege, but not to be used as the place of deposit for lumber or other materials. *Kaler v. Beaman*, 49 Me. 208.

Ways Granted for Agricultural Purposes.—The grant of a way for agricultural purposes was held not to include the right to transport coals over such a way. *Cowling v. Higginson*, 4 M. & W. 245.

Nor to transport lime from a quarry. *Jackson v. Stacy*, Holt, N. P. 455. Nor does it give a right of way for mineral purposes generally. *Bradburn v. Morris*, L. R., 3 Ch. D. 812.

So in *Parks v. Bishop*, 120 Mass. 340; 21 Am. Rep. 519, it was held, that where a way is by prescription appurtenant to an agricultural estate, for general purposes of agriculture, and the condition and character of the dominant estate is substantially altered, as in the case of a way to carry off wood from wild land which is afterwards cultivated and built upon, or of a way for agricultural purposes of a farm which is afterwards turned into a manufactory or divided into building lots—the right of way cannot be used for new purposes required by the altered condition of the property and imposing

same side.¹ So a right of way through certain premises, reserved to the grantor of a portion of them, cannot be enlarged, as against the first grantee, by a reference, contained in a subsequent deed of another portion, to the effect that the right extends to a certain point, which is, in fact, beyond that fixed in the reservation.² If no dimensions or purposes are expressed, the extent and nature of the right of way may be inferred from the terms of the grant, interpreted in the light of surrounding facts and circumstances. The necessities, conveniences, and usages incidental to a way are always presumed to have been contemplated by the parties in making the grant.³ The grant of "a right of passage" over agricultural lands passes nothing but what is requisite to its fair enjoyment. The way, in point of width and height, is such as is reasonably necessary and convenient for the purposes for which it is granted.⁴ But a grant of a way, "as now laid out,"

a greater burden upon the servient estate.

Article 595 of the *Louisiana Civil Code*, giving to a proprietor whose lands are inclosed, a right of way to the public roads through the estate of his neighbors, for the cultivation of his estate, does not restrict the right of the owner of lands so situated, to claim the servitude of passage only for planting purposes. *Littlejohn v. Cox*, 15 La. Ann. 67.

For Carting Timber.—A right to cart timber will not sustain a plea of a general right of way on foot, or with horses, carts, wagons, and other carriages. *Higman v. Rabbelt*, 5 Bing. N. Cas. 622.

For Drawing Water.—A right to draw water from a river will not sustain a plea of a right to draw goods and water. *Knight v. Woore*, 3 Bing. N. Cas. 3.

1. *Comstock v. VanDeusen*, 5 Pick. (Mass.) 163.

A right of way over land in all directions where most convenient to the defendant, and least prejudicial to the plaintiff, cannot be prescribed for, nor can a non-existing grant of way be presumed. *Jones v. Percival*, 5 Pick. (Mass.) 485; 16 Am. Dec. 415.

2. *Brossart v. Corlett*, 27 Iowa 288.

The rule is well settled that if a man has a right of way over another's land to a particular close, he cannot enlarge it and extend it to other closes. *Davenport v. Lamson*, 21 Pick. (Mass.) 74; *Howell v. King*, 1 Mod. 190; *Senhouse v. Christian*, 1 T. R. 569; *Springer v. McIntire*, 9 W. Va. 196; *Schroder v. Brennehan*, 23 Pa. St. 348; *French v.*

Marstin, 32 N. H. 316. But one who has a right of way over his neighbor's land as appurtenant to a parcel of his own land is not a trespasser, because he erroneously claims the right to exist as appurtenant to another parcel as well. *Hayes v. Di Vito*, 141 Mass. 233.

3. *Long v. Gill*, 80 Ala. 410.

4. *Atkins v. Boardman*, 2 Met. (Mass.) 457; 37 Am. Dec. 100; *Bateman v. Talbot*, 31 N. Y. 371; 88 Am. Dec. 275. See *Gerrish v. Shattuck*, 132 Mass. 235.

Where a lease of premises described them as abutting on "an intended way of thirty feet wide" which was not then set out, on the soil which was the property of the lessor, and an underlease was granted describing the premises as abutting on "an intended way" not mentioning the width, it was held that the underlease was entitled to a convenient way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual injury having been sustained. *Harding v. Wilson*, 2 B. & C. 96.

A description in a deed of land granted as bounded "westerly on Park street one hundred and fifty feet," does not amount to a covenant of the existence of a street of the same width as the street of that name, if such a street, though graded and laid down upon the plan published by a former owner, has since been closed and plowed up; but only to a covenant of the existence of a way of reasonable width. *Walker v. Worcester*, 6 Gray (Mass.) 548.

gives the owner of the land over which it passes no right, in the absence of evidence of a contrary usage, to narrow or erect a gate at the entrance of the way.¹

IX. RIGHTS OF THE PARTIES.—A private way appurtenant or appurtenant to land conveyed, passes with the dominant estate as an incident thereto.² But the title to the soil remains in the owner of the land and he may maintain trespass against persons using it without right;³ or ejectment against those making erections upon or over it.⁴ A right of way appurtenant to land is appurtenant to the whole and to every part of it; and, if such land be divided, and conveyed in separate parcels, a right of way thereby passes to each of the grantees.⁵ The question who may use a way depends upon the law under which it is created. The private way established by statute in many of the States is not the private way or right of way known to the common law.⁶ Such a way is open to the use of the public, especially when opened with the indication that it is a way for public use.⁷ In *New York*, a citizen has not the right to use a private road as he does a public highway. He can only use it when he has business with the road-owner, or some other lawful occasion for going to the land intended to be benefited by the road. He can only justify an entry on the road when he could justify an entry on the land on account of which the road was laid out. Even the owner of the land over which the road passes, unless he is given notice of such an inten-

1. *Welch v. Wilcox*, 101 Mass. 163.

The grant of a right of way for horses, carts, and other vehicles contained the following description: "To a street forty feet wide, and in, over, and through said forty feet street." The street was owned by the grantor and laid out by him between his lots, and was so situated that there was much passage over the same. *Held*, that such a grant gave a right of way in the entire space of that width, and the grantee could maintain an action for damages if those claiming under him afterwards obstructed his convenient use and enjoyment of any part of it. *Tudor Ice Co. v. Cunningham*, 8 Allen (Mass.) 139.

2. *Boatman v. Lasley*, 23 Ohio St. 618; *Moore v. Crose*, 43 Ind. 30; *Canon v. Boyd*, 73 Pa. St. 179.

A right of way, devised in express terms, is appurtenant to the dominant estate, and passes by a conveyance of such estate without express mention of the appurtenances. It is a charge upon the servient premises, and continues such when they are in the hands of any subsequent purchaser, and it is not impaired by the fact, that the owner of the dominant estate has a mere per-

mission, revocable at any time, to pass over the land to a third party in order to reach the dominant estate. *Lide v. Hadley*, 36 Ala. 627; 76 Am. Dec. 338.

3. *Hollenbeck v. Rowley*, 8 Allen (Mass.) 476; *Hart v. Chalker*, 5 Conn. 315; *Peck v. Smith*, 1 Conn. 103; *Jamaica Pond etc. Corp. v. Chandler*, 9 Allen (Mass.) 159; *Wilson v. Wilson*, 2 Vt. 68.

For all purposes not inconsistent with the grantee's paramount right to use the way as a "free and open road," the soil and the beneficial use thereof remains in the grantor. *Kaler v. Beaman*, 49 Me. 208; *Perley v. Chandler*, 6 Mass. 454; *Atkins v. Boardman*, 2 Met. (Mass.) 457; 37 Am. Dec. 100; *Shroder v. Brennehan*, 23 Pa. St. 348.

4. *Codman v. Evans*, 5 Allen (Mass.) 308; 81 Am. Dec. 748.

5. *Underwood v. Carney*, 1 Cush. (Mass.) 285; *Whitney v. Lee*, 1 Allen (Mass.) 198; 79 Am. Dec. 727; *Watson v. Bisren*, 1 S. & R. (Pa.) 227; 7 Am. Dec. 617; *Miller v. Washburn*, 117 Mass. 371.

6. *Perrine v. Farr*, 22 N. J. L. 356.

7. *Metcalfe v. Bingham*, 3 N. H. 459;

tion before the damages are assessed, has no right to use the road for his own purposes; if he does so, or if his fences encroach upon the road, the owner of the road may have an action against him.¹

X REPAIRS.—The owner of a private way may do any work upon its surface which is necessary, fit, and proper to be done to enable him to use and enjoy his right in a manner beneficial and advantageous to himself, provided he does not thereby make any material change in the state and condition of the soil, or disturb or interfere with the estate or privileges of other persons therein.²

XI. OBSTRUCTIONS—1. **Generally.**—The grantee of a private way may maintain an action for damages,³ or resort to the remedy by

Nudd v. Hobbs, 17 N. H. 524; Denham v. Bristol Co., 108 Mass. 202; Danford v. Durell, 8 Allen (Mass.)

244.

1. Taylor v. Porter, 4 Hill (N. Y.) 140; 40 Am. Dec. 274; Lambert v. Hoke, 14 Johns. (N. Y.) 383. See Com. v. Low, 3 Pick. (Mass.) 408.

In *Michigan* it has been held that where a tenant is obliged to cross his landlord's premises in going to and from those he occupies and is allowed to do so without objection, the arrangement being for the benefit of both parties, his children or members of his family may also go upon such premises to help him. Powers v. Harlow, 53 Mich. 507; 51 Am. Rep. 154.

2. Brown v. Stone, 10 Gray (Mass.) 61; 69 Am. Dec. 303; Appleton v. Fullerton, 1 Gray (Mass.) 186; McMillen v. Cronin, 57 How. Pr. (N. Y.) 55; Lyman v. Arnold, 5 Mason (U. S.) 195; Gerrard v. Cooke, 2 B. P., N. R. 109; Baker v. Dedham, 16 Gray (Mass.) 393; Walker v. Pierce, 38 Vt. 95; Osborn v. Wise, 7 C. & P. 761; Wynkoop v. Burger, 12 Johns. (N. Y.) 222.

In *McMillen v. Cronin*, 57 How. Pr. (N. Y.) 55, the court by Miller, J., said: "The very existence of a right of way precludes the idea that the party who has the right cannot repair or keep the way in order. Suppose the way should be partially impaired by a storm or in some manner become obstructed and impassable, can it be claimed that there is no power to repair it and put it in order? Clearly not, for the right to repair is incident to the easement, and without it the way might become useless and of no benefit. Having the easement carries with it the right to make necessary repairs."

In *Nugent v. Wann*, 1 McCrary (U.

S.) 439, the court by McCrary, J., said: "A proprietor of land who opens a private way upon his own premises is under no obligation to keep the same in repair for the safety of persons who may pass over it uninvited; and even when such proprietor permits persons generally to pass over such way he does not make himself liable for accidents or injuries which may result from the fact that the way is not a safe one or not in repair. The proprietor of such a way owes no duty to the public to keep it in repair for their use, and whoever uses it does so at his own risk, provided only that the proprietor, knowing that the public are in the habit of using the way, has no right to place therein anything that he knows will endanger the safety of persons passing over it, without giving warning of the danger."

Where a private way is established at the instance and expense of a person, he is not bound to keep it in repair through his own land for the benefit of those who may have acquired a prescriptive right to use it. *Puryear v. Clements*, 53 Ga. 233.

The owner of a private way by prescription, over another's land, has no right to cut ditches for the improvement of his way without the consent of the owner of the soil, unless he has acquired such right also by a prescriptive use. *Capers v. McKee*, 1 Strobb. (S. Car.) 164.

3. *O'Brien v. Schayer*, 124 Mass. 211; *Tudor Ice Co. v. Cunningham*, 8 Allen (Mass.) 139; *Smiles v. Hastings*, 24 Barb. (N. Y.) 44; *Phillips v. Bowers*, 7 Gray (Mass.) 21; *Gerrish v. Shattuck*, 128 Mass. 571; *Bagley v. People*, 43 Mich. 355; 38 Am. Rep. 192; *Common Council v. Croa*, 7 Ind. 9; *Haynes v. Thomas*, 7 Ind. 38; *Tate v. Ohio etc. R. Co.*, 7 Ind. 479; *Richardson v.*

Pond, 15 Gray (Mass.) 387; Longendyck v. Anderson, 59 How. Pr. (N. Y.) 1; Shewsmith v. Byerby, 28 L. T., N. S. 553.

A turnpike company having the right to use a certain highway, placed a tow-house in the highway at a point where plaintiff's private way entered the highway, thereby obstructing the plaintiff's convenient entrance to the highway. It was held that plaintiff could maintain an action therefor. *Stratton v. Elliott*, 83 Ind. 425.

The owner of a farm built a cider-mill abutting upon a right of way owned by D, and allowed his customers to station their wagons across the way. Held, that D could recover of him for the obstruction. *Dennis v. Cipperly*, 17 Hun (N. Y.) 69.

So where a party having a right of way licenses the owner of the soil to build an arch over a way and such owner unnecessarily and unreasonably obstructs the way in building the arch, an action on the case will lie for abuse of the license. *Cushing v. Adams*, 18 Pick. (Mass.) 110.

Cutting Down Grade.—Under a deed of a fee to the center of a private way laid out on a plan, and of a right of way over it, subject to a like right in the grantor, the latter has no right to cut down the grade of the way to the injury of the grantee. *Kelley v. Saltmarsh*, 146 Mass. 585.

Action for Obstruction.—Any person owning a right of way may bring an action for its obstruction. *Tudor Ice Co. v. Cunningham*, 8 Allen (Mass.) 139; *Gerrish v. Shattuck*, 128 Mass. 571; *Burke v. Wall*, 29 La. Ann. 38; 29 Am. Rep. 316; *Hill v. Hagaman*, 84 Ind. 287; *Oakley v. Adamson*, 1 M. & S. 510; *Lide v. Hadley*, 36 Ala. 627; *Richardson v. Pond*, 15 Gray (Mass.) 387; *Lansing v. Wiswall*, 5 Dem. (N. Y.) 213; *Okeson v. Patterson*, 29 Pa. St. 22.

But the owner of a reversion who occupies merely the position of life tenant, cannot maintain an action against one for obstructing the right of way appurtenant to the estate. *Kimball v. McIntosh*, 134 Mass. 362; *Hopwood v. Scholfield*, 2 M. & R. 34. Compare *Kidgill v. Moore*, 9 C. B. 364.

A party, who has not been in constant and uninterrupted use of a private way for seven years, cannot maintain, under Georgia Code, §§ 737-740, a petition to an ordinary to order the

removal of obstructions thereon. *Brown v. Marshall*, 63 Ga. 657.

An action for damages will not lie for the obstruction of a right of way, alleged to have arisen from an implied covenant contained in a reference in a deed to a street as a boundary, where possession of such street was never given or taken under the deed, and the owner had built thereon and had exclusive possession thereof for more than twenty-one years before suit brought, without any denial of title. *Spackman v. Steidel*, 88 Pa. St. 453.

Notice of Action.—Where the plaintiff has a temporary use of a right of way, the defendant is entitled to reasonable notice that the plaintiff may use the way before being liable to an action for obstructing it. *Mansfield v. Shepard*, 124 Mass. 520.

The plaintiff had a right of way to repair his mill race. The defendant put a fence across with bars easily removed, and informed the plaintiff that he might remove them himself when he had occasion to pass, and that upon notice the defendant would cause them to be taken down. Held, that the plaintiff was not entitled to recover the damages for the obstruction of the way. *McTavish v. Carroll*, 17 Md. 1.

Pleading.—In a case for obstructing a private way "onto and into a certain highway which lies near where the said plaintiff resides" is a sufficient description of a terminus *ad quem* in a declaration in a case for the obstruction of a private way. At any rate, it is good after verdict. *Frather v. Owen*, Cheves (S. Car.) 236; *Collier v. Farr*, 81 Ga. 749. But "a certain lot of land in N" is an insufficient description whether the way is set forth as dependent to land, or the land is intended as a terminus of the way. *Lamphier v. Worcester* etc. R. Co., 33 N. H. 495.

Evidence.—In an action for obstructing a private road, notice from plaintiff to defendants in which he spoke of it as a public road is admissible to show that he did not regard it as a private road. *Turner v. Williams*, 76 Mo. 617.

So an award may be given in evidence to establish the plaintiff's right of way, not as conveying the right but as estopping the defendant from denying it. *Prince v. Wilbourn*, 1 Rich. (S. Car.) 58.

So a verdict for damages that the plaintiff determine the right of way is conclusive evidence against the defendant in a subsequent action between the

injunction for any obstructions that interfere with its convenient use or enjoyment.¹ So if a way be limited to particular purposes, and there yet be a covenant that the same shall be open and free of incumbrances, the grantor has no right to obstruct the way.² If the way belongs to owners in common, one of them can maintain an action against another for obstructing it.³ Each owner may make reasonable repairs which do not injuriously affect his co-owners,⁴ but he cannot make alterations in the course of the way, or changes in its grade or surface, which make the way less convenient and useful, to any appreciable extent, to any one who has an equal right in the same.⁵

One of the owners in common of a way who erects an obstruction on his part, beneficial to himself, and which does not tend to incommode one who has an equal right of way, cannot be compelled to remove such obstruction.⁶ And whether such acts di-

same parties. *Prather v. Owens, Cheves* (S. Car.) 236.

Damages.—The plaintiff, in an action for the obstruction of a way, will not be limited to the recovery of merely nominal damages. *Smiles v. Hastings*, 24 Barb. (N. Y.) 44.

In an action for damages for the obstruction of an alley, it is competent for defendant to prove, by way of mitigation of damages, that it was not plaintiff's only means of access to the rear of his property. *Demuth v. Amweg*, 90 Pa. St. 181.

Proof of Actual Damages Unnecessary.—An action will lie for an obstruction of a private way, without proof of actual damages. *Tuttle v. Walker*, 46 Me. 280.

When Action Unnecessary.—Where one who has covenanted for a right of way, places an obstruction therein, the covenantee may remove the obstruction, and need not resort to an action for a breach of the covenant. And it is not necessary that, at the time he removed the obstruction, he should have been passing upon the road for the purpose of going to the place to which the way led. *Quintard v. Bishop*, 29 Conn. 366.

1. *Lide v. Hadley*, 36 Ala. 505; 76 Am. Dec. 338; *Gerrish v. Shattuck*, 128 Mass. 571; *McConnell v. Rathbun*, 46 Mich. 303; *Devore v. Ellis*, 62 Iowa 505; *Collins v. Slade*, 23 W. R. 109; *Wells v. London etc. R. Co.*, 5 L. R., Ch. Div. 126. See *State v. Randall*, 1 Strobh. (S. Car.) 110; *Brightman v. Chapin*, 15 R. I. 166; *Bean v. Coleman*, 44 N. H. 539.

A land owner is entitled to an injunction to restrain the shutting up of

a private way which furnishes the only convenient egress from his land to the public highway. *Lakenan v. Hannibal etc. Co.*, 36 Mo. App. 363.

A party whose easement in another's land is disturbed by an incorporated company, authorized by law to make a public improvement, cannot maintain a bill in equity against the owner of the land, to oblige him to restore the easement to its primitive condition. *Mulvany v. Kennedy*, 26 Pa. St. 44.

2. *Brownell v. Dyer*, 5 Mason (U. S.) 227.

3. *Hall v. McCaughey*, 51 Pa. St. 43. See *McCarty v. Kitchenman*, 47 Pa. St. 239.

4. *Killion v. Kelley*, 120 Mass. 47; *People v. Jackson*, 7 Mich. 432; 74 Am. Dec. 729; *Carlin v. Paul*, 11 Mo. 32; 47 Am. Dec. 139; *Nash v. New England Mut. L. Ins. Co.*, 127 Mass. 91; *Walker v. Gerhard*, 9 Phila. (Pa.) 116.

5. *Thomas v. Poole*, 7 Gray (Mass.) 83; *Richardson v. Pond*, 15 Gray (Mass.) 387; *Meehan v. Barry*, 97 Mass. 447; *Killion v. Kelley*, 120 Mass. 47; *Phillips v. Bowers*, 7 Gray (Mass.) 21; *Nute v. Boston etc. Bldg. Co.*, 149 Mass. 465.

Where, under grants, an alley is made appurtenant to each of two estates, neither owner can alter the character of the alley without the consent of the other. *Ellis v. Academy of Music*, 120 Pa. St. 608.

6. *Meehan v. Barry*, 97 Mass. 447; *Jackson v. Allen*, 3 Cow. (N. Y.) 320; *Dempsey v. Kipp*, 61 N. Y. 462; *Craven v. Rose*, 3 S. Car. 72.

The owner of a fee in the land over which is a right of way, may erect a

minish the convenience of those using the way may be a question of fact for the jury, unless the undisputed facts make it clear beyond all reasonable controversy.¹

2. Erecting Gates.—The grantor of a right of way may erect gateways at the termini of the way where the grant is general.² So where the grantor places a gate at the end of a way where it enters a public highway, and the grantee is not entitled to an open way, he is bound to close the gate as often as he opens and passes through it.³ But where the grantee has a right to an open way, the grantor cannot erect a gate or fence across the way.⁴ If one's right of way over another's land is subject to gates, and he removes the gates, the land-owner is not thereby justified in forcibly preventing him from using the way.⁵

building over said way, if in so doing he does not interfere with the right of way. *Sutton v. Groll*, 42 N. J. Eq. 213. See *Gerrish v. Shattuck*, 132 Mass. 235; *Atkins v. Bordman*, 2 Met. (Mass.) 457; 37 Am. Dec. 100.

1. *Meehan v. Barry*, 97 Mass. 447.

2. *Maxwell v. AcAtee*, 9 B. Mon. (Ky.) 20; 48 Am. Dec. 409. *Stevens v. Allen*, 29 N. J. L. 68; *Brooke v. Connery*, 7 Phila. (Pa.) 193; *Baker v. Frick*, 45 Md. 337; 24 Am. Rep. 506; *Short v. Devine*, 146 Mass. 119; *State v. Jefcoat*, 11 Rich. (S. Car.) 529; *Whaley v. Jarrett*, 69 Wis. 613.

Compare Allen v. Stevens, 29 N. J. L. 509; *Welch v. Wilcox*, 101 Mass. 162; *Houpes v. Alderson*, 22 Iowa 160.

The grant of a private right of way over the land of the grantor does not prevent his erection of such gates upon the road, at its termini, as are necessary for the beneficial occupation of his land. In an action by the grantee for obstructing the way, his necessity, as regards the situation of the grantor's property, is a question for the jury. *Baker v. Frick*, 45 Md. 337; 24 Am. Rep. 506.

The grantor of the easement of a passage-way over his land for a foot-passage, has a right to build over the alley or passage-way, provided he does not obstruct it. *Stevenson v. Stewart*, 7 Phila. (Pa.) 293.

Owners in Common.—The owners of several parcels of land, through which was a private way having a gate across it, entered into an indenture containing the following memorandum: "The gate above mentioned is to be kept up, except by the consent of the parties." *Held*, that it was their intent that the gate should be upheld until by agreement it should be taken down; and then

it was to remain down forever. *Fowle v. Bigelow*, 10 Mass. 379.

3. *Amondson v. Severson*, 37 Iowa 602; *Brill v. Brill*, 108 N. Y. 511.

One passing over a road obstructed by movable bars does not become a trespasser *ab initio* by his neglect to replace the bars, but is liable in case for the injury arising from such neglect. *Hinks v. Hinks*, 46 Me. 423.

4. *Devore v. Ellis*, 62 Iowa 505; *Joyce v. Conlin*, 72 Wis. 607.

One to whom is granted a right of way through a farm lane "for the convenient occupation of" his premises, may object to the putting up of a gate across the lane. *Dickinson v. Whiting*, 141 Mass. 414.

The fact that a fenced way has been in constant use for the purposes of a way by the purchaser of the right thereof, though the writing has not been recorded, constitutes valid notice to a subsequent purchaser, and is good ground for a perpetual injunction upon its obstruction. *McCann v. Day*, 57 Ill. 101.

Enforcement of Contract.—A bill to enforce a specific performance of a contract between coparceners for keeping open a lane through their lands, filed nearly twenty years after the contract was made, against a purchaser holding under one of the parties without actual notice, the lane having been shut up for a number of years, and the plaintiff having stood by when the land was twice sold without making any claim to the lane, and having parted with the land to which the lane was said to have given value, was dismissed on appeal. *McCue v. Ralston*, 9 Gratt. (Va.) 430.

5. *McMillen v. Cronin*, 57 How. Pr. (N. Y.) 53.

XII. RIGHT TO GO EXTRA VIAM.—Where the right to a way of necessity is clear and unquestionable and the owner of the servient estate obstructs or closes such way, the owner of the dominant estate has a right to deviate from the usual way and go over other parts of the land, doing no unnecessary damage.¹ But if it is the duty of the grantee, and not that of the land owner, to protect such easement and make necessary repairs, it seems that he cannot depart from the way and go upon adjoining land if the way becomes impassable.² If, however, the way becomes impassable through the fault of the owner of the land, one entitled to use the way may go *extra viam*.³ This is said to have been the rule for many years in *England*; and although in some cases it is held that the owner of a private way cannot justify passing over the adjoining land in any case,⁴ yet the law seems to be clear and unquestionable that if the owner of land, which is subject to a private right of way, obstructs the way, a person entitled to use the same may lawfully enter upon and go over the adjoining land.⁵

XIII.—HOW RIGHT OF WAY LOST OR EXTINGUISHED.—A private right of way may be lost by abandonment,⁶ by non-user,⁷ by

1. Bass v. Edwards, 126 Mass. 445; Haley v. Colcord, 59 N. H. 7; 47 Am. Rep. 176; Leonard v. Leonard, 2 Allen (Mass.) 543; Holmes v. Seely, 19 Wend. (N. Y.) 507; Farnum v. Platt, 8 Pick. (Mass.) 339; 19 Am. Dec. 330. See Taylor v. Whitehead, 2 Dougl. 475.

Compare Williams v. Safford, 7 Barb. (N. Y.) 309; Miller v. Bristol, 12 Pick. (Mass.) 550.

2. Farnum v. Platt, 8 Pick. (Mass.) 339; 19 Am. Dec. 330; Leonard v. Leonard, 2 Allen (Mass.) 543; Miller v. Bristol, 12 Pick. (Mass.) 550.

3. Kent v. Judkins, 53 Me. 160; 87 Am. Dec. 544; Henn's Case, W. Jones 296; Greenleaf's Cruise, tit. 24, §§ 17, 18; Tudor's Leading Cases, 127.

Way Made Impassable by Slough.—The impassability of a road gives no right to an easement over the land of another. It confers a personal temporary right, but not one which is appurtenant to his estate. Carey v. Rae, 58 Cal. 159.

4. Williams v. Safford, 7 Barb. (N. Y.) 309; Newkirk v. Sabler, 9 Barb. (N. Y.) 655; Pomfert v. Ricroft, 1 Saund. 321; Bullard v. Harrison, 4 M. & S. 387. See Taylor v. Whitehead, 2 Dougl. 475.

5. Kent v. Judkins, 53 Me. 160; 87 Am. Dec. 544; Farnam v. Platt, 8 Pick. (Mass.) 339; 19 Am. Dec. 330;

Leonard v. Leonard, 2 Allen (Mass.) 543; Bass v. Edwards, 126 Mass. 445; Holmes v. Seely, 19 Wend. (N. Y.) 507.

The defendant had a private right of way over the plaintiff's land, which the latter plowed up and fenced. Defendant thereupon passed over the plaintiff's land in a different place. Plaintiff then obstructed that place. Defendant then entered at still another place. Plaintiff also obstructed this. Defendant then selected and used a fourth place of entrance. Plaintiff thereupon sued the defendant in an action of trespass. The court declared the defendant's right to pass over the adjoining land of the plaintiff to be clear and unquestionable. Leonard v. Leonard, 2 Allen (Mass.) 543.

6. Fox v. Forrest, 60 Md. 74.

Mere non-user for less than twenty years will not prove an abandonment of a right of way. Williams v. Nelson, 23 Pick. (Mass.) 141; 34 Am. Dec. 45.

7. Yeakle v. Nace, 2 Whart. (Pa.) 123; Clarke v. Gaffaney, 116 Ill. 362; Thompson v. Meyers, 34 La. Ann. 615; Street v. Griffiths, 50 N. J. L. 656.

In an action for obstructing a private way, it appeared that a part of the alleged private road, as once traveled, had not been lately used, although the place where the obstruc-

merger of the dominant and servient estates,¹ or when the necessity of a way ceases.² When there are facts to show clearly an intention to abandon a way as such, it is sufficient, though the obstruction be not of a more permanent character than that created by a board or rail fence. So, too, it is enough that the way is plowed up and cultivated for agricultural purposes, if there be evidence of an intention to make the occupation perpetual, or of a purpose inconsistent with the enjoyment of the easement.³ A right of way abandoned reverts to the owner of the soil.⁴

XIV. REVIVAL OF LOST RIGHT OF WAY.—If a right of way which has been extinguished by the union of the title, and possession of the dominant and servient estates in one owner, is kept open after

tion was located had been continually made use of by the plaintiff down to the time of placing the obstruction. *Held*, that the plaintiff's ceasing to use the road through a swamp, which was the part as to which the use had been discontinued, would not prevent his recovering. *Crounse v. Wemple*, 29 N. Y. 540.

The eviction and continuance for more than twenty years of a gate across a neighborhood road, by the owner of the soil, during all which time no one was hindered from passing through it, does not amount to an extinguishment of the public easement in the road, though it may modify it. *State v. Pettis*, 7 Rich. (S. Car.) 390.

In *Longendyck v. Anderson*, 59 How. Pr. (N. Y.) 1; *Riehle v. Hennings*, 38 N. J. Eq. 20, it is held that a right of way existing in favor of a party by grant cannot be lost by mere non-user.

1. *Mott v. Mott*, 8 Hun (N. Y.) 474; *Jacocks v. Newby*, 4 Jones (N. Car.) 266; *Du Val v. Du Val*, 21 Md. 149.

Acquiring the fee simple title to the dominant tenement by the owner of the servient tenement over which a right of way exists extinguishes the right of way. *Pearce v. McClenaghan*, 5 Rich. (S. Car.) 178; but it is not extinguished by the vesting of both estates in the same person as mortgagee until the mortgage is foreclosed. *Ritger v. Parker*, 8 Cush. (Mass.) 145; 54 Am. Dec. 744.

2. *Hancock v. Wentworth*, 5 Met. (Mass.) 446. See also *infra*, this title, *Ways of Necessity*.

3. *Crain v. Fox*, 16 Barb. (N. Y.)

184; *Jamaica Pond etc. Corp. v. Chandler*, 121 Mass. 3; *Bombaugh v. Miller*, 82 Pa. St. 203; *Boyden v. Ach-enbach*, 86 N. Car. 397.

In *Corning v. Gould*, 16 Wend. (N. Y.) 531, Cowen, J., said "that a fence erected in the center of a way enjoyed in common by two parties is an unequivocal act which manifested an intention on the part of him who erected the fence to regard the right of way in common as extinguished."

Bars kept up in the place of swinging gates, across a private or by-road, for thirty or forty years, by the owner of the land through which the road passes, without complaint on the part of those using the road, creates no presumption that the right of use of the road has ceased. *Van Blarcom v. Frike*, 29 N. J. L. 516.

Evidence that for many years the whole close over which the right of way is claimed, has been plowed and cultivated almost every year, without the objection of the claimant of the right of way is competent. So evidence of an executed oral agreement between the owners of a dominant and servient tenement to discontinue an old way and substitute a different one is competent evidence of the surrender of the old right of way. *Pope v. Devreux*, 5 Gray (Mass.) 409.

The rule that the discontinuance of the use of one way merely by reason of the party's having a more convenient way is no evidence of abandonment, has been held to apply, even where a close board fence had been maintained across the way for seven years. *Hayford v. Spokesfield*, 100 Mass. 491.

4. *Cincinnati etc. R. Co. v. Mims*, 71 Ga. 240.

the unity of the title and possession as before, it may be revived and pass with the dominant estate when sold to several purchasers.¹ Ways extinguished by unity of title generally do not revive upon severance of the title, unless they are apparent and obviously continuous.² And they must be necessary to the enjoyment of the estate granted.³

1. *Kiefer v. Imhoff*, 26 Pa. St. 438; *Phillips v. Phillips*, 48 Pa. St. 185; *Fetters v. Humphrey*, 18 N. J. Eq. 262.

2. *Kieffer v. Imhoff*, 26 Pa. St. 438. See *Overdeer v. Updegraff*, 69 Pa. St. 119; *Cannon v. Boyd*, 73 Pa. St. 179. See *Payne v. Williams*, 2 Spears (S. Car.) 15; *Pearson v. Spencer*, 1 B. & S. 571.

3. *Brown v. Berry*, 6 Coldw. (Tenn.) 98; *Fetters v. Humphrey*, 18 N. J. Eq. 262.

In *Kieffer v. Imhoff*, 26 Pa. St. 438, the right to an alley-way through the servient in favor of the dominant portion of land, which two portions had formerly belonged to one proprietor and had been sold at sheriff's sale, with no mention of the right of way, was sustained, although it was not a way of necessity. The court by Lewis, C. J., said: "It is obvious, therefore, that if the dominant and servient tenements become the property of the same owner, the exercise of the right, which in other cases would be the subject of an easement, is, during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure. The inferior right of easement is merged in the higher title of ownership. *Holmes v. Gering*, 2 Bing. 83; 9 Moore 166; 3 Bulst. 340. . . . Upon a subsequent severance of the estate by alienation of part of it, the alienee becomes entitled to all continuous and apparent easements which have been used by the owner, during the unity of the estate and without which the enjoyment of the several portions could not be fully had. . . . The owner may, undoubtedly, alter the quality of the several parts of his heritage, and if he does so and afterwards aliens one part, it is but reasonable that the alterations thus made, if palpable and manifest and obviously permanent in their nature, shall go to the purchaser in the condition in which they were placed and with the qualities attached to them by the previous owner." The learned

judge also approved of the rules of the civil law with reference to servitudes, and cited Pardessus, *Traite des Servitudes*, § 288, which (as given in Gale, p. 50) is: "If afterwards these heritages should become the property of different owners, whether by alienation or division amongst his heirs, the service which the one derived from the other and which was simple '*destination du pue de famille*,' as long as the heritages belonged to the same owner, becomes a servitude as soon as they pass into the hands of different proprietors."

In *Phillips v. Phillips*, 48 Pa. St. 186, the court by Thompson, J., said: "In this, although we do not recognize a way of necessity, we see the reason for the creation of this private way (*i. e.*, that it was the only convenient way), why it was opened, kept open and used by the owner and his family until his death, and the same condition of things, as regards the surroundings continuing, we may presume that it must have been the intention of the owner that it should remain permanent, inasmuch as he made a final disposition by will of both the dominant and servient portions, without the slightest hint of a wish that their relations to each other should be changed." It will be noticed that the court gave a different face to the devise in fee from that given by the *Rhode Island* court, and as its opinion is derived from a consideration of the whole will, it would seem to be in better accord with the usually received principles of interpretation.

England.—In *Whalley v. Thompson*, 1 B. & P. 371 (1799) it was held that a way extinguished by unity of possession did not revive on severance. In *Plant v. James*, 5 B. & A. 791 (1833) Lord Denman said: "If the grantor wishes to revive or create such a right he must do it by express words or introduce the words therein used and enjoyed, in which case easements existing in point of fact though not existing in point of law would be transferred to a grantee."

XV.—STATUTORY PRIVATE WAYS.—1. In General.—There is a class of so-called private ways provided for and laid out under the statutes of some of the States. As to these the term "private" is rather a misnomer and is used to distinguish these ways from highways proper. Though called private ways and though not required, as are highways, by the public at large, they are public in the sense that the general public may use them.¹ It is under this view of the matter that condemnation of the necessary land is lawful notwithstanding constitutional inhibitions against the appropriation of private property to private use.²

2. Establishment.—The object of the legislation regulating the establishment of private ways is to enable petitioners to get access into established highways, so that they may not be shut out from

1. *Sherman v. Buick*, 32 Cal. 241; 91 Am. Dec. 577; *Monterey Co. v. Cushing*, 83 Cal. 507; *Denham v. Bristol Co.*, 108 Mass. 202; *Jones v. Andover*, 6 Pick. (Mass.) 59; *Parks v. Boston*, 8 Pick. (Mass.) 218; *Metcalf v. Bingham*, 3 N. H. 459; *Perrine v. Farr*, 22 N. J. L. 356; *Flagg v. Flagg*, 16 Gray (Mass.) 175; *Hall v. County Commr's*, 62 Me. 327.

In *Flagg v. Flagg*, 16 Gray (Mass.) 179, the court by Bigelow, C. J., said: "The term 'private or particular way' is used in the statute, not to designate or define the use or purpose for which it was laid out, or the nature or extent of the easement which it created, but in contradistinction to a highway or public road, which was not confined within the boundaries or territory of a town, but extended from town to town or place to place, and which could be laid out only by the court of sessions. Nor was it intended by the phrases 'for the use of such town only,' or 'for the use of one or more individuals thereof or proprietors therein,' to limit the easements or rights created by the way to the inhabitants of the town or the owners of land therein, or to particular individuals, but to describe it as a road for local accommodation and convenience, which the selectmen were empowered to lay out at the expense of the town or the persons who would receive the greatest benefit from the establishment of the way."

To the point that, on the ground of necessity, land may be taken for private ways, see *Steele v. County Commr's*, 83 Ala. 304; *Monterey Co. v. Cushing*, 83 Cal. 508; *Ayres v. Richards*, 38 Mich. 217; *Pocopson Road*, 16 Pa. St. 15; *Barr v. Flynn*, 20 Mo. App. 383; *Schehr v. Detroit*, 45 Mich. 626;

People v. Pitkin Co. Ct., 11 Colo. 147.

In *Ayres v. Richards*, 38 Mich. 216, the court by Campbell, C. J., said: "It is hardly needful for us to say that nothing but a clear practical necessity can, under our constitution, justify the taking of private property of one person to be used as a private road by another. It is not to be taken for mere convenience. The taking is only justifiable where no other way of access to the lands of the applicant can be found. And both constitution and statute require that its use shall be only commensurate with the necessity of the applicants, and confined to them and the owner."

2. *Sherman v. Buick*, 32 Cal. 241; 91 Am. Dec. 577; *Monterey Co. v. Cushing*, 83 Cal. 507; *Denham v. Bristol Co.*, 108 Mass. 202. In this last case the doctrine is expounded and the cases reviewed. *Taylor v. Porter*, 4 Hill (N. Y.) 140; 40 Am. Dec. 274, relied on as authority for the statement that condemnation is unconstitutional, being distinguished on the ground that the ways provided for by the statute there under review were strictly private ways, paid for and owned by the applicants, and in which the general public had neither title nor interest. On grounds similar to that of *Taylor v. Porter*, 4 Hill (N. Y.) 140; 40 Am. Dec. 274, rest *Osborn v. Hart*, 24 Wis. 89; 1 Am. Rep. 161; *Sadler v. Langham*, 34 Ala. 311; *Dickey v. Tension*, 27 Mo. 373; *Nesbitt v. Trumbo*, 39 Ill. 110; 89 Am. Dec. 290; *Crear v. Crossly*, 40 Ill. 175; *White v. Clack*, 2 Swan (Tenn.) 230; *Witham v. Osburn*, 4 Oregon 318.

And see further EMINENT DOMAIN, vol. 6, p. 529.

connection therewith.¹ The formalities required for laying out private ways, which, in many respects, are similar to those required for laying out public roads, must be pursued strictly.² And persons locating a private way must determine its expediency, or necessity, and the damage thereby done to the land owner, and what would be a reasonable compensation for such damage. These are judicial acts requiring disinterestedness on the part of those making the adjudication.³

3. Petition or Application.—The statutes generally require that a petition or application for a private road should be made in writing, specifying its width and location, courses and distances, and the names of the owners and occupants of the land through which the road is proposed to be laid out;⁴ and the petition must show that the way is "necessary, reasonable and just."⁵

The definite points where a private road shall begin and end ought to be set out with reasonable certainty.⁶ A way which is too indefinite for a determinate description is too indefinite to be established and protected by the court,⁷ and the commissioners are bound to lay out the road as described in the application. They have no discretion either to refuse to lay it out, to change its location, or to depart in any respect from the road proposed by the applicants.⁸

Proceedings to open a private road are invalid, unless the landowner has personal notice of the time and place of the meeting

1. *In re Sandy Lick Creek Road*, 51 Pa. St. 94; *Hall v. County Comm'rs*, 62 Md. 325.

2. *Douglas Co. v. Clark*, 15 Oregon 3. A way may not be laid out for a portion of the year only, the statute not so providing. *Holcomb v. Moore*, 4 Allen (Mass.) 529.

3. *Lyon v. Hamor*, 73 Me. 58.

In proceedings to lay out a private way, the jury must find that there is a necessity for it; it is not enough to certify that they "adjudge and determine that a private highway be established." *Rundell v. Blakeslee*, 47 Mich. 575.

4. *Satterly v. Winne*, 101 N. Y. 221.

Return of Surveyors.—Although an application for the laying out of a private road must state that it is to run to and from the land of the applicant, the surveyors need not repeat these words in their return. A return that they "think and adjudge the said private road to be necessary, and do lay the same," is sufficient. *Powell v. Hitchner*, 32 N. J. L. 211.

5. *Colville v. Judy*, 73 Mo. 651; *Burwell v. Sneed*, 104 N. Car. 118; *Warlick v. Lowman*, 104 N. Car. 403.

North Carolina Code, § 2056, provides that "if any person be settled upon or cultivating any land to which there is leading no public road, and it shall appear necessary, reasonable, and just that such person should have a private way to a public road over the lands of other persons, he may file his petition before the board of supervisors of the township, praying for a cartway to be kept open across such other person's lands, leading to some public road," etc. *Held*, that while it is essential that the petition shall state sufficient facts to show that the road asked for is "necessary, reasonable, and just," and that there is no public road to answer the purpose, yet the petition is not required to be so formal and precise as ordinary pleadings, and it is sufficient if enough is stated to show with reasonable certainty the existence of the state of facts mentioned in the statute. *Warlick v. Lowman*, 101 N. Car. 403.

6. *Keeling's Road*, 59 Pa. St. 358.

7. *Fox v. Pierce*, 50 Mich. 505.

8. *Satterly v. Winne*, 101 N. Y. 221.

of the viewers, and of the time and place fixed for the assessment of damages.¹

4. Notice.—The time of notice should be long enough to allow the summoning of witnesses, or for such examination and legal counsel as are necessary to enable the parties to defend their rights; and where the statute does not provide for any particular time of notice, the time of such notice may be governed by the analogy of similar cases, such as a notice required under the highway laws.² So, in like manner, must the land owner have an opportunity of being heard on the assessment of damages, and it is not sufficient to state in the report that application was made to him for a release thereof.³ Though persons interested, opposing a petition for a private way, have not been legally notified, yet if they appear and contest the petition, without objecting for want of notice, the right to object, on that ground, is waived.⁴

5. Damages.—The damages payable are ascertained by methods similar to those obtaining in case of highways.⁵

PRIVILEGE—(See also ARREST, vol. 1, p. 719; *compare* FRANCHISES, vol. 8, p. 584; LICENSE, vol. 13, p. 514).—Exemption from such burdens as others are subjected to.⁶ A right peculiar to the person on whom conferred, not to be exercised by another or others.⁷ "The word privilege may be defined as a right peculiar to an individual or body."⁸

1. *In re* Plum Creek Township Road, 110 Pa. St. 544; *Hoagland v. Culvert*, 20 N. J. L. 387.

2. *Ayers v. Richards*, 38 Mich. 217; *In re* Redstone Private Road, 112 Pa. St. 183.

Time of Notice is regulated by statute. See *Rout v. Mountjoy*, 3 B. Mon. (Ky.) 302; *Green v. Reeves*, 80 Ga. 805.

3. *In re* Redstone Private Road, 112 Pa. St. 183.

4. *Woods v. Skinner*, 6 Paige (N. Y.) 76.

Where a statute provides twenty days' notice to the land owner to entitle the applicant to have commissioners appointed to review and lay out the road, the owner of the land over which the way is to be laid out, who files no objection to the order and is present and assists in the appointment of the commissioners, though he is served with no notice of the time and place of meeting, is stopped from complaining of the action of the ordinary appointing the commissioners. *Green v. Reeves*, 80 Ga. 805.

5. *Ex parte* Craig, 10 Wend. (N. Y.) 585.

In Clowes Private Road, 31 Pa. St. 12, it was held that the order for open-

ing the way should not be made until the amount was paid or tendered and brought into court.

In *Stewart v. Hartman*, 46 Ind. 331, it was held that the receipt of damages assessed in proceedings before a county commissioner for the opening of a private way would not stop the person receiving the same from resisting the opening of the way over his land, where the money was accepted on a mistake as to the amount of work that would be done in opening the way by the person for whose benefit it was proposed to be opened.

In *Chatterton v. Parrott*, 46 Mich. 432, it was adjudged that one taking compensation for land condemned for a private way could not object afterwards to the validity of the proceedings on the ground of a juror's incompetency.

6. *State v. Betts*, 24 N. J. L. 557.

7. *Brenham v. Brenham Water Co.*, 67 Tex. 542.

8. *Ripley v. Knight*, 123 Mass. 519.

It means something which cannot be enjoyed without legal authority, which is generally evidenced by license. *Cate v. State*, 3 Sneed (Tenn.) 120.

A privilege is a right or immunity by way of exemption from the general

PRIVILEGED COMMUNICATIONS.—(See also **ARBITRATION**, vol. 1, p. 691; **EVIDENCE**, vol. 7, p. 103; **GRAND JURIES**, vol. 9, p. 17; **HUSBAND AND WIFE**, vol. 9, p. 806; **JURY AND JURY TRIAL**, vol. 12, p. 378; **LIBEL AND SLANDER**, vol. 13, p. 292; **MALICIOUS PROSECUTION**, vol. 14, p. 16; **MERCANTILE AGENCIES**, vol. 15, p. 280; **WITNESSES**.)

I. Definition, 122. [123.]

II. Political Matters; State Secrets, 123.

III. Judicial Matters, 123.

1. *Proceedings in the Jury Room* (See **JURY AND JURY TRIAL**, vol. 12, p. 318), 123.

2. *Proceedings in the Grand Jury Room* (See **GRAND JURIES**, vol. 9, p. 17), 123.

3. *Testimony of Judges* (See also **JUDGE**, vol. 12, p. 2), 124.

4. *Testimony of Arbitrators* (See also **ARBITRATION**, vol. 1, p. 691), 124.

5. *Sources of Information in Criminal Prosecutions* (See also **INFORMERS**, vol. 7, p. 711), 127.

IV. Professional Communications, 127.

1. *To Attorney*, 127.

a. *In General*, 127.

b. *Retainer Not Essential*, 130.

c. *Willingness to Testify*, 131.

d. *Importance of Communication*, 131.

e. *Enjoining Secrecy Unnecessary*, 131.

f. *Communications Through Attorney's Representatives*, 131.

g. *Who May Claim the Privilege*, 133.

h. *When Privilege Waived*, 133.

i. *Attorney Acting for Several Clients*, 134.

j. *Negotiations Respecting the Sale or Mortgage of Property*, 135.

k. *Admissions*, 135.

l. *Professional Advisers of Strangers to the Suit*, 136.

m. *Defective Memory*, 136.

n. *Communications Not Privileged*, 136.

(1) *Generally*, 136.

(2) *Compromises and Agreements*, 141.

(3) *Disclosures for Protection of Attorney*, 142.

(4) *Cross-examination of Attorneys*, 142.

(5) *Communications with Third Persons*, 142.

(6) *Testamentary Communications*, 142.

(7) *Collateral Matters*, 143.

(8) *Disclosing Address of Client*, 143.

o. *Documents*, 144.

(1) *In General*, 144.

(2) *Correspondence Between Attorney and Client*, 146.

(3) *Documents in the Hands of Third Persons*, 146.

(4) *Where Attorney and Client Are Co-defendants*, 147.

2. *To Physician*, 147.

a. *Nature of the Privilege*, 147.

b. *How Waived*, 150.

3. *To Spiritual Adviser*, 151.

V. **Social Matters**, 152.

1. *Communications Between Husband and Wife*, 152.

2. *Evidence Impeaching the Legitimacy of Children* (See **BASTARDY**, vol. 2, p. 129), 154.

3. *Evidence Offensive to Public Morals*, 154. [155.]

VI. **Communications Not Privileged**, [155.]

1. *Telegraphic Dispatches*, 155.

2. *Miscellaneous Communications*, 155.

law. Louisville etc. R. Co. v. Gaines, 3 Fed. Rep. 278. See also State v. Betts, 24 N. J. L. 557; Tennessee v. Whitworth, 117 U. S. 146.

Privilege is a right of franchise created by legislative grant that cannot be exercised by any citizen without some statutory provision conferring upon some one or more individuals the right of doing some particular

thing. Languille v. State, 4 Tex. App. 317.

The exercise of mental power cannot be a privilege. It is not derived from a law granting a special prerogative contrary to common right. Lawyer's Tax Cases, 8 Heisk. (Tenn.) 649.

As used in Tennessee constitution permitting the legislature to tax "privileges," the word is defined to

I. DEFINITION.—It is designed here to treat of that evidence which, on grounds of public policy, courts decline to receive, for the reason that its admission would entail greater mischief than its rejection because of some collateral evil to third persons or to society. The rule requiring the rejection of such evidence is independent of questions of the relevancy of the evidence to the matters in dispute. Questions of the incompetency of witnesses by reason of inability to understand the nature of an oath, disregard for its sanctity, disqualifying interest, infamy, and other causes are related to the subject of witnesses and are there treated.¹ A learned and logical writer,² whose classification is here adopted, divides the matters thus excluded on grounds of public policy into political, judicial, professional, and social. Under the first come all secrets of State, such as State papers, and all communications between the government and its officers—the privilege in such cases not being that of the person who is in possession of the secret, but under the second, viz: judicial, fall the secrets of the jury room³ and of the grand jury room,⁴ so far as such secrets are protected from publicity, consultations of judges in matters before them for judicial action, and their testimony, so far as it may be inadmissible under the circumstances, and the testimony of arbitrators, so far as the same may be incompetent to impeach their verdict. To this branch of the subject belongs the rule upholding the secrecy of the sources of the information on which criminal prosecutions are founded. Under the third class, viz: professional, are included disclosures of client to counsel, of patient to physician, of penitent to priest or clergyman.

mean "any occupation which was not open to every citizen, but could only be exercised by a license from some constituted authority"—*e. g.*, the business of a wholesale grocer. *French v. Baker*, 4 Sneed (Tenn.) 193. *Secus* a livery stable. Mayor, etc. of *Columbia v. Guest*, 3 Head (Tenn.) 413.

The word privilege as used in the constitution of *Minnesota*, prohibiting the legislature from enacting any private law granting any special or exclusive privilege, etc., means generally a right or immunity granted to a person either against or beyond the course of the common or general law, and the passage of an act providing for the adjustment and determination of two alleged claims, is not a violation of the prohibition. *Dike v. State*, 38 Minn. 366.

Privileges and Immunities.—See CITIZENSHIP, vol. 3, p. 252; CONSTITUTIONAL LAW, vol. 3, p. 670.

Special or Exclusive Privilege.—Any particular or individual authority or exemption existing in a person or class of persons, and in derogation of common right; as, the grant of a monopoly. *Anderson's L. Dict.*, citing *Elk Point v. Vaughn*, 1 Dak. 118; 1 Utah 111; 1 Bl. Com. 272.

Within the meaning of the prohibition in the constitution of *New York* against granting to private corporations "any exclusive privilege," describes grants in the nature of monopolies, of such inherent or statutory character as to make impossible the co-existence of the same right in another. *Trustees of Exempt Firemen's Fund v. Roome* 93 N. Y. 328.

1. See WITNESSES.

2. *Best on Evidence*, § 578. In *Greenleaf on Ev.*, § 236 *et seq.*, the classification is substantially similar.

3. See JURY AND JURY TRIAL, vol. 12, p. 378.

4. See GRAND JURIES, vol. 9, p. 17.

The fourth class, viz : social, embraces those communications between husband and wife concerning which neither may testify, such testimony by the one against the other as, under the common law or under statutes modifying the rule of the common law, is incompetent,¹ such evidence of non-access as is held incompetent for the purpose of impeaching the legitimacy of children presumably legitimate,² and evidence which, by reason of its indecency or offensiveness to public morals, may be rejected, if not absolutely required by its relations to the matter in hand.

II. POLITICAL MATTERS; STATE SECRETS.—On the ground of public policy, the executive department of the government cannot be interrogated in a judicial proceeding concerning official transactions with its subordinates.³

III. JUDICIAL MATTERS—1. **Proceedings in the Jury Room.**—See JURY AND JURY TRIAL, vol. 12, p. 318.

2. **Proceedings in the Grand Jury Room.**—See GRAND JURIES, vol. 9, p. 17.

1. See HUSBAND AND WIFE, vol. 9, p. 806.

2. See BASTARDY, vol. 2, p. 129.

3. 1 Greenleaf on Evidence, § 251; 1 Wharton on Evidence, § 604 a; Best on Evidence, § 578; U. S. v. Six Lots of Ground, 1 Woods (U. S.) 234.

Thus, communications between a provincial governor and his attorney-general, on the state of the colony, or the conduct of its officers, has been held incompetent. *Wyatt v. Gore*, Holt N. P. Cas. 299; and so a communication between such a governor and a military officer under his authority; *Cooke v. Maxwell*, 1 Stark. 183; and the report of a military commission of inquiry made to the commander-in-chief. *Home v. Bentinck*, 2 B. & B. 130; and correspondence between an agent of the government and a secretary of State. *Anderson v. Hamilton*, 2 B. & B. 156 n.; *Marbury v. Madison*, 1 Cranch. (U. S.) 144.

It is said that the executive and his cabinet officers are the sole judges of the propriety of a refusal to testify, or to produce papers in such case. *Beatstone v. Skene*, 5 H. & N. 538; *Anderson v. Hamilton*, 2 B. & B. 156; *Gray v. Pentland*, 2 S. & R. (Pa.) 23; *Yoter v. Sanno*, 6 Watts (Pa.) 164; *Thompson v. German Valley R. Co.*, 22 N. J. Eq. 111. But see *Dickson v. Wilston*, 1 F. & F. 425 for an intimation by Lord Campbell, that, where a head of a department sends papers called for, the judge may examine the papers himself

and determine whether they are such as should be excluded on the ground of public policy.

On the trial of Aaron Burr, a subpoena was asked for, to compel the attendance of President Jefferson. His reply was that, as head of the executive department, it was for him to determine what executive proceedings could be disclosed with safety. The matter ended here, an attachment not being asked for. 2 *Robertson's Burr's Trial*, p. 501, *et seq.*

In *Gray v. Pentland*, 2 S. & R. (Pa.) 23, a subpoena to the governor of Pennsylvania, requiring him to produce a paper filed with him and alleged to be libelous, was refused.

In *Hartranft's Appeal*, 85 Pa. St. 433, an order of attachment against the governor, the secretary of State, and certain other officers, to compel them to testify before a grand jury in an investigation, relating to a certain riot, was set aside by the supreme court, it being held that the witnesses were privileged.

In *Thompson v. German Valley R. Co.*, 22 N. J. Eq. 111, the governor of New Jersey was sustained in his refusal to obey a subpoena, requiring him to produce before a court an engrossed copy of a private bill.

Totten v. U. S., 92 U. S. 107, was an action brought in the court of claims, to recover compensation from the United States for secret services rendered under a contract with the President, during the war, in the exam-

3. Testimony of Judges.—The consultations of judges are privileged.¹ It is said that the judge presiding at a trial may not be made a witness in the case,² though this rule, perhaps, admits of some qualification.³ A judge may, however, testify as to what took place before him in open court.⁴ As to matters coming before him for purely judicial action, the rule of privilege applies.⁵

4. Testimony of Arbitrators.⁶

ination of fortifications, &c., within the rebel territory, etc. The court declared that the nature of the services precluded the maintenance of the action, because of the secrecy imposed by the contract.

1. 1 Wharton on Evidence, § 600.

2. *People v. Miller*, 2 Park. Cr. (N. Y.) 197. See *Morss v. Morss*, 11 Barb. (N. Y.) 510; *McMillen v. Andrews*, 10 Ohio St. 112; *Dabney v. Mitchell*, 66 Ala. 495; *Ross v. Buhler*, 2 Mart., N. S. (La.) 313.

3. If the judge does testify without objection, it is not ground of error. *People v. Dohring*, 59 N. Y. 374; 17 Am. Rep. 349.

It was held in *Sigourney v. Sibley*, 21 Pick. (Mass.) 100; 32 Am. Dec. 243, that a judge of probate whose decision was appealed from, on the ground of his disqualification by reason of interest, was a competent witness on the appeal, to prove his want of interest.

In *Taylor on Evidence*, § 1244, it is noticed that, on State trials before the House of Lords, peers who have been examined as witnesses have nevertheless joined in rendering the verdict.

4. For the purpose, for example, of identifying the case, or showing to what a witness testified, *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498; *In re Heyward*, 1 Sandf. (N. Y.) 701.

In *Rex v. Gazard*, 8 C. & P. 895, the grand jury were advised not to examine the chairman of the quarter sessions as to what a witness testified to on a trial in the quarter sessions. And see *People v. Miller*, 2 Park. Cr. (N. Y.) 197.

But see a contrary ruling of Byles, J., in *Rex v. Harvey*, 8 Cox C. C. 99. And see *Agan v. Hey*, 30 Hun (N. Y.) 591, where it was held error to allow a judge to testify as to the ground on which he decided a case.

It is said in *Welcome v. Batchelder*, 23 Me. 85, that the judge's privilege, when not touching matters of public policy, may be waived by him.

In *Ex parte Gillebrand*, L. R., 10

Ch. 52, the county court judge's verified notes of the evidence were used as evidence, to the exclusion of other evidence of what was testified to at the trial which is the subject of inquiry.

5. 1 Wharton on Evidence, § 600; 1 Greenleaf on Evidence, § 249. And see generally, *JUDGES*, vol. 12, p. 31.

6. It is said on this head in Wharton on Ev. 6, § 599, that it is not permissible to examine an arbitrator as to the reasons which led him to particular conclusions, for this would be collaterally to review his acts, citing *Johnson v. Durant*, 4 C. & P. 327, nor to prove by him his own misconduct, citing *Claycomb v. Butler*, 36 Ill. 100; *Ellison v. Weathers*, 78 Mo. 115; but that, as to matters of fact coming to his knowledge, there is no reason why they should not be examined, citing *Woodbury v. Northy*, 3 Me. 85; 14 Am. Dec. 214; *Pulliam v. Pensoneau*, 33 Ill. 375; *Mayor etc. of N. Y. v. Butler*, 1 Barb. (N. Y.) 325; *Buccleugh v. Metropolitan Board of Works*, L. R., 3 Exch. 306. See also *ARBITRATION*, vol. 1, p. 691.

The language of Gray, J., in *Worthington v. Scribner*, 109 Mass. 487; 12 Am. Rep. 736, a leading case on this subject, clearly states this rule of law. In this case, which was an action of tort, charging defendant with maliciously and falsely representing to the Treasury Department that plaintiff had violated the revenue laws, plaintiff filed interrogatories designed to elicit information as to whether defendants had given such information. The court held that these interrogatories should not be answered, and used the following language: "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of State, and leaves the question how far and under what circumstances the names of the informers and the channel of communication

shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice, therefore, will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications." The court then proceeded to review the authorities as follows: "The earliest case upon the subject, is *Rex v. Akers*, 6 Esp. 125, in which on an indictment for obstructing a custom-house officer in the execution of his duty, Lord Kenyon said: 'The defendant's counsel have no right, nor shall they be permitted, to inquire the name of the person who gave the information of the smuggled goods.' All the English authorities agree that the rule has ever since been held in revenue cases to prevent a witness from answering questions that would disclose the informer, if a third person; and in *Attorney-General v. Briant*, 15 M. & W. 169, it was held that a witness could not be asked on cross-examination whether he was himself the informer. The rule has been nearly as long established in prosecutions for high treason. *Rex v. Hardy*, 24 How. St. Tr. 199; *Rex v. Watson*, 32 How. St. Tr. 1; 2 Stark 116. and it has been often applied in civil actions.

"In *Robinson v. May*, 2 Smith 3, which was an action for a libel in a letter by the defendant to the lords of the admiralty, charging the plaintiff with unlawfully pretending to be a magistrate and granting protections to vessels to the prejudice of the royal service, the lords of the admiralty had given up the letter and directed the action to be brought, so that no question whether it could otherwise have been put in evidence arose; the only question argued was whether the letter could be held to be a libel; and Lord Ellenborough in delivering judgment against the defendant on that question, expressed a significant doubt 'whether the board of admiralty did right in suffering the paper to go out of their hands, since it might tend to discourage the giving of information concerning abuses'—thus distinctly implying that, but for the

course taken by the board of admiralty, the plaintiff could not have proved his case.

"In *Home v. Bentinck*, 2 B. & B. 130, it was held by Chief Justice Abbot, and affirmed in the exchequer chamber, in an action for libel by an officer of the army against the president of a military court of inquiry, that neither their report to the commander-in-chief, nor an office copy of it, should be admitted in evidence. In the very recent case of *Dawkins v. Rokeby*, L. R., 8 Q. B. 255, the same court held the statements, oral or written, of an officer, examined before such a military tribunal, to come within the same principle. And in *Beatson v. Skene*, 5 H. & N. 838, an action of slander against one military officer for speaking defamatory words of the military conduct of another, it was held that the Secretary of War, who objected to produce in evidence the minutes of a court of inquiry, and letters written to the War Department by the plaintiff himself, on the ground that their production would be prejudicial to the public service, was not bound to produce either.

"In *Earl v. Vass*, 1 Shaw 229, which was an action for a libel alleged to be contained in a letter to the board of customs before which the nomination of the plaintiff as a custom-house officer was pending, the House of Lords, upon the opinion of Lord Eldon, after conference with Chief Justice Abbott, held that the board could not be compelled to produce the letter, 'because it is against public policy that you should be compelled to produce instruments and papers, which, if persons are compelled to produce, it must shut out the possibility of the public receiving any information as to a person's fitness to be appointed to an office;' and 'it would be a very dangerous thing indeed, if this were permitted.'

"In *Marbury v. Madison*, 1 Cranch (U. S.) 137, the Supreme Court of the United States compelled the acting Secretary of State to testify whether certain commissions from the executive had ever been in his office, only because 'that could not be a confidential fact;' and declared, that if there was anything confidential, or the Secretary thought anything was communicated to him in confidence, he was not obliged to disclose it.

"The ruling of Chief Justice Marshall upon the trial of Aaron Burr, cited for the plaintiff, was merely that a *subpœna*

duces tecum might be issued to the President of the United States for a letter addressed to him by a military officer who was to be a witness against the defendant; leaving the question of the production of the letter, if containing any matter which in the judgment of the President could not be disclosed without injury to the public, to be considered on the return of the subpoena. 1 Burr's Trial 177-189. And he never had occasion to decide that question. See 2 Burr's Trial 533-539.

"In *U. S. v. Moses*, 4 Wash. (U. S.) 726, upon the trial of an indictment for counterfeiting, it was ruled that the officer who apprehended the defendant was not bound to disclose the name of the person from whom he received the information which led to the detection and arrest, Mr. Justice Washington saying that such disclosure might be highly prejudicial to the public in the administration of justice by deterring persons from making similar disclosures of crimes which they knew to have been committed.

"In *State v. Soper*, 16 Me. 293; 33 Am. Dec. 665, a like ruling was made upon the cross-examination of the owner of stolen goods, when called as a witness for the government upon the trial of an indictment for larceny.

"In *Pennsylvania*, it has been determined in an action for a libel contained in a deposition made and sent to the governor by a private citizen, charging the plaintiff with misconduct in office, that it was within the discretion of the governor to produce or withhold the letter, and that parol evidence of its contents was inadmissible. *Gray v. Pentland*, 2 S. & R. (Pa.) 23; *Yoter v. Sanno*, 6 Watts (Pa.) 166.

"In *White v. Nicholls*, 3 How. (U. S.) 266, and *Howard v. Thompson*, 21 Wend. (N. Y.) 319; 34 Am. Dec. 238, cited for the plaintiff, the original letters to the President and Secretary of the Treasury, which were relied on as containing libelous matter, were produced by the plaintiff, who must have obtained them by permission of the government, so that no question of compelling a disclosure arose; and in *Howard v. Thompson*, 21 Wend. (N. Y.) 319; 34 Am. Dec. 238, the court said that if the letters had not been surrendered by the Secretary of the Treasury, he could not have been compelled to produce them, and secondary evidence of their contents could not have been admitted.

"The only cases which afford any color for the plaintiff's position are of rulings at *nisi prius*, of very little weight, as compared with so many well considered judgments rendered upon full argument.

"In one case before Lord Kenyon and another before Baron Rolfe, a witness who appeared on his direct examination by the government to be an informer was permitted, without objection, to testify on cross-examination that no other person gave information upon the subject; but in such a case, Baron Rolfe remarked, 'The principle was rather followed than violated.' *Rex v. Blackman*, 1 Esp. 95; *Reg v. Candy*, cited 15 M. & W. 175.

"The ruling of Chief Justice Cockburn, upon an indictment for administering poison, in *Reg. v. Richardson*, 3 F. & F. 693, compelling a policeman to answer on cross-examination from whom he had received the information in consequence of which he found the poison in a place used by the defendant, must be maintained, if at all, upon the ground that the witness had already been examined by the government as to part of the conversation between him and the informer, and might, therefore, for the protection of the defendant against any unjust inference which might be drawn from the result of such examination, be required to state the whole of that conversation.

The ruling of Lord Campbell in *Dickson v. Wilton*, 1 F. & F. 419, that a communication sued on as a libel, held by the secretary for war in behalf of the crown, should be produced from his office and read in evidence, was, as observed by Chief Baron Kelly in delivering the judgment of the exchequer chamber in *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, directly at variance with the previous judgment of that court in *Home v. Bentinck*, 2 B. & B. 130, above cited.

"In *Blake v. Pilfold*, 1 M. & Rob. 198, in which Mr. Justice Taunton admitted in evidence to support an action for libel, a letter to the chief secretary of the Postmaster General from a private individual, complaining of the misconduct of a guard, the objection was made by the defendant's counsel on the ground that it was a privileged communication made to a public officer, and that such public officer ought not to be allowed to produce it; the Post-Office Department had evidently suffered the letter to pass into the plaintiff's

5. **Sources of Information in Criminal Prosecutions.**—In cases in which the government is immediately concerned, no witness can be compelled to answer any question, the answer to which would tend to discover the names of persons by or to whom information was given as to the commission of offenses.¹

IV. **PROFESSIONAL COMMUNICATIONS**—1. **To Attorney.**—*a.* IN GENERAL.—All communications made by a client to his counsel for the purpose of obtaining professional advice or assistance are privileged.²

hands, for the report states that the handwriting was proved before the objection was made; and the whole attention of the judge seems to have been directed to the question whether the letter could be deemed a privileged communication upon which no action would lie. This last question was the only one touched by the other authorities cited for the plaintiff. *Fairman v. Ives*, 5 B. & Ald. 642; *Dawkins v. Paulet*, L. R., 5 Q. B. 94; *O'Donaghue v. McGovern*, 23 Wend. (N. Y.) 26; 2 Kent Com. (6th ed.) 22.

"The question now before us is not one of the law of slander or libel, but of the law of evidence; not whether the communications of the defendants to the officers of the Treasury are so privileged from being considered as slanderous, as to affect the right to maintain an action against the defendants upon or by reason of them; but whether they are privileged in a different sense, so that courts of justice will not compel or permit their disclosure without the assent of the government to whose officers they were addressed. The reasons and authorities already stated conclusively show that the communications in question are privileged in the latter sense, and cannot be disclosed without the permission of the Secretary of the Treasury. And it is quite clear that the discovery of documents which are protected from disclosure upon grounds of public policy cannot be compelled, either by bill in equity or by interrogatories at law. *McElveney v. Connellan*, 17 Ir. C. L. 55; *Wilson v. Webber*, 2 Gray (Mass.) 558."

1. Stephen's Dig. of the Law of Evidence, art. 113.

2. *Milan v. State*, 24 Ark. 346; *Andrews v. Simms*, 33 Ark. 771; *Hallenbach v. Todd*, 119 Ill. 543; *King v. Barrett*, 11 Ohio St. 261; *Babo v. Fryson*, 21 Ark. 387; 76 Am. Dec. 407; *Bigler v. Reyher*, 43 Ind. 112; *Oliver v. Pate*, 43 Ind. 132; *Holmes v. Barbin*,

15 La. Ann. 553; *Higbee v. Dresser*, 103 Mass. 523; *State v. Hazleton*, 15 La. Ann. 72; *Bank of Utica v. Merseureau*, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627; *Britton v. Loring*, 45 N. Y. 51; *Williams v. Fitch*, 18 N. Y. 546; *Brand v. Klien*, 17 Johns. (N. Y.) 335; *Graham v. People*, 63 Barb. (N. Y.) 468; *Yordan v. Hess*, 13 Johns. (N. Y.) 492; *Sleeper v. Abbott*, 60 N. H. 162; *People v. Sheriff*, 29 Barb. (N. Y.) 622; *State v. Dawson*, 90 Mo. 149; *Vogal v. Gruaz*, 110 U. S. 311; *Snow v. Gould*, 74 Me. 540; 45 Am. Rep. 604; *Rhoades v. Selin*, 4 Wash. (U. S.) 718; *Heister v. Davis*, 3 Yeates (Pa.) 4; *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280; *Parker v. Carter*, 4 Munf. (Va.) 273; 6 Am. Dec. 513; *Rogers v. Dare*, Wright (Ohio) 136; *Crawford v. McKissack*, 1 Port. (Ala.) 433; *Jenkinson v. State*, 5 Blackf. (Ind.) 465; *Causey v. Wiley*, 27 Ga. 444; *Scales v. Kelley*, 2 Lea (Tenn.) 706; *Benedict v. State*, 44 Ohio St. 679; *Brown v. Rome etc. R. Co.*, 45 Hun (N. Y.) 439; *Chahoon v. Com.*, 21 Gratt. (Va.) 822; *Orton v. McCord*, 33 Wis. 205; *Maxham v. Place*, 46 Vt. 434; *Whetherbee v. Ezekiel*, 25 Vt. 47; *Rex v. Dixon*, 3 Burr. 1687; *Woolley v. R. R.*, 4 C. P. 602; *Skinner v. R. R.*, L. R. 9 Exch. 298; *Jenner v. R. R.*, 7 Q. B. 767; *Chant v. Brown*, 9 Hare 790; *Greenough v. Gaskell*, 1 Myl. & K. 101; *Carpmael v. Powis*, 1 Ph. 692; *Cromack v. Heathcote*, 2 B. & B. *Hernandez v. State*, 18 Tex. App. 134; 51 Am. Rep. 295; *Peters v. Walkins*, 4 Scott 155; *Stephens v. Mattox*, 37 Ga. 289; *Turton v. Barber*, 17 L. R. Eq. 329; *Minet v. Morgan*, 8 L. R. Ch. 361; *Turquand v. Knight*, 2 M. & W. 98; *Desborough v. Rawlins*, 3 My. & C. 515; *Oliver v. Pate*, 43 Ind. 132; *Foster v. Hahl*, 12 Pick. (Mass.) 89; 22 Am. Dec. 400; *Beltzhoover v. Bleakstock*, 3 Watts (Pa.) 20; 27 Am. Dec.

Such is the rule at common law.¹ The common law rule has been substantially affirmed by statute in the various States.²

Communications made to an attorney in the course of any personal employment, relating to the subject thereof, and which may be supposed to be drawn out in confidence of the relation in which the parties stand to each other, are under the seal of confidence and entitled to protection as privileged communications.³ They are entitled to protection whether they relate to a suit pending or contemplated,⁴ or to any other matter, which is the

330; *Stratford v. Hogan*, 2 Ball & B. 164; *Richards v. Jackson*, 18 Ves. 474; *Morgan v. Shaw*, 4 Madd. 57; *Pearse v. Pearse*, 1 DeG. & Sm. 12; *Chant v. Brown*, 7 Hare 79; *Turton v. Barber*, 17 L. R. Eq. 329; *Walker v. Wildman*, 6 Madd. 47; *Shellard v. Harris*, 5 C. & P. 592; *Andrews v. Simms*, 33 Ark. 771; *Hughes v. Boone*, 102 N. Car. 137.

An attorney will be prevented from communicating his client's secrets even after he is struck off the roll. *Cholmondeley v. Clinton*, 19 Ves. 268.

1. *Balton v. Corporation of Liverpool*, 3 Sm. 467; 1 Myl. & K. 88; *Woods v. Woods*, 4 Hare 83; *Vent v. Pacey*, 4 Russ. 193; *Hughes v. Biddulph*, 4 Russ. 190; *Clagett v. Phillips*, 2 Y. & C. 82; 1 Greenlf. Ev., § 240; *Foster v. Hall*, 12 Pick. (Mass.) 89; 22 Am. Dec. 400; *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 20; 27 Am. Dec. 330.

2. *Arizona* Rev. Stat. 1887, p. 818; *Arkansas* Stat. 1883, p. 625; *California* Code C. P. 1885, § 1881; *Colorado* Gen. Stat. 1883, pp. 1062-63; *Georgia* Code 1882, p. 987, § 3797; *Idaho* Rev. Stat. 1887, p. 679; *Indiana* Rev. Stat. 1881 (ed. of 1888), § 1796; *Iowa* Rev. Code 1884, p. 860, § 3643; *Kansas* Comp. Laws 1885, p. 645, § 323; *Minnesota* Gen. Stat. 1881, p. 792, ch. 73; *Missouri* Rev. Stats. 1879, p. 690, § 4017; *Montana* Comp. Stat. 1887, p. 230; *Nebraska* Comp. Stat. 1885, § 328; *Nevada* Gen. Stats. 1885, p. 833, § 3404 sec. 382; *New York* Code Civ. Proc., § 835; *Ohio* Rev. Stat. 1884, p. 1096, § 5241; *Oregon* Gen. L. 1872, p. 251; *Pennsylvania* L. 158, §§ 2-5; *Tennessee* Code 1884, § 4748, p. 897; *Texas* Rev. C. 1888, p. 219, § 2439; *Utah* Comp. L. 1876, p. 506; *Washington* Code 1881, p. 102; *Wisconsin* Rev. Stat., § 4074, p. 292; *Wyoming* Rev. Stat. 1887, p. 590, § 2589.

3. *Sharon v. Sharon*, 79 Cal. 633; *Avery v. Mattice*, 56 Hun (N. Y.) 639; *State v. Dawson*, 90 Mo. 149; *Williams*

v. Fitch, 18 N. Y. 546; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627; *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280; *Yordan v. Hess*, 13 Johns. (N. Y.) 492; *Aiken v. Kilburne*, 27 Me. 252; *Whetherbee v. Ezekiel*, 25 Vt. 47; *King v. Barrett*, 11 Ohio St. 261; *Crisler v. Garland*, 11 Smed. & M. (Miss.) 136; 44 Am. Dec. 49; *Rogers v. Dare*, *Wright (Ohio)* 136; *Parker v. Carter*, 4 Munf. (Va.) 273; 6 Am. Dec. 513; *Kaut v. Kessler*, 114 Pa. St. 603; *Rhoades v. Selin*, 4 Wash. (U. S.) 718; *Heister v. Davis*, 3 Yeates (Pa.) 4; *Crawford v. McKissack*, 1 Port. (Ala.) 433; *Millers v. Weeks*, 22 Pa. St. 89; *Wilson v. Rostall*, 4 T. R. 735; *Hughes v. Boone*, 102 N. Car. 137; *People v. Hillhouse*, 80 Mich. 580; *People v. Gilon* (Supreme Ct.), 9 N. Y. Supp. 243.

See ANSWER, vol. 1, p. 601.

4. *Bacon v. Frisbie*, 80 N. Y. 394; *Jones v. State*, 65 Miss. 179; *Vent v. Pacey*, 4 Russ. 193; *Woods v. Woods*, 4 Hare 83; *Johnson v. Sullivan*, 23 Mo. 474; *Pierson v. Steortz*, 1 Morr. (Iowa) 136; *Foster v. Hall*, 12 Pick. (Mass.) 89; 22 Am. Dec. 400; *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 20; 27 Am. Dec. 330; *McMannus v. State*, 2 Head (Tenn.) 213; *Cromack v. Hathcote*, 4 Moore 357; *Clark v. Clark*, 1 M. & Rob. 3; *Durkee v. Leland*, 4 Vt. 615; *People v. Barker*, 56 Ill. 299; *Parkhurst v. McGraw*, 24 Miss. 134; *Miller v. Weeks*, 22 Pa. St. 89; *Swift v. Perry*, 13 Ga. 138; *Whetherbee v. Ezekiel*, 25 Vt. 47; *McClellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599; *Sargent v. Hampden*, 38 Me. 581; *Parker v. Carter*, 4 Munf. (Va.) 273; 6 Am. Dec. 513; *Whiting v. Barney*, 38 Barb. (N. Y.) 393; *Johnson v. Sullivan*, 23 Mo. 474; *Bigler v. Reyher*, 43 Ind. 112; *Young v. State*, 65 Ga. 525.

Compare Bluck v. Galsworth, 2 Giff. 1153.

proper subject of professional advice.¹ But the relation of attorney and client must exist in order that the communications between them may be privileged.² The communication, however, need not necessarily relate to litigation.³ The rule is not limited in its application to advice given, or opinion stated; it extends to facts communicated by the client and attorney in the course and for the purpose of the business.⁴ Where com-

1. *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495. See also *Williams v. Fitch*, 18 N. Y. 550; *Johnson v. Sullivan*, 23 Mo. 474; *Aikin v. Kilborne*, 27 Me. 252; *March v. Ludlum*, 3 Sand. Ch. (N. Y.) 46; *Graham v. People*, 63 Barb. (N. Y.) 482; *Clark v. Richards*, 3 E. D. Smith (N. Y.) 95; *Moore v. Bray*, 10 Pa. St. 524; *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 20; 27 Am. Dec. 330; *Foster v. Hall*, 12 Pick. (Mass.) 89; 22 Am. Dec. 400; *Parker v. Carter*, 4 Munf. (Va.) 273; 6 Am. Dec. 513; *Britton v. Lorenz*, 45 N. Y. 57; *Carnes v. Platt*, 15 Abb. Pr., N. S. (N. Y.) 337; *Bigler v. Reyber*, 43 Ind. 112; *Bobo v. Bryson*, 21 Ark. 387; 76 Am. Dec. 407; *McClellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599; *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189; *Hugh v. Biddulph*, 4 Russ. 193; *Holmes v. Bad-dely*, 1 Ph. 476; *Wigram, V. C. in Ld. Walsingham v. Goodricke*, 3 Hare 124, citing *Bolton v. Corp. of Liverpool*, 3 Sim. 467; 1 Myl. & K. 88; *Thompson v. Falk*, 1 Drew. 21; *Goodall v. Little*, 1 Sim. N. S. 155; *Combs v. Corp. of London*, 1 Y. & C. Ch. R. 631; *Claggett v. Phillips*, 2 Y. & C. Ch. R. 82; *Vent v. Pacey*, 4 Russ. 193. See also *Woods v. Woods*, 4 Hare 83; *Knight v. Mayor of Waterford*, 2 Y. & C. Ex. R. 38; *Reese v. Trye*, 9 Beav. 316; *Adams v. Barry*, 2 Y. & C. Ex. R. 167; *Curling v. Perring*, Myl. & K. 38; *Nias v. Northern etc. R. Co.*, 3 Myl. & Cr. 355; these cases overrule *Preston v. Carr*, 1 Y. & J. 175; and *Newton v. Beresford*, 1 You. 376; 1 Taylor Ev., §§ 845, 924; *Claggett v. Phillips*, 2 Y. & Coll. C. C. 82; *Higbee v. Dresser*, 103 Mass. 523; *Swenk v. People*, 20 Ill. App. 111.

Compare In re O'Donohue, 3 Nat. Bankr. Reg. 245; *Riggs v. Denniston*, 3 Johns. Cas. (N. Y.) 198; 2 Am. Dec. 145; *Whiting v. Barney*, 30 N. Y. 330.

2. *Cotton v. State*, 87 Ala. 75; *Sharon v. Sharon*, 79 Cal. 633; *Brown v. Matthews*, 79 Ga. 1; *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 510; *Rom-*

berg v. Hughes, 18 Neb. 579; *Flack v. Neill*, 26 Tex. 273; *Parkhurst v. McGraw*, 24 Miss. 134; *Meysenbergh v. Engelke*, 18 Mo. App. 346; *Pulford's Appeal*, 48 Conn. 247; *Brayton v. Chase*, 3 Wis. 456; *Beeson v. Beeson*, 9 Pa. St. 279; *Granger v. Warrington*, 8 Ill. 299; *Gillard v. Bates*, 6 M. & W. 547; *Rex v. Brewer*, 6 C. & P. 363; *Hill v. Elliott*, 5 C. & P. 363; *Farquind v. Knight*, 2 M. & W. 100; *Annesley v. Anglesea*, 10 How. St. Tr. 1221; *Bramwell v. Lucas*, 4 D. & R. 367; *Bogert v. Bogert*, 2 Edw. Ch. (N. Y.) 399; *Riley v. Johnston*, 13 Ga. 260; *Branden v. Gowing*, 7 Rich. (S. Car.) 459; *Parker v. Carter*, 4 Munf. (Va.) 273; 6 Am. Dec. 513; *Coon v. Swan*, 30 Vt. 6; *Rockford v. Falver*, 27 Ill. App. 604. *Compare Bean v. Quimby*, 5 N. H. 94.

The rule applies only to licensed attorneys. *Holman v. Kimball*, 22 Vt. 555.

If, after the relation of attorney and client has ceased, the client voluntarily repeat to the attorney what he had communicated while that relation existed, the attorney is a competent witness as to this communication. *Yordan v. Hess*, 13 Johns. (N. Y.) 492.

Communications made by a client to one whom he supposed to be an attorney, and whom he employed as such, but who, although doing business as a member of the bar, was not in fact admitted at that time, are not privileged. *Sample v. Frost*, 10 Iowa 266.

In *Benedict v. State*, 44 Ohio St. 679, communications made to one not an attorney of record but whose regular business had long been that of practicing before a justice of the peace, were held privileged communications. It was so held as to cases where the relation of attorney and client do not exist in fact. *Sargent v. Hampden*, 38 Me. 581.

3. *Carnes v. Platt*, 36 N. Y. Super. Ct. 361; 15 Abb. Pr., N. S. (N. Y.) 337; *Herring v. Cloberry*, 1 Phi. 91. See *Whiting v. Barney*, 30 N. Y. 330.

4. *Lengsfeld v. Richardson*, 52 Miss. 443; *Bacon v. Frisbie*, 15 Hun (N. Y.)

munications are made to an attorney of either of two or more parties in the presence of the others, while he is employed as their common attorney in matters in which they are mutually interested and in which their interests are adverse, such communications are privileged, in a suit between them or either of them and a third person.¹ It makes no difference in regard to the rule as to privileged communications, that the client is not a party to the cause before the court.² So the communications between a party or his legal adviser and his witnesses are privileged.³ The rule applies in criminal as well as in civil cases. An attorney in a criminal case cannot be compelled to disclose anything in evidence against his client either before the grand jury or the court, which has been communicated to him in the course of his employment as the professional adviser of the party. He is bound by the same rules as to confidential communications as in civil procedure.⁴

b. RETAINER NOT ESSENTIAL.—It is not essential that any fee or compensation be actually paid, or even that there should be a general retainer,⁵ and although the attorney is not actually employed at the time of the conversation, yet, if the same is had

26; *Causey v. Wiley*, 27 Ga. 444. See *DeWitt v. Perkins*, 22 Wis. 473; *Jupp v. Andrews*, Cowp. 845; *Brown v. Foster*, H. & N. 736.

In *Andrews v. Thompson*, 1 Houst. (Del.) 522, it was held that one who has been attorney and counsel for the plaintiff in an action on trial is incompetent to testify as to any fact coming to his knowledge during his connection with the action, although such connection has ceased with the leave of the court.

The fact of the retainer of counsel or attorney is not a privileged communication. *Forshaw v. Lewis*, 1 Jur., N. S. 263.

But see *Rundle v. Foster*, 3 Tenn. Ch. 658; *Allen v. Harrison*, 30 Vt. 219; *Bramwell v. Lucas*, 4 D. & R. 367.

Words used by an attorney, in detailing a statement of a case to a person to whom he applies to become security on the bringing of a writ of error, are to be deemed made in the course of judicial proceedings, and privileged, as it seems. *Blunt v. Tunts*, Anth. (N. Y.) 180.

1. *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495 (reversing 21 Hun (N. Y.) 344); *Hull v. Lyon*, 27 Mo. 570; *Eadie v. Addison*, 52 L. J. Ch. 81; *In re Ubsdell*, 27 L. T., N. S. 460.

2. *Rex v. Wethers*, 2 Camp. 578. See *Allen v. Harrison*, 30 Vt. 219.

3. *Story v. Lennox*, 1 Myl. & C. 525; *Llewellyn v. Baddeley*, 1 Hare 527; *Curling v. Perring*, 2 Myl. & K. 380; *Ross v. Gibbs*, L. R., 8 Eq. 522; *Preston v. Carr*, 1 Y. & J. 175; *Grandee v. Stamford*, 4 De G. & J. 1; *Lafoyne v. Falkland Island Co.*, 4 Kay & J. 34; *Hamilton v. Nott*, L. R., 16 Eq. 112; *Wilosn v. Northampton etc. R. Co.*, L. R., 14 Eq. 477; *Phillips v. Routh*, L. R., 7 C. P. 289; *Daw v. Eley*, 2 Hem. & M. 725; *Scranton v. Stewart*, 52 Ind. 68.

4. *Weeks on Atty's*, § 180; *Anonymous*, 8 Mass. 370; *Rex v. Duchess of Kingston*, 2 How. St. Tr. 612; *State v. Squires*, 1 Tyler (Vt.) 147; *Rex v. Hawkins*, 2 C. & Kir. 823; *Rex v. Dixon*, 3 Burr. 1687; *Rex v. Hayward*, 2 C. & Kir. 234; *Rex v. Jones*, 1 Den. 166; *Rex v. Brown*, 9 Cox 281; *McLellan v. Richardson*, 13 Me. 82; *Clark v. Field*, 12 Vt. 485. Compare *Reg. v. Avery*, 8 C. & P. 596; *White v. Fox*, 1 Bibb (Ky.) 369; 4 Am. Dec. 643.

On trial for stealing silver coin, defendant's attorney may not testify that his retainer was paid in silver. *State v. Dawson*, 90 Mo. 149.

The fact that an attorney's client accused of a crime, turns State's evidence does not entitle the attorney to testify concerning confidential communications. *Sutton v. State*, 16 Tex. App. 490.

5. *Andrews v. Simms*, 33 Ark.

in anticipation of employing him, it will come within the letter; the reason, and the spirit of the law.¹

c. WILLINGNESS TO TESTIFY.—It is immaterial that the witness is ready and willing to testify as to confidential communications which are privileged. They are protected as a rule of law, and the courts will interpose and determine from the facts whether the witness was acting in a professional capacity when the communications were made.²

d. IMPORTANCE OF THE COMMUNICATION.—The question, what may be privileged communications does not depend upon their importance or materiality in the prosecution or defense of the suit, but on the character of the communications.³

e. ENJOINING SECRECY UNNECESSARY.—To entitle a client to this protection, it is not essential that he be apprised of it, or that he enjoin secrecy.⁴

f. COMMUNICATIONS THROUGH ATTORNEY'S REPRESENTATIVES.—Communications made through a third person from a client to a solicitor are privileged, if otherwise entitled to be so.⁵ So whoever represents a lawyer in conference or correspondence with the client, is under the same protection as the lawyer himself.⁶

771; *Bacon v. Frisbie*, 80 N. Y. 394; *Cross v. Riggins*, 50 Mo. 335; *Earle v. Grout*, 46 Vt. 113; *March v. Ludlum*, 3 Sandf. Ch. (N. Y.) 35; *Reed v. Smith*, 2 Ind. 160; *Foster v. Hall*, 12 Pick. (Mass.) 89; 22 Am. Dec. 400; *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 20; 27 Am. Dec. 330; *Ross v. Gibbins*, L. R. 8 Eq. 522; *Thayer v. Thayer*, 101 Mass. 111; 100 Am. Dec. 110; *McManus v. State*, 2 Head (Tenn.) 213.

Compare Thompson v. Kilborne, 28 Vt. 750.

The rule has been held to embrace a case where one seeking counsel pays no fee and employs other attorneys in the prosecution of the business, and even where the lawyer consulted is afterwards employed on the other side. *Cross v. Riggins*, 50 Mo. 335.

An attorney, however, has been compelled to testify as to non-confidential statements made to him before retainer by one who afterwards became his client. *Cutts v. Pickering*, 1 Vent. 197; *Weeks on Attys.*, § 154.

1. *Young v. State*, 65 Ga. 525; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627; *Thorp v. Goewey*, 85 Ill. 611; *Orton v. McCord*, 38 Wis. 205; *Cross v. Riggins*, 50 Mo. 335; *Bean v. Quimby*, 5 N. H. 94.

2. *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec.

189; *People v. Atkinson*, 40 Cal. 284; *Foster v. Hall*, 12 Pick. (Mass.) 89; 22 Am. Dec. 400; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 629.

3. *Aiken v. Kilburne*, 27 Me. 252.

4. *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599; *Wheeler v. Hill*, 16 Me. 329.

And declarations made to an attorney with reference to his employment in the cause, fall under the same privilege, although the attorney declines the engagement. *Sargent v. Hamden*, 38 Me. 581.

5. *Bunbury v. Bunbury*, 2 Beav. 173; *Reid v. Langlois*, 1 M. & G. 627; *Russell v. Jackson*, 9 Hare 387; *Lafone v. Falkland Islands Co.*, 4 K. & J. 34; *Original Hartlepool Collieries Co. v. Moon*, 30 L. T., N. S. 585; *Hooker v. Gumm*, 2 John. & H. 602; *Page v. Ward*, 17 W. R. 435.

Letters relating to the subject-matter of a suit written by the defendant's solicitor to the defendant's agent are not protected from production unless they were written with reference to the dispute between the parties to the suit, and with a view to the defense of the suit. *Original Hartlepool Collieries Co. v. Moon*, 30 L. T., N. S. 585. *Compare Wilson v. Northampton etc. R. Co.*, 14 L. R. Eq. 477.

6. *Steele v. Stewart*, 1 Ph. 471; 14

The privilege extends to the attorney's clerk,¹ interpreter,² assistant attorney, or other agent, while in the discharge of his duty; and it covers confidential communications made to him or in his presence or hearing, if made for the purpose of advice or assistance, by the client of the attorney or counselor, as where it is made to an attorney's clerk to enable him to prepare a complaint or other paper.³ The privilege has also been held to extend to a scrivener appointed to raise money,⁴ or a conveyancer employed to draw deeds.⁵ So counsel consulted as to family or other arrangements without reference to litigation are placed under the same restrictions.⁶ A lawyer's executor has also been considered privileged;⁷ but not an ordinary business agent whom the client consults, and who is neither a lawyer nor represents a

L. J., N. S. Ch. 34; Weeks on Attys. 161; Chant v. Brown, 9 Hare 790; Lafone v. Falkland Islands Co., 4 K. & J. 34; Mills v. Oddy, 6 C. & P. 731; Taylor v. Forester, 2 C. & P. 195; Goodell v. Little, 1 Sim., N. S. 155; Walker v. Wildman, 6 Madd. 47; Ross v. Gibbs, L. R., 3 Q. B. 91; Brand v. Brand, 39 How. Pr. (N. Y.) 193; Jackson v. French, 3 Wend. (N. Y.) 337; 20 Am. Dec. 699; Fenner v. R. R., L. R., 7 Q. B. 767; Bunbury v. Bunbury, 2 Beav. 173; Parker v. Hawkshaw, 2 Stark. 239; Du Barre v. Livette, Peake R. 77; Carpmeal v. Powis, 9 Beav. 16; Sibley v. Waffle, 16 N. Y. 180; Burtros v. White, L. R., 1 Q. B. 423; Walsham v. Stainton, 9 L. T., N. S. 603; Jenkins v. Bushby, 35 L. J. Ch. 820; Churton v. Frewen, 2 D. & Sm. 390; Hooker v. Gumm, 2 J. & H. Eng. Ch. 662.

The agent of defendant's attorney cannot be examined as to communications with the defendant on the subject of the action in order to prove his identity. Parkins v. Hawkshaw, 2 Stark. 239.

1. Foster v. Hall, 12 Pick. (Mass.) 93; 22 Am. Dec. 400; Du Barre v. Livette, Peake R. 77; Taylor v. Foster, 2 C. & P. 195; Wilson v. Rastall, 4 T. R. 756; Jackson v. French, 3 Wend. (N. Y.) 337; 20 Am. Dec. 699; Andrews v. Solomon, Pet. (C. C.) 356; Chant v. Brown, 9 Hare 790; Wheatley v. Williams, 1 M. & W. 553; Mills v. Oddy, 6 C. & P. 731; Rex v. Upper Bodington, 8 D. & R. 725; Bowman v. Norton, 5 C. & P. 177; Landsberger v. Grorham, 5 Cal. 450; Brayton v. Chase, 3 Wis. 458; Sibley v. Waffle, 16 N. Y. 180.

Communications made by a person

to an attorney in ignorance of his professional character and without any purpose of securing his professional aid, or to a clerk of an attorney, but of which fact the one making them was ignorant, are not privileged. Hawes v. State, 88 Ala. 37.

2. Jackson v. French, 3 Wend. (N. Y.) 339; 20 Am. Dec. 699; Andrews v. Solomon, Pet. (C. C.) 356; Parker v. Carter, 4 Munf. (Va.) 273; 6 Am. Dec. 513; Brayton v. Chase, 3 Wis. 456; Goddard v. Gardner, 28 Conn. 172; Fountain v. Young, 6 Esp. 113; Taylor v. Foster, 2 C. & P. 195; Du Barre v. Livette, Peake 77. See INTERROGATORIES, vol. 11, p. 526.

3. Brand v. Brand, 39 How. Pr. (N. Y.) 193; Jackson v. French, 3 Wend. (N. Y.) 337; 20 Am. Dec. 699; Taylor v. Foster, 2 C. & P. 195; Port & Hayne, 1 C. & P. 545; Boman & Norton, 5 C. & P. 177.

But an attorney's clerk is not privileged from answering whether he has received a particular paper from the client. Eicke v. Nokes, M. & M. 303.

4. 1 Whart. Ev., § 581; Turquand v. Knight, 2 M. & W. 100; Harvey v. Clayton, 2 Swan 221. Compare Coon v. Swan, 30 Vt. 6; De Wolf v. Strader, 26 Ill. 225; 72 Am. Dec. 571.

5. Cromack v. Heathcote, 2 B. & B. 4; Carpmeal v. Powis, 1 Ph. 687; Doe v. Seaton, 2 A. & E. 171; Clay v. Williams, 2 Munf. (Va.) 105; 5 Am. Dec. 453; Getzlaff v. Seliger, 43 Wis. 297. See Tarquand v. Knight, 2 M. & W. 100. Compare Matthews' Estate, 1 Phila. (Pa.) 292.

6. 1 Whart. Ev., § 581.

7. Fenwick v. Reed, 1 Mer. 114; Wharton on Ev., § 582.

lawyer.¹ A law student does not come under the category of clerks, and should a client consult a mere student who is not admitted, even though he erroneously thought the student a practicing attorney, the communications are not privileged.²

g. WHO MAY CLAIM THE PRIVILEGE.—The privilege is that of the client and not of the attorney.³ The client may consent to the admission of the testimony or he may waive the privilege by not claiming it, and when the attorney is called upon to testify by the client, or the consent of the latter is shown, the attorney may be compelled to testify.⁴ A sheriff is entitled to the same privilege in his communication with his attorney as other persons.⁵

h. WHEN PRIVILEGE WAIVED.—At common law as well as under the statutes, the protection given to privileged communications continues forever unless waived by the client.⁶ The client may waive the privilege⁷ but such waiver must be distinct and

1. Weeks on Attys., § 161; *In re Bellis*, 3 Ben. (U. S.) 386; Sample v. Frost, 10 Iowa 266.

It has been held to reach cases in which a person has been consulted under the belief that he was a professional lawyer, although he was not. Calley v. Richards, 19 Beav. 401. And also to cases where the communications were made under the erroneous belief that the party consulted had consented to act as counsel. Smith v. Fell, 2 Curt. (U. S.) 667.

2. Schubkagel v. Dierstein, 131 Pa. St. 46; Holman v. Kimball, 22 Vt. 555; Andrews v. Solomon, Pet. (C. C.) 356; Sibley v. Waffle, 16 N. Y. 180; Landsberger v. Gorham, 5 Col. 450; Barnes v. Harris, 7 Cush. (Mass.) 576; 54 Am. Dec. 734; Fountain v. Young, 6 Esp. 113.

Where a person goes to the office of an attorney at law to obtain professional advice, and there consults a student at law in the office, the communications made by him to the student in the course of such consultation, are not protected from disclosure in court, even if he supposes the student to be an attorney. Barnes v. Harris, 7 Cush. (Mass.) 576; 54 Am. Dec. 734.

3. Parkhurst v. Lowten, 2 Swanst. 216; Gresley v. Mousley, 2 K. & J. 288; Rowland v. Plummer, 50 Ala. 182; Bacon v. Frisbie, 80 N. Y. 394; 36 Am. Rep. 627; Nave v. Baird, 12 Ind. 318; Sleeper v. Abbott, 60 N. H. 162; Tate v. Tate, 75 Va. 522; Bank of Utica v. Mercereau, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189; Wilson v. Rastall, 4 L. R. 753; Herring v. Claberry, 11 L.

J., N. S., Ch. 149; Greenland v. King, 1 Beav. 137; *In re Cameron's Coalbrook R. Co.*, 25 Beav. 1.

4. Benjamin v. Coventry, 19 Wend. (N. Y.) 353; Riddles v. Aikin, 29 Mo. 453; Wood v. Thornby, 58 Ill. 464; Rowland v. Plummer, 50 Ala. 182; Fossler v. Schriber, 38 Ill. 172; Hamilton v. People, 29 Mich. 175; Wilson v. Rostall, 4 T. R. 759; Herring v. Claberry, 1 Ph. 96; Sandford v. Remington, 2 Ves. Jr. 189; Lea v. Wheatley, 20 How. St. Tr. 574; Baillie's Case, 21 How. St. Tr. 341; Merle v. Moore, R. & M. 390.

5. Paxton v. Steckel, 2 Pa. St. 93.

6. Hutton v. Robinson, 14 Pick. (Mass.) 416; 25 Am. Dec. 415; Bank of Utica v. Mercereau, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189; Yordan v. Hess, 13 Johns. (N. Y.) 492; Chase's Case, 1 Bland's Ch. (Md.) 206; 17 Am. Dec. 277; Bacon v. Frisbie, 80 N. Y. 394; 36 Am. Rep. 627; Wilson v. Rastall, 4 T. R. 759; Parker v. Yates, 12 Moore 520; Calley v. Richards, 19 Beav. 401; Marriott v. Anchor Reversionary Co., 8 Jur., N. S. 51. See Moxhay v. Liederwick, 9 Jur. 343.

Compare Charlton v. Combes, 32 L. J. Ch. 284.

7. Alberti v. New York etc. R. Co., 118 N. Y. 77; Thompson v. Ish, 99 Mo. 160; *In re Coleman's Will*, 111 N. Y. 220; Hunt v. Blackburn, 128 U. S. 464; Jones v. State, 65 Miss. 179; Passmore v. Passmore, 50 Mich. 626; 45 Am. Rep. 62; Hamilton v. People, 29 Mich. 184; Chase's Case, 1 Bland Ch. (Md.) 206; 17 Am. Dec. 177; Foster v. Hall, 12 Pick. (Mass.) 89; 22 Am. Dec. 400; Benjamin v. Coventry, 19

unconditional.¹ It is not extinguished by agreement or compromise² or by becoming a witness and testifying in his own behalf.³ Where a party gives evidence in his own behalf, he cannot, on cross-examination, be compelled to divulge statements made by him when consulting, as a client, an attorney at law.⁴ But he may waive the privilege by calling upon the attorney to testify.⁵ Not claiming the privilege may amount to a waiver.⁶

i. ATTORNEY ACTING FOR SEVERAL CLIENTS.—Where the privilege belongs to several clients, it seems that neither one of them, nor even a majority, contrary to the express will of the others, can waive the privilege so as to warrant the attorney in giving testimony in relation to such privileged communications.⁷ So an attorney cannot testify as to what transpired between such

Wend. (N. Y.) 353; *Fossler v. Schriber*, 38 Ill. 172; *Rowland v. Plummer*, 50 Ala. 182; *Duttenhofer v. State*, 34 Ohio St. 91; 32 Am. Dec. 362; *Hatton v. Robinson*, 14 Pick. (Mass.) 416; 25 Am. Dec. 415; *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599; *Sleeper v. Abbott*, 60 N. H. 162; *Oliver v. Cameron*, 4 McArthur (D. C.) 237; *Merle v. Moore, R. & M.* 390; *Baile's Case*, 2 How. St. Tr. 341; *Sea v. Wheatley*, C. B. Pav. 30; *Blenkinsop*, 17 L. J. Ch. 343; *Chant v. Brown*, 7 Hare 79.

It is a rule for the protection of the client, that he may present his case to his counsel in the fullest confidence. If the client waive the privilege, the attorney may testify; otherwise it never ceases. 1 Phil. Evid. 108; 1 Greenl. Evid., § 243; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627.

The client may waive the obligation, and the heir of the client is entitled to the same privilege. *Fossler v. Schriber*, 38 Ill. 172.

Counsel professionally consulted may be required to testify, if the privilege be waived by the party who consulted him, although the interest in the subject-matter of the confidential communication has passed to a third person, who objects to the disclosure. *Benjamin v. Coventry*, 19 Wend. (N. Y.) 353.

1. *Tate v. Tate*, 75 Va. 522.

2. *Hughes v. Garnous*, 6 Beav. 252; *Turney v. Bailey*, 34 Beav. 105.

3. *Jones v. State*, 65 Miss. 179. See *Bigler v. Reyher*, 43 Ind. 112; *Duttenhofer v. State*, 34 Ohio St. 91; 32 Am. Dec. 362; *Barker v. Kuhn*, 38 Iowa 395; *Bobo v. Bryson*, 21 Ark. 387; 76 Am. Dec. 407; *State v. White*, 19 Kan. 445; 27 Am. Rep. 137.

4. *Duttenhofer v. State*, 34 Ohio St. 91; 32 Am. Dec. 362; *Baker v. Kuhn*, 38 Iowa 392; *Alderman v. People*, 4 Mich. 414; 69 Am. Dec. 321; *Oliver v. Pate*, 43 Ind. 132; *Bigler v. Reyher*, 43 Ind. 112; *Hemenway v. Smith*, 28 Vt. 701; *Bobo v. Bryson*, 21 Ark. 387; 76 Am. Dec. 407. In *Massachusetts* the rule is otherwise. See *Woburn v. Henshaw*, 101 Mass. 193; 3 Am. Rep. 333; and so in *Ohio*. *King v. Barrett*, 11 Ohio St. 261; though, in *Ohio*, the statute governs the case. But when one jointly indicted with others, turns State's evidence and attempts to convict others by testimony which also convicts himself, he cannot claim that communications made by himself to his attorney are privileged. *Jones v. State*, 65 Miss. 179.

5. *Smith v. Crego*, 54 Hun (N. Y.) 22; *Fassler v. Schriber*, 38 Ill. 172; *Benjamin v. Coventry*, 19 Wend. (N. Y.) 353; *Riddles v. Alkin*, 29 Mo. 453; *Crittenden v. Strother*, 2 Cranch (C. C.) 464.

If the client examines his attorney as to the communications, he waives his privilege and the attorney is bound to testify upon cross-examination. *Vailant v. Dodemead*, 2 Atk. 524; *Waldron v. Ward*, Style 449; *Bate v. Kinsey*, 1 C. M. & R. 38.

6. *Weeks v. Attys.*, § 177; *Hunter v. Capron*, 5 Beav. 93; *Thomas v. Rawlings*, 27 Beav. 140; *Walsh v. Trevannion*, 15 Sim. 577; *Dartmouth v. Holdsworth*, 10 Sim. 476.

7. *Bank of Utica v. Mercereau*, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189; *Whiting v. Barney*, 38 Barb. (N. Y.) 393; *Chahoon v. Com.*, 21 Gratt. (Va.) 822; *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495; *Robson v. Kemp*, 4 Esp. 233; *McLellan v. Longfellow*, 32

parties and a third person, unless all the parties for whom he acted consent.¹ Nor can an attorney be permitted to testify what his client told him before action brought that he intended to waive the forfeiture on which the action is founded.²

j. NEGOTIATIONS RESPECTING THE SALE OR MORTGAGE OF PROPERTY.—The privilege of communications between solicitor and client extends to all matters within the scope of the ordinary duties of a solicitor, and the sale of estates being of such matters, a solicitor is not at liberty to disclose what passed in conversations which he had either with the client or the agent of the client, relative to the amount of the bidding to be reserved upon the sale of an estate in which he had been concerned for him, or to other matters connected with such sale.³ But the privilege does not extend to declarations made to one employed merely to prepare a mortgage.⁴ So what a mortgagor in a treaty to raise money says to the attorney is not a privileged communication.⁵

k. ADMISSIONS addressed to an attorney in order to elicit a legal opinion from him touching the rights of the parties, as between themselves, are entitled to the protection accorded to com-

Me. 494; 54 Am. Dec. 599; Strode v. Seaton, 2 A. & E. 171; People v. Barker, 56 Ill. 299.

1. Micheal v. Foil, 100 N. Car. 178.

2. Goodlight v. Bridge; Laff 27.

3. Carpmacel v. Powis, 1 Ph. 687; Mynn v. Joliffe, 1 M. & Rob. 326. See Barry v. Coville, 53 Hun (N. Y.) 620.

4. Machette v. Wanless, 2 Colo. 169; Prouty v. Eaton, 41 Barb. (N. Y.) 409.

Statements by the purchaser of mortgaged property to an attorney whom he had employed to draw the conveyance, and whom he wished to retain "to keep the mortgage alive," but who declined that employment, are not privileged. Theisen v. Dayton (Iowa 1891), 47 N. W. Rep. 891.

5. Marston v. Downs, 4 N. & M. 861.

A took a forged will to B, a solicitor, and asked him to advance money on a mortgage of the property mentioned in the will. B made no charge for the interview, and did not advance the money. Held, not a privileged communication. Reg v. Farley, 1 Den. C. C. 197; 2 C. & K. 313.

Assignment of Mortgage.—Communications of the object for which an assignment of a mortgage was made, to a counsel concerned for the assignee, on the distribution of the proceeds of the mortgaged premises, are privileged al-

though no question then arose as to the object of the assignment, and the counsel considered the communications in the light of a casual conversation. Moore v. Bray, 10 Pa. St. 519.

An attorney-at-law employed to draw an assignment of a mortgage, acts as an attorney and not as a notary merely; and the court should not permit him as a witness to testify against his client as to disclosures made to him by the latter in the course of such employment. Getzlaff v. Seliger, 43 Wis. 297.

Ejectment.—A applied to B, an attorney, to raise money upon certain property, and enabled him to obtain an abstract of the title and compare it with the original, but the money was never raised. In an ejectment, B was called upon to produce the abstract as secondary evidence of an original deed stated therein. Held, that A's communication was confidential, and that B's evidence was therefore inadmissible. Doe v. Watkins, 4 Scott 155.

Foreclosure of Mortgage.—Where a solicitor who had been employed to foreclose a mortgage was asked as a witness before an examination, whether he had received any instructions from the complainants, his clients, as to the sale thereunder and the amount to be bid, he was excused from answering. Stuyvesant v. Peckham, 3 Edw. Ch. (N. Y.) 579.

munications made to an attorney in professional confidence, and are therefore privileged.¹

l. PROFESSIONAL ADVISERS OF STRANGERS TO THE SUIT.—The rule extends to the professional advisers of strangers to the suit,² as for instance to disclosures in regard to the contents of title-deeds of strangers when the deeds are confidentially deposited.³

m. DEFECTIVE MEMORY.—Privileged communications made to counsel should not be allowed to be disclosed on the grounds that owing to defective memory of the witness, he cannot positively state whether they were privileged or not.⁴

n. COMMUNICATIONS NOT PRIVILEGED.—(1) *Generally.*—Communications made by a client where the relation of attorney and client does not exist, are not privileged.⁵ So with communications that do not come within the peculiar scope of the lawyer's

1. *Bowers v. Briggs*, 20 Ind. 139; *Borum v. Fouts*, 15 Ind. 50; *Pearsall v. Elmer*, 5 Redf. (N. Y.) 181.

A, who was a foreigner unacquainted with the English language, being about to sue B for a debt, engaged C to act as her agent and interpreter in stating the case to attorneys, in order to employ them to bring the suit. Suit having been brought and C having sworn to an admission made to him by B of his indebtedness to A, B (having first laid the proper foundation for the question), offered to prove by said attorney that C in his statement of the case to them had said that he had never heard such admission. The attorney having declined to answer the question, held that the evidence was inadmissible. *Maas v. Bloch*, 7 Ind. 202. Where by the admissions of a party, a champertous contract was established between him and his attorney, it was held that such attorney was not a competent witness to prove the falsity of his client's statements, and that no such contract was entered into. *Dowell v. Dowell*, 3 Head (Tenn.) 502.

2. *Soloman v. Horne*, 2 Esp. 696; *Merle v. Moore*, R. & M. 390; *Bowman v. Norton*, 5 C. & P. 177; *Rex v. Withers*, 12 Camp. 578. See *Chant v. Brown*, 12 Eng. L. & E. 299; *Higgs v. Taylor*, 1 C. & K. 85.

3. *Weeks on Atty's*, § 172.

4. *People v. Atkinson*, 40 Cal. 284.

5. *Sharon v. Sharon*, 79 Cal. 636; *Althouse v. Wells*, 40 Hun (N. Y.) 336; *Wilson v. Godlove*, 34 Mo. 337; *Lynde v. McGregor*, 13 Allen (Mass.) 172; 90 Am. Dec. 188; *Fulton v. Macracken*, 18 Md. 528; 81 Am. Dec. 620;

Pitchard v. Roe, 8 C. & P. 99; *Shore v. Bedford*, 5 M. & G. 271; *Brayton v. Chase*, 3 Wis. 456; *Williams v. Benton*, 12 La. Ann. 91; *Tucker v. Finch*, 66 Wis. 17; *Sharman v. Morton*, 31 Ga. 34; *Clark v. Richards*, 3 E. D. Smith (N. Y.) 89; *Hall v. Rixey*, 84 Va. 790; *State v. Gleason* (Oregon 1890), 23 Pac. Rep. 817; *Martin v. Platt*, 51 Hun (N. Y.) 429; *Piano Mfg. Co. v. Frawley*, 68 Wis. 577.

The employment of an attorney in an action will not exempt him from testifying to any communication made to him by his client previous to the employment. *Harris v. Daugherty*, 74 Tex. 1.

Communications voluntarily made to counsel after he has refused to be employed by the party making them are not privileged. *Setzar v. Wilson*, 4 Ired. (N. Car.) 501.

Where an attorney is applied to as a friend and acts as a friend, he may be required to disclose the communications made to him. *Goltra v. Wolcott*, 14 Ill. 89; *Hoffman v. Smith*, 1 Cai. (N. Y.) 157; *Borum v. Fouts*, 15 Ind. 50; *Thompson v. Kilborne*, 28 Vt. 750; *Cady v. Walker*, 62 Mich. 157; and where the attorney for a county official sues his principal for money paid to his use in satisfying his bond to the public, the testimony of the prosecuting attorney is not privileged if he obtained his information as the law officer of the county, and as a member of a committee appointed to obtain a surrender of the principal's property in settlement of his liabilities to the public. *Lange v. Perley*, 47 Mich. 352.

So where disputes arise between two *cestuis que trustent* in respect of the

duty and profession,¹ where they have no element of confidence in them of which the attorney is competent to testify,² where no

trust matters and the trustee acts as solicitor for one, communications between such solicitor and *cestui que trust*, are not privileged as against the other. *Tugwell v. Hooper*, 10 Beav. 348; *Pritchard v. Foulkes*, C. P. C. 14.

1. *Brown v. Jewett*, 120 Mass. 215; *Johnson v. Davenport*, 19 Johns. (N. Y.) 134; 10 Am. Dec. 108; *Bramwell v. Lucas*, 2 B. & C. 86; *Rex v. Leveson*, 11 Cox C. C. 152; *Carpmeal v. Powis*, 1 Ph. 687; *Brown v. Foster*, 1 H. & N. 736; *Goodall v. Little*, 20 L. J. Ch. 132; *Wheatley v. Williams*, 1 M. & W. 533; *Jones v. Goodrich*, 5 Moore P. C. 16; *Desborough v. Rawlins*, 3 Myl. & C. 515; *Smith v. Daniel*, L. R., 18 Eq. 649; *Clark v. Richards*, 3 E. D. Smith (N. Y.) 89; *Pierson v. Steortz*, Morr. (Iowa) 36; *Studdy v. Sanders*, 2 D. & R. 347; *Doe v. Andrews*, 2 Cowp. 846; *Hurd v. Moring*, 1 C. & P. 372; *Ramsbotham v. Senior*, L. R., 8 Eq. 575; *Ex parte Campbell*, L. R., 5 Ch. App. 703; *Gillard v. Bates*, 6 M. & W. 547; *Annesley v. Anglesea*, 11 How. St. Tr. 1220.

2. *Chapman v. Peebles*, 84 Ala. 283; *Johnson v. Patterson*, 13 Lea (Tenn.) 626; *Milan v. State*, 24 Ark. 346; *Rogers v. Dare*, *Wright* (Ohio) 136; *Rhoades v. Selin*, 4 Wash. (U. S.) 718.

Wills.—An attorney who drew a will may testify on its probate to what transpired between the testator and himself in the course of its preparation and publication. *In re Austin*, 42 Hun (N. Y.) 516.

Communications Relating to Contracts.—Directions by a client to his attorney to make a certain contract, were held after its execution not to constitute a privileged communication. *Burnside v. Terry*, 51 Ga. 186. See *Northampton etc. R. Co.*, 20 W. R. 938.

Where two contracting parties employ an attorney to draw up their contract, and make their communications to him in the presence of each other, each thereby waives as against the other his right to treat those communications as confidential, and each is entitled in asserting his rights under the contract to a disclosure of its stipulations from the attorney. *Parish v. Gates*, 29 Ala. 254; *Whiting v. Barney*, 30 N. Y. 330; *Warde v. Warde*, 5 Eng. L. & Eq. 217.

Deeds.—Communications made to an attorney in the course of his employment as a scrivener to draw a deed, are not privileged. *Caldwell v. Davis*, 10 Colo. 481. See *Brazee v. Fair*, 26 S. Car. 370; *Mutual L. Ins. Co. v. Corey*, 54 Hun (N. Y.) 493; *Sheldon v. Sheldon*, 58 Hun (N. Y.) 601.

Whether a deed drawn by an attorney for his client was written subsequent to the day of its date and after a certain suit, was held to be a question of fact and not privileged. *Rundle v. Foster*, 3 Tenn. Ch. 658.

Instructions by a grantor to an attorney drawing a deed are not ordinarily privileged communications. If the grantor had instructed the attorney to make the conveyance to the grantee in trust, it would be competent for the attorney to testify to that fact. *Todd v. Munson*, 53 Conn. 579.

In *Hebbard v. Haughian*, 70 N. Y. 54, it was held that an attorney who was employed to draw a deed is competent to testify as to the directions received by him from the parties and as to the transactions between them at the time, and that knowledge acquired under such circumstances is not within the class of privileged communications. Compare *Gruber v. Baker*, 20 Nev. 453; *Barry v. Coville*, 53 Hun (N. Y.) 620.

An attorney for a trust estate was employed to draw a deed from the trustee to the *cestui que trust* and a mortgage back. Held, that the statements made in his presence by one to the other, were not privileged. *Moffatt v. Hardin*, 22 S. Car. 9.

Garnishment.—See GARNISHMENT, vol. 8, p. 1205.

Impeachment of Witness.—For the purpose of impeaching a witness, a prosecuting attorney may be compelled to testify as to a statement made by the witness before the grand jury. This is not a privileged communication. *State v. Van Buskirk*, 59 Ind. 384.

Indorsement of Drafts.—A and B employed an attorney to prepare a paper authorizing C to indorse their drafts and receive the money. In a suit brought by A against C to recover the proceeds of a draft, it was held that the attorney might testify that in a conversation had in his office between A and

legal advice is given,¹ or where they do not relate to the subject-matter of the consultation.² Communications made by one party to a mutual attorney for the purpose of being forwarded to the other party, are not privileged,³ and where persons employ an

B, C not being present, it was agreed to give C the drafts as his own. *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570; *Cady v. Walker*, 62 Mich. 157.

Interrogatories.—The statute, by which attorneys were prohibited from giving testimony for or against their clients, does not include proving service of notices, interrogatories and such matters which could be proved by the client himself. *Rogers v. Hoskins*, 15 Ga. 270; *Collins v. Johnson*, 16 Ga. 458.

Where interrogatories were addressed to an attorney, to ascertain who was his client, when that relationship commenced and ended, and what money had been received, and what paid over, and to whom paid, it was held that none of these matters were privileged communications within the meaning of article 2262 of the *Louisiana* Civil Code. *Shaughnessy v. Fogg*, 15 La. Ann. 330.

The service of a copy of interrogatories upon an attorney is not such "a matter or thing acquired from his client, or during the existence and by reason of the relationship of client and attorney," under the St. of 1850, as to be regarded as a confidential communication. *McDougald v. Lane*, 18 Ga. 444.

Non-feasance of Officer.—So an attorney of record in a former suit is competent to testify, in an action against an officer for not seizing goods on an execution, that he delivered the execution to the officer within thirty days after rendition of judgment in the suit in which he was attorney. *Phillips v. Bridge*, 11 Mass. 242.

Note.—An admission made by a party to an attorney relative to his liability on a note, is not privileged. *Plano Mfg. Co. v. Frawley*, 68 Wis. 577.

1. *Marsh v. Howe*, 36 Barb. (N. Y.) 649; *Alderman v. People*, 4 Mich. 414; 69 Am. Dec. 321; *Flack v. Neill*, 26 Tex. 273; *Lynde v. McGregor*, 13 Allen (Mass.) 172; 90 Am. Dec. 188; *Bramwell v. Lucas*, 4 D. & R. 367; *DeWolfe v. Strader*, 26 Ill. 225; 72 Am. Dec. 371; *Hatton v. Robinson*, 14 Pick. (Mass.) 416; 25 Am. Dec. 415; *Chew v. Farmers' Bank*, 2 Md. Ch. 231; *Milan v. State*, 24 Ark. 346; *Pierson v. Steortz*, 1 Morr. (Iowa) 136; *Rogers v.*

Dare, Wright (Ohio) 136; *Beeson v. Beeson*, 9 Pa. St. 279; *Braden v. Gowling*, 7 Rich. (S. Car.) 459.

An attorney who is merely employed to draw up the necessary papers to consummate a contract to which the parties had agreed, no legal advice being asked or required, is not privileged, and may testify as to what comes to his knowledge in connection with the transaction. *Smith v. Long*, 106 Ill. 485; *Borum v. Fouts*, 15 Ind. 50.

An attorney who is merely employed to draw a deed or mortgage without giving any legal advice in regard thereto, cannot decline to testify to statements made by his employer, on the ground that they are privileged communications. *De Wolf v. Strader*, 26 Ill. 225; 72 Am. Dec. 371.

A debtor requested an attorney at law to draw up a mortgage of his personal property, and disclosed the purpose of the transaction, but neither asked nor received any legal advice as to its effect. Held, that the attorney's testimony as to such disclosure was admissible. *Hatton v. Robinson*, 14 Pick. (Mass.) 416; 25 Am. Dec. 415.

2. *State v. Mewherter*, 16 Iowa 88; *Riggs v. Denniston*, 3 Johns. Cas. (N. Y.) 198; 2 Am. Dec. 145; *Pierson v. Steortz*, 1 Morr. (Iowa) 136; *Mandeville v. Guernsey*, 38 Barb. (N. Y.) 225; *De Witt v. Perkins*, 22 Wis. 473; *Cobden v. Kendrick*, 4 T. R. 431; *Gillard v. Bates*, 6 M. & W. 547.

Statements made by an attorney are not privileged, merely because the attorney has at different times transacted business for the party making the statements, they not being made in reference to any business that he was then transacting, nor in connection with professional employment. *Carroll v. Spragne*, 59 Cal. 655; *Rice v. Rice*, 14 B. Mon. (Ky.) 335; *De Witt v. Perkins*, 22 Wis. 473; *Com. v. Goddard*, 14 Gray (Mass.) 402; *Waldo v. Beckwith*, 1 N. Mex. 97.

3. *White v. State*, 86 Ala. 69; *Hughes v. Boone*, 102 N. Car. 137; *Michael v. Foil*, 100 N. Car. 178; *Perry v. Smith*, 9 M. & W. 681; *Spencely v. Schulenburg*, 7 East 357; *Baugh v. Pradocke*, 1 M. & R. 182; *Desborough v. Raw-*

attorney in the same business, communications made by them in pursuance of such common retainer are not privileged *inter sese*.¹ So the attorney is bound to testify, like any other witness, to statements made by the client to other persons, or by other persons to the client, or to each other in his presence.² Where both parties are present declarations to an attorney are not privileged communications.³ Nor does the rule of privilege, protecting confidential communications, extend to communications between the solicitors of opposite parties.⁴

Communications made by a party to a suit to an attorney to be communicated to the adverse party are not privileged.⁵ So communications made by persons other than the client, are not

lins, Myl. & C. 515; *Cady v. Walker*, 62 Mich. 157; *Bartlett v. Bunn*, 56 Hun (N. Y.) 507.

Compare *Eadie v. Addison*, 52 L. J. Ch. 81.

Communications made by the plaintiff's assignor in trust for creditors, in the presence of the defendant, to the attorney employed to draw the papers between them were held not privileged. *Britton v. Lorenz*, 45 N. Y. 52.

1. *Gulick v. Gulick*, 39 N. J. Eq. 516; *Sherman v. Scott*, 27 Hun (N. Y.) 331; *Cady v. Walker*, 62 Mich. 157; *Haulon v. Doherty*, 109 Ind. 37; *Goodwin Gas Stove etc. Co.'s Appeal*, 117 Pa. St. 514; *Doe v. Watkins*, 3 Bing. N. Cas. 421; *Reg. v. Farley*, 2 C. & K. 318; *Rex v. Boddington*, 8 D. & R. 726; *Baugh v. Cradocke*, 1 M. & Rob. 182; *Cleeve & Powell*, 1 M. & Rob. 228; *Perry v. Smith*, 9 M. & W. 681; *Sael v. Carr*, C. & M. 123; *In re Ubadell*, 27 L. T., N. S. 460; *Carr v. Weld*, 19 N. J. Eq. 319; *Greenl. Ev.*, § 239 a; 1 Whart. on Ev., § 587; *Warde v. Warde*, 3 M. & G. 365; *Rice v. Rice*, 14 B. Mon. (Ky.) 335; *Robson v. Kemp*, 4 Esp. 235.

Compare *Reg. v. Avery*, 8 C. & P. 596; *Fylney*, 18 L. J., M. C. 37.

Where an attorney is the legal adviser of both the parties to an action, communications from each received in the presence of the other in reference to papers being prepared at the instance of both, are not privileged. *Goodwin Gas etc. Co.'s Appeal*, 117 Pa. St. 514; *Parish v. Gates*, 29 Ala. 254; *Warde v. Warde*, 5 Eng. L. & Eq. 217; *Whiting v. Barney*, 30 N. Y. 330; *Shore v. Bedford*, 5 M. & G. 271; *Reynolds v. Sprye*, 10 Beav. 51; *Earle v. Grout*, 46 Vt. 113; *Hatton v. Robinson*, 14 Pick. (Mass.) 416; 25 Am. Dec. 415; *Corbett v. Gilbert*, 24 Ga. 454.

A lawyer was employed by the defendant to draw a deed for lands from him to a third party, and one from the third party to defendant's wife, and also a declaration of trust from her to the defendant. The first deed and the declaration of trust were duly executed on the same day, but the second deed was not executed until some time afterwards. The lawyer then advised that a new declaration of trust should be given by the wife, which was done. In a controversy between the husband and his wife over the new declaration of trust, the lawyer was called as a witness by the wife to testify as to what was said by the parties to those transactions, and objection was made to his testimony on the ground that what was said to him by the husband was privileged. *Held*, that the objection could not be maintained. *Gulick v. Gulick*, 39 N. J. Eq. 516.

2. *Hughes v. Boone*, 102 N. Car. 137; *Gallagher v. Williamson*, 23 Cal. 331; *Griffith v. Davis*, 5 B. & A. 503; *Repon v. Davis*, 2 N. & M. 210; *Turner v. Bailton*, 2 Esp. 274; *Desborough v. Rawlins*, 3 Myl. & C. 515; *Jackson v. French*, 3 Wend. (N. Y.) 337; 20 Am. Dec. 699; *Goddard v. Gardner*, 28 Conn. 172; *Mobile etc. R. Co. v. Yeates*, 67 Ala. 164; *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570.

3. *Colt v. McConnell*, 116 Ind. 249; *In re Bauer's Estate*, 79 Cal. 304; *Cady v. Walker*, 62 Mich. 157; *Smith v. Crego*, 54 Hun (N. Y.) 22; *Dikeman v. Arnold*, 78 Mich. 455; *Goodwin's Gas etc. Co.'s Appeal*, 117 Pa. St. 514.

4. *Gore v. Harris*, 2 Eng. L. & Eq. 147.

5. *Henderson v. Terry*, 62 Tex. 281; *Ripon v. Davies*, 2 N. & M. 310.

privileged.¹ Professional communications are not privileged when such communications are for an unlawful purpose, having for their object the commission of a crime.² So a witness may be asked whether he had been retained by a party as counsel or attorney.³ He may prove matters which occurred on the trial in open court against his client, as for instance, what title was in question therein.⁴ So he may testify as to acts which have come to his knowledge by being done in his presence, though he was present in consequence of his engagement as counsel.⁵ And an at-

1. *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Randolph v. Quidnick Co.*, 23 Fed. Rep. 278; *Perkins v. Guy*, 55 Miss. 153.

This is the rule even where the client has given the same information. *Marsh v. Keith*, 1 D. & S. 342; *Lewis v. Pennington*, 20 L. J. Ch. 670; *Davies v. Waters*, 9 M. & W. 611; *Follett v. Jefferyes*, 1 Sim., N. S. 3; *Greenough v. Gaskell*, 1 Myl. & K. 104; *Mackenzie v. Yeo*, 2 Curt. (U. S.) 866; *Crosby v. Berger*, 11 Paige (N. Y.) 377; 42 Am. Dec. 117; *Howard v. Copely*, 10 La. Ann. 504; *Chillicothe Ferry etc. Co. v. Jameson*, 48 Ill. 281; *Thompson v. Wilson*, 29 Ga. 539; *Hatton v. Robinson*, 14 Pick. (Mass.) 416; 25 Am. Dec. 415.

2. *Hughes v. Boone*, 102 N. Car. 137; *People v. Van Alstine*, 57 Mich. 69; *Dudley v. Beck*, 3 Wis. 274; *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189; *Graham v. People*, 63 Barb. (N. Y.) 483; *People v. Sheriff*, 29 Barb. (N. Y.) 622; *People v. Mahon*, 1 Utah 205; *Orman v. State*, 22 Tex. App. 604; 58 Am. Rep. 662; *Coveney v. Fannahill*, 1 Hill (N. Y.) 33; 27 Am. Rep. 287; *People v. Blakeley*, 4 Park. Cr. (N. Y.) 176; *Reg. v. Brewer*, C. & P. 363; *Charlton v. Coombs*, 32 L. J. Ch. 289; *Rex v. Farley*, 1 Den. C. C. 197; *Reg. v. Jones*, 1 Den. C. C. 166; *Bank v. Rich*, 32 L. J., Q. B. 300; *Blight v. Goodliffe*, 18 C. B., N. S. 757; *Goodman v. Holroyd*, 15 C. B., N. S. 839; *Gore v. Bowser*, 5 De G. & S. 30; *Mornington v. Mornington*, 2 Johns. & H. 697; *Annesley v. Angelsea*, 17 How. St. Tr. 1139; *State v. Douglass*, 20 W. Va. 770; *Russell v. Jackson*, 9 Hare 387; *Reg. v. Avery*, 8 C. & P. 596; *Clay v. Williams*, 2 Munf. (Va.) 105; 5 Am. Dec. 453. See also *Tyler v. Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642.

An attorney may be ordered to be examined against his client in case of fraud. *Cutts v. Pickering*, 3 Ch. Rep.

66; *Gore v. Bowser*, 5 De G. & S. 30; *Gore v. Harris*, 21 L. J., N. S. Ch. 10; *Hawkins v. Gathercole*, 1 Sim., N. S. 150; *Gresley v. Mousley*, 2 K. & J. 288; *Reynell v. Sprye*, 11 Beav. 618; *Kelley v. Jackson*, 13 Ir. Eq. R. 129; *Gartside v. Outram*, 3 Jur., N. S. 39; *Flaver v. Williams*, 11 Jur., N. S. 902; *Russell v. Jackson*, 9 Hare 389.

Communications for an unlawful purpose "partake of the nature of a conspiracy, or attempted conspiracy, and it is not only lawful to divulge such communications, but under certain circumstances it might become the duty of the attorney to do so. The interest of public justice require that no such shield from merited exposure shall be interposed to protect a person who takes counsel how he can safely commit a crime. The relation of attorney and client cannot exist for the purpose of counsel in concocting crimes. The privilege does not exist in such cases." *People v. Van Alstine*, 57 Mich. 69.

3. *White v. State*, 86 Ala. 69; *Hampton v. Boylan*, 46 Hun (N. Y.) 151; *Mobile etc. R. Co. v. Yeates*, 67 Ala. 164; *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280; *Sattilee v. Bliss*, 36 Cal. 489; *Reindecker v. Waldron*, 52 Ill. 283; *Gower v. Emery*, 18 Me. 79; *Brigham v. McDowell*, 19 Neb. 407; *Levy v. Pope*, M. & M. 410; *Forshaw v. Lewis*, Jur., N. S. 263.

It is not an error to permit an attorney, as a witness, to answer a question, the object of which was merely to ascertain whether the relation of attorney and client actually existed, not what was disclosed to him in that relation. Such question calls for no breach of professional confidence. *Leindecker v. Waldron*, 52 Ill. 283.

4. *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280.

5. *Patten v. Moor*, 29 N. H. 163. See *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543.

torney may testify as to the handwriting of his client, if a knowledge thereof is acquired without any communication from him.¹ He may be asked to supply the predicate for secondary evidence of a deed, whether he or the client has the deed.² An attorney may be asked whether his client signed a bail bond,³ whether a note put into his hands for collection was indorsed or not,⁴ and whether he has a paper in court relating to the cause, in order that a notice to produce it immediately may be a sufficient and reasonable notice.⁵ An attorney who has appeared for a party without authority is a competent witness to prove that fact.⁶ And also to prove the execution of a power to himself, where he appears under a power.⁷

(2) *Compromises and Agreements.*—A party may call an attorney to prove an offer of compromise by him on the part of his client.⁸ So agreements made in the presence of an attorney between his client and the opposite party, are not privileged communications.⁹

If an attorney were present when his client was sworn to answer, he might be a witness on an indictment for perjury, to prove the fact of taking the oath, it not being a fact peculiarly within his knowledge as an attorney, and not communicated to him in secrecy. *Jupp v. Andrews*, Cowp. 846. See *Duffin v. Smith*, Peake 108. So the attorney may testify as to the identity of parties, though except from his intercourse with them professionally, he would know nothing of them. *Hurd v. Moring*, 1 C. & P. 372; *Beckwith v. Benner*, 6 C. & P. 681; *Eicke v. Nokes*, M. & M. 303; *Study v. Sanders*, 3 D. & R. 347; *Rex v. Watkinson*, 2 Strange 1122.

1. *Johnson v. Daverne*, 19 Johns. (N. Y.) 134; 10 Am. Dec. 198; *Chant v. Browne*, 12 Eng. L. & Eq. 299; *Hurd v. Moring*, 1 C. & P. 372; *Coates v. Birch*, 2 Q. B. 252; *Bevans v. Waters*, M. & M. 235.

An attorney cannot be compelled to testify whether or not a certain guaranty written above the payee's name and in a different handwriting on the back of a note, was there when placed in his hands for collection. *Dietrich v. Mitchell*, 43 Ill. 40; 92 Am. Dec. 99.

2. *Zabel v. Schroeder*, 35 Tex. 308; *Weeks on Atty's*, § 171. See *Cutts v. Pickering*, 1 Vent. 197.

3. *Hurd v. Moring*, 1 C. & P. 345.

4. *Baker v. Arnold*, 1 Cai. (N. Y.) 258; *Weeks on Atty's*, § 171.

5. *Weeks on Atty's*, § 171; *Rhoades v. Selin*, 4 Wash. (U. S.) 718.

6. *Cox v. Hill*, 3 Ohio 411.

7. *Caniff v. Myers*, 15 Johns. (N. Y.) 246.

8. *Turner v. Railton*, 2 Esp. 474. See *Burchall v. Spottiswoode*, 3 C. & K. 302; *M'Tavish v. Denning*, Anth. (N. Y.) 113; *Yordan v. Hess*, 13 Johns. (N. Y.) 492; *Baugh v. Cradock*, 1 M. & Rob. 182; *Reynell v. Sprye*, 10 Beav. 57; *Perry v. Smith*, 9 M. & W. 681; *Cleve v. Powell*, 1 M. & Rob. 228; *Gulick v. Gulick*, 39 N. J. Eq. 402; *Gainsford v. Grammar*, 2 Camp. 9; *Chickering v. Brooks*, 61 Vt. 554.

A witness may be called upon by the plaintiff to state a conversation, in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as attorney for the defendant. *Griffith v. Davies*, 5 B. & Ad. 502.

A letter from one of the parties, proposing a compromise, is not a privileged communication, if tendered as evidence that a compromise had actually been effected. *Collier v. Nokes*, 2 C. & K. 1012.

Attorney's Clerk.—Where the clerk of the plaintiff's attorney went to the defendant's attorney for the object of effecting a compromise, and what he said was said with the wish of effecting it—*held*, that all that passed was privileged as being a negotiation to bring about a compromise. *Jardine v. Sheridan*, 2 C. & P. 24.

9. *Hughes v. Boone*, 102 N. Car. 137; *Carr v. Weld*, 19 N. J. Eq. 319; *Thayer v. McEwen*, 4 Ill. App. 416; *Parish v. Gates*, 29 Ala. 254; *Whiting v. Barney*, 30 N. Y. 330; *Warde v. Warde*, 5

(3) *Disclosures for Protection of Attorney.*—The general rule that an attorney cannot, as a witness against his client, disclose confidential communications, does not apply where the client sues the attorney for disobeying instructions alleged to have been given in such consultations, and for unskillfully managing a cause upon information given by the client in them.¹

(4) *Cross-Examination of Attorneys.*—Where an attorney is offered as a witness by his client, he cannot claim his privilege on cross-examination.² So an attorney may be compelled on cross-examination by interrogatories, to produce letters relating to the subject-matter, if he does not state that they are confidential.³

(5) *Communications with Third Persons.*—A third person who overhears a confidential communication between an attorney and his client may testify of it.⁴ Or in a dispute between A and B, if the attorney of A has communications with B they are not privileged.⁵

(6) *Testamentary Communications.*—The privilege does not apply to testamentary communications.⁶ In the case of a testamentary disposition, the very foundation upon which the rule

Eng. L. & Eq. 217. See *Weeks v. Argent*, 16 M. & W. 817.

1. *Nave v. Baird*, 12 Ind. 318; *Mitchell v. Bromberger*, 2 Nev. 345; 90 Am. Dec. 550.

2. *Crittenden v. Strother*, 2 Cranch (C. C.) 464; *Vailliant v. Dodemead*, 2 Atk. 524.

3. *Atkinson v. Atkinson*, 2 Adams 469; *Weeks on Attys.*, § 157.

4. *Cotton v. State*, 87 Ala. 75; *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570; *Hoy v. Morris*, 13 Gray (Mass.) 519; 74 Am. Dec. 650; *Greer v. Greer*, 58 Hun (N. Y.) 251; *Mobile etc. R. Co. v. Yeates*, 67 Ala. 164; *Weinstein v. Reid*, 25 Mo. App. 41; *Perkins v. Guy*, 55 Miss. 153; 30 Am. Rep. 510; *Ford v. Tenant*, 9 Jur., N. S. 292; *Bramwell v. Lucas*, 2 B. & C. 743; *Allen v. Harrison*, 30 Vt. 219; *Heaton v. Findlay*, 12 Pa. St. 304; *Sawyer v. Birchmore*, 3 Myl. & K. 572; *In re McCarthy*, 55 Hun (N. Y.) 7.

An attorney's mother-in-law being present at a time when professional communications were made to the attorney, overheard them. *Held*, that she could be required to testify concerning them. *Walker v. State*, 19 Tex. App. 176.

5. *Ford v. Tenant*, 9 Jur., N. S. 292; *Marsh v. Keith*, 6 Jur., N. S. 1182; *Wheeler v. Le Merchant*, 17 L. R., Ch. D. 675; *Page v. Ward*, 20 L. T., N. S. 518.

A communication was made by a

client to an attorney, in the office of the latter, which was in his dwelling house, and in the presence of a son of the attorney, who lived in his family, but who had no connection with the professional business of his father. *Held*, that the communication was not in relation to the son, a privileged one, and that it might be disclosed by his testimony. *Goddard v. Gardner*, 28 Conn. 172.

6. *Russell v. Jackson*, 9 Hare 387; *Scott v. Harris*, 113 Ill. 447; *Blackburn v. Crawford*, 3 Wall. (U. S.) 186; *Sheridan v. Houghton*, 6 Abb. N. Cas. (N. Y.) 234; *Graham v. O'Fallon*, 4 Mo. 338; *In re Austin*, 42 Hun (N. Y.) 516; *Follett v. Jefferyes*, 1 Eng. L. & Eq. 172.

Compare Bennett's Estate, 13 Phila. (Pa.) 331; *Loder v. Whelpley*, 111 N. Y. 239, overruling *Whelpley v. Loder*, 1 Dem. (N. Y.) 368; *Mason v. Williams*, 53 Hun (N. Y.) 398.

On a question of marriage and legitimacy, an attorney who drew a will for the alleged husband now deceased, in which the children of the connection set up as wedlock are described as the "natural children" of the testator, may, without violating professional confidence, testify what was said by the testator about the character of the children and his relations to their mother, in interviews between the testator and himself preceding and connected with the preparation

proceeds seems to be wanting; and, in the absence of any illegal purpose entertained by the testator, there does not seem to be ground for applying it.¹

(7) *Collateral Matters.*—As to collateral matters, the knowledge of which the attorney has acquired by personal observation, and which were not communicated as a secret, or as to such collateral facts which may be material for the other party, and the answer to which does not betray any confidential communication between them, the attorney may be compelled to answer.²

(8) *Disclosing Address of Client.*—The court may compel an attorney bringing suits on behalf of a number of persons as plaintiffs, against one defendant to disclose the names and residences of his clients.³ They may also require him to exhibit his authority to bring the suits.⁴

of the will. (Clifford, J., dissenting.) *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175.

In a suit by next of kin of a testator, challenging a residuary gift made by his will to his executors, on the ground that it was made on a secret trust, for an illegal purpose, which the executors had promised to perform, the court held, that communications had between the testator and the solicitor employed by him to prepare the will, with reference to the will and the trusts thereof, were not privileged; but that communications with reference to the will and the trusts thereof had after the death of the testator, between the solicitor, and the executors who had continued to employ him as their solicitor were privileged. *Russell v. Jackson*, 8 Eng. L. & Eq. 80.

But in *Loder v. Whelpley*, 111 N. Y. 239, it was held that the privilege of physicians and attorneys, given by the code of *New York Civil Proc.*, §§ 834, 835, as to information received in the course of their professional employment applied to proceedings to probate a will could not be waived, after the patient's or client's death, by her executor or any one else.

1. 1 Whart. Ev., § 591.

2. *Wheatley v. Williams*, 2 G. & D. 140; 1 M. & W. 533; *Brandt v. Klien*, 17 Johns. (N. Y.) 335; *Johnson v. Davenport*, 19 Johns. (N. Y.) 134; 10 Am. Dec. 198; *Coates v. Birch*, 2 Q. B. 252; *Bevans v. Waters*, M. & W. 235; *Hurd v. Moring*, 1 C. & P. 372; *Bramwell v. Lucas*, 4 D. & R. 367; 2 B. & C. 745; *Levy v. Pope*, M. & M. 410; *Chillicothe Ferry etc. Co. v. Jameson*, 48 Ill. 281; *Morgan v. Shaw*, 4 Madd. 57.

As where the question is about the rasure in a deed or will, the attorney may be asked whether he had ever seen such deed or will in other plight; for that is a fact in his own knowledge; though he is not to discover any confessions made by his client on such head. *Brandt v. Klien*, 17 Johns. (N. Y.) 335.

In *Kingston v. Gale*, Finch 359; 8 Vin. Abr. 548, where there was a bill for a discovery of a deed and the contents of it, in the custody of the defendant who was attorney, and the defendant demurred to the bill, for that he was an attorney at law, and was intrusted by his client with the deed, the court were of the opinion that there ought to be a discovery whether there was such a deed, where the same then was, to whom delivered, and when the defendant last saw the same, and in whose custody; but that he was not to produce the deed, or discover the date or contents of it.

3. *Ninety-nine Plaintiffs v. Vanderbilt*, 1 Abb. Pr. (N. Y.) 193; *McKierman v. Patrick*, 4 How. (Miss.) 333; *West v. Houston*, 3 Harr. (Del.) 15; *Johnston v. Bixby*, 4 B. & Ald. 540; *Gynn v. Kirby*, 1 Strange 402; *Ramsbotham v. Senior*, 8 L. R. Eq. 575; *Worten v. Smith*, 6 J. B. Moore 110; *Com. v. Bacon*, 135 Mass. 521; *Martin v. Anderson*, 21 Ga. 301; *Brown v. Payson*, 6 N. H. 443; *Foster v. Hall*, 12 Pick. (Mass.) 189; 22 Am. Dec. 400; *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 20; 27 Am. Dec. 330.

Compare Braceby v. Dalton, 2 Strange 681.

4. *Ninety-nine Plaintiffs v. Vanderbilt*, 1 Abb. Pr. (N. Y.) 193.

o. DOCUMENTS.—(1) *In General.*—The privilege of an attorney or counselor extends to written instruments held by counsel or attorney on behalf of clients,¹ or to information derived from books or papers shown to the attorney by his client, or placed in his hands in his character of attorney or counsel by such client.² He may testify to the existence of a paper, and that it is in his own possession;³ but not as to its situation or appearance,⁴ in order to enable the opposite party to give parol proof of its contents;⁵ nor is he obliged to produce them, in order that they may be exhibited to a grand jury, or prosecuting officer, on a charge

1. *Dover v. Harrell*, 58 Ga. 572; *Neal v. Patten*, 47 Ga. 73; *Philadelphia Fire Assoc. v. Fleming*, 78 Ga. 738; *In re Caleman's Will*, 111 N. Y. 220; *Wilson v. Troup*, 7 Johns. Ch. (N. Y.) 25; *Jackson v. Burtis*, 14 Johns. (N. Y.) 391; *Kellogg v. Kellogg*, 6 Barb. (N. Y.) 116; *Lynde v. Judd*, 3 Day (Conn.) 499; *Anonymous*, 8 Mass. 370; *Crosby v. Berger*, 11 Paige (N. Y.) 377; 42 Am. Dec. 117; *People v. Benjamin*, 9 How. Pr. (N. Y.) 419; *Hawkins v. Howard*, R. & M. 64; *Blant v. Soyer*, 13 C. B. 231; *Laing v. Barclary*, 3 Stark. 42; *Doe v. James*, 2 M. & Rob. 47; *Selden v. State*, 74 Wis. 271; *Burnham v. Roberts*, 70 Ill. 19.

2. *Crosby v. Berger*, 11 Paige (N. Y.) 377; 42 Am. Dec. 117; *Jackson v. Burtis*, 14 Johns. (N. Y.) 391; *Lynde v. Judd*, 3 Day (Conn.) 499; *Durkee v. Leeland*, 4 Vt. 612; *State v. Hazeton*, 15 La. Ann. 72; *Laring v. Barclay*, 3 Stark. 42; *Voylant v. Soyer*, 13 C. B. 231; *Bargaddie Coal Co. v. Wark*, 3 Macq. Scotch Cas. 468; *Mills v. Oddy*, 6 C. & P. 728; *Mars-ton v. Downes*, 6 C. & P. 381; *Bottomley v. Usborne*, Peake Ad. Cas. 99; *Bate v. Kinsey*, 1 C. M. & R. 38; *Walker v. Wildman*, 6 Madd. 47; *Robson v. Kemp*, 5 Esp. 53; *Jackson v. Denison*, 4 Wend. (N. Y.) 558; *Cook v. Hearn*, 1 M. & R. 201; *Peter v. Watkins*, 3 Bing. (N. Cas.) 421; *Taylor v. Blacklow*, 3 Bing. N. Cas. 235; *Beard v. Ackerman*, 5 Esp. 120; *Crawford v. McKissack*, 1 Port. (Ala.) 433; *Heister v. Davis*, 3 Yeates (Pa.) 4; *Gray v. Fox*, 43 Mo. 570; 97 Am. Dec. 416; *Com. v. Moyer*, 15 Phila. (Pa.) 397; *Newton v. Chaplin*, 10 C. B. 356; *Hughes v. Biddulph*, 4 Russ. 190; *Walsh v. Trevanion*, 15 Sim. 577; *Arnold v. Chesebrough*, 41 Fed. Rep. 74; *Goodall v. Little*, 1 Sim. N. S. 155; *Bluck v. Galsworthy*, 2 Giff. 453. See also *Moats v. Rymer*, 18 W. Va. 642; 41 Am. Rep. 703; *Lawrence v. Campbell*, 4 Drew. 485.

The court will not order the production of confidential communications between solicitor and client which took place either in the progress of the suit or with reference to the suit at its commencement. Confidential communications between attorney or counsel and client anterior to the suit and without reference thereto are not privileged. *Flight v. Robinson*, 8 Beav. 22. See *Thompson v. Falk*, 1 Drew. 21.

3. *Coveney v. Tannahill*, 1 Hill (N. Y.) 33; 27 Am. Dec. 287; *Coates v. Birch*, 2 Ad. & E., N. S. 252; *Bevan v. Waters*, M. & W. 235; *Allen v. Root*, 39 Tex. 589. See *Turquand v. Knight*, 2 M. & W. 98.

The right of an attorney to refuse to disclose matters with which he had become acquainted in the course of his employment as such, does not extend to matters of fact which he knows by any other means than confidential communication with his client, though, if he had not been employed as attorney he probably would not have known them; therefore an attorney of a party to a suit is bound to answer, on a trial, whether a particular document belonging to his client is in his possession, and is then in court. *Dwyer v. Collins*, 7 Exch. 639.

In *Cotman v. Orton*, 9 L. J., N. S. Ch. 268, it was held that a solicitor would not be allowed to disclose in whose possession or custody a particular document is, or when or where he saw the same if he came to the knowledge of the fact inquired after in the course of confidential communications with his client in his professional capacity.

4. *Driggs v. Rockwell*, 11 Wend. (N. Y.) 504; *Wheatley v. Williams*, 1 M. & W. 533.

5. *Coveney v. Tannahill*, 1 Hill (N. Y.) 33; 27 Am. Dec. 287; *Rhoades v. Selin*, 4 Wash. (U. S.) 718; *Brandt v. Klein*, 17 Johns. (N. Y.) 335; *Jackson*

of forgery or fraud against the client.¹ An attorney is neither bound to produce a document nor to answer a question with respect to its nature.² The names, times, or dates contained in a written instrument, though not known from the communication of the client, yet come to the knowledge of the attorney from the delivery of the instrument by his client, are privileged.³ Where it is sworn that documents are confidential communications, relating to the particular suit or to another suit, which though not actually in the matter of the same litigation, involves or embraces the same issue, they are privileged, although they do not directly relate to the particular suit.⁴ An attorney who has in his possession papers which his client could be compelled to produce or disclose, can also be compelled to produce them or testify as to their contents.⁵ But he cannot against the will of his client be compelled to produce them even by a person who has an equal interest in them with the client.⁶ He may be asked whether he has papers of his client in court, and if by his answer,

v. M'Vey, 18 Johns. (N. Y.) 330; *Dwyer v. Collins*, 7 Ex. 639; *Phelps v. Prew*, 3 El. & B. 430; *Wharton on Ev.* § 585.

1. *State v. Squires*, 1 Tyler (Vt.) 147; *Anonymous*, 8 Mass. 370.

2. *Volant v. Soyer*, 16 Eng. L. & Eq. 426; *Dover v. Harrell*, 58 Ga. 572; *Vent v. Pacey*, 4 Russ. 193; *Harvey v. Kirwin*, 7 L. J., N. S. Exch. Eq. 50. An attorney cannot be compelled to produce a will which he holds as attorney for a devisee claiming under it. *Carter v. Larnes*, 2 Moody & R. 47; nor is the attorney for a party bound to state the contents of a document of which he first obtained a knowledge by having read it at the suggestion of his counsel in the course of a consultation in the cause. *Davies v. Water*, 9 M. & W. 608.

An attorney or counsel who, as the attorney or counsel of one of the parties in a cause, has been intrusted with papers by a third person, cannot be called upon by the opposite party to produce these papers in evidence. *Jackson v. Burtis*, 14 Johns. (N. Y.) 391.

But the privilege does not extend to a combination between attorney and client to prevent the court from compelling the production of important papers at the trial. *People v. Sheriff*, 29 Barb. (N. Y.) 622.

3. *Beard v. Ackerman*, 5 Esp. 119; *Bate v. Kinsey*, 6 M. & R. 42; *Jones v. Fugh*, 12 Sim. 470.

4. *Thompson v. Falk*, 15 Eng. L. &

Eq. 56; *Lynde v. Judd*, 3 Day. (Conn.) 491; *Jackson v. Denison*, 4 Wend. (N. Y.) 558; *Walsingham v. Goodricke*, 3 Hare 122.

5. *Andrews v. Ohio etc. R. Co.*, 14 Ind. 169; *Ex parte Maulsby*, 13 Md. 625; *Dwyer v. Collins*, 12 Eng. L. & Eq. 532, and note 537. See *Courtall v. Thomas*, 9 B. & C. 288; *Egremont v. Langdon*, 18 L. J., N. S., Q. B. 17.

6. *Wharton on Ev.*, § 585; *Weeks on Attys.* § 163; *Bargaddie Coal Co. v. Mark*, 3 Macq. S. C. 668; *Volant v. Soyer*, 13 C. B. 231; *Crosby v. Berger*, 11 Paige (N. Y.) 377; 42 Am. Dec. 117; *Lanig v. Barclay*, 3 Stark. 42; *Newton v. Chaplin*, 10 C. B. 356.

Where a practitioner held a paper delivered to him by his client which the grand jury were desirous of seeing, the court held him not bound to produce it. *Anonymous*, 8 Mass. 370.

Deed.—An attorney is not allowed to produce a deed which has been deposited with him confidentially in his professional character; and if the deed has been obtained out of his hands for the purpose of being produced in evidence by another witness, it cannot be received, nor is a copy of such deed so obtained good secondary evidence. *Fisher v. Hemming*, 1 Phil. Ev. 132.

Lease.—A solicitor to a third person is bound to produce his client's lease executed by the defendant, provided the production will not operate to the prejudice of his client. *Copeland v. Watts*, 1 Stark. 95.

which is compulsory, he admits the fact, secondary evidence of their contents may be given if the originals are not produced.¹

(2) *Correspondence Between Attorney and Client.*—The court will not order a defendant to produce letters which passed between himself and his solicitor in the professional relation in the progress of the cause or with reference to it, before it was instituted, or which contained legal advice; as, for an example, a letter having for its object to direct the solicitor to take the opinion of counsel upon the question in dispute.² Copies of telegrams as well as letters sent by clients to their solicitors *ante litem motam*, are privileged.³

(3) *Documents in the Hands of Third Persons.*—If a legal adviser permits his client's papers to pass out of his hands into those of strangers, or if such papers are in any way extracted from his custody, they may be put in evidence by the party by whom they are held as against the client.⁴ If an attorney permits a witness

1. Wharton on Ev., § 585; Weeks on Attys., § 163; Brant v. Klein, 17 Johns. (N. Y.) 335; Phelps v. Prew, 3 El. & B. 430.

2. Philadelphia F. Assoc. v. Fleming, 78 Ga. 733; Garland v. Scott, 3 Sim. 396; Arnold v. Cheesborough, 41 Fed. Rep. 74; Vent v. Parcey, 4 Russ. 193. See Hamilton v. Nott, 16 L. R. Eq. 112; Harvey v. Kirwin, 7 L. J., N. S., Exch. Eq. 50; Walsingham v. Loodriche, 3 Hare 122; Goodall v. Little, 1 Sim., N. S. 155; Knight v. Waterford, 2 Y. & Coll. 37; Hughes v. Garnous, 6 Beav. 352; Boyd v. Petrie, 17 W. R. 903; Call v. Tourle, 19 W. R. 56; Hampson v. Hampson, 26 L. J. Ch. 612; Follett v. Jefferyes, 1 Sim., N. S. 3; Snow v. Gould, 74 Me. 540; 43 Am. Rep. 604; Jenkyns v. Bushby, L. R., 2 Eq. 547; *In re* U. S. v. Six Lots of Ground, 1 Wood (U. S.) 234; *In re* Whittock, 51 Hun (N. Y.) 351.

So as to letters written before suit; but after the dispute arose. Bushnell v. Bushnell, 2 Jur. 774; Minet v. Morgan, 8 L. R. Ch. 361. Compare Page v. Warde, 17 W. R. 435.

Letters which passed between an architect and the solicitor to one of the parties to a suit with regard to building premises, the subject of the suit, are not privileged from production. Page v. Ward, 20 L. T., N. S. 518.

An attorney may be ordered to produce letters received from his client in cases of fraud. Hawkins v. Gathercole, 1 Sim., N. S. 150; Reynell v. Sprye, 11 Beav. 618; Charlton v. Coombs, 4 Giff. 372.

A letter from a client to an attorney, complaining that the latter has betrayed his trust in certain matters, and stating that these facts have been communicated to another lawyer for the purpose of obtaining a settlement with the dishonest attorney, is not one of those confidential communications which the law forbids the attorney to disclose. Laffin v. Herrington, 1 Black (U. S.) 326.

Attorney Acting for Trustee.—In a suit to which trustees were defendants, production was sought of letters which had passed between the trustees and their solicitors with reference to the trust, and of memoranda and instructions to counsel prepared by the solicitors on behalf of the trustees. Some of these documents related to a former suit which had sought to set aside a deed of release impeached in the present suit. None of the documents had been charged to the trust estate. Held, that all these documents were privileged. Bacon v. Bacon, 34 L. T., N. S. 349.

In an action by *cestuis que trustent* against their trustees to compel them to make good a breach of trust, held, that the trustees must produce letters and copies of letters from and to their solicitors in relation to matters in question in the action *ante litem motam*. Talbot v. Marshfield, 2 D. & S. 549, followed *In re* Mason, Mason v. Cattley, 22 L. R., Ch. D. 609.

3. Macfarlan v. Rait, 14 L. R. Eq. 580.

4. Weeks on Attys., § 163; Lloyd v. Mostyn, 10 M. & W. 481; Fisher v.

to see such writings, such witness not being a clerk of the attorney or legal adviser of the client may be called to give secondary evidence of the writings, due notice being first given to produce them on the trial.¹ It is otherwise as to papers passing into the hands of the attorney's agents or representatives, the papers in such hands being entitled to the same protection they enjoyed when in the hands of the attorney.²

(4) *Where Attorney and Client Are Co-defendants* the attorney cannot refuse to produce documents belonging to his client.³

2. To Physician.—a. NATURE OF THE PRIVILEGE.—At common law, confidential communications made by a patient to a physician are not privileged;⁴ but by statutes in the various States, communications made by a patient to his physician or surgeon, and information acquired by him while attending a patient in a professional capacity, and which were important to enable him so to act are protected.⁵ The privilege extends to facts necessary to enable the physician to prescribe, and which are communicated to him for the purpose of enabling him to perform his professional duties.⁶ Such facts are privileged whether learned directly

Henning, 1 Ph. Ev. 170. See *Glyn v. Caulfield*, 3 Macn. & G. 468; *Enthoven v. Coff*, 15 Eng. L. & Eq. 277.

1. *Weeks on Attys.*, § 163; *Lloyd v. Mostyn*, 10 M. & W. 481.

2. *Wharton on Ev.*, § 586; *Weeks on Attys.*, § 163; *Fenwick v. Reed*, 1 Mer. 114; *Hooker v. Gumm*, 2 John & H. 602.

3. *Lockett v. Cary*, 3 N. R. 405; *Gaskell v. Chambers*, 26 Beav. 303. See *Blenkinsopp v. Blenkinsopp*, 2 Ph. 607.

4. *Duchess of Kingston's Case*, 20 How. St. Tr. 643; *Rex v. Gibbons*, 1 C. & P. 97; *Baker v. R. Co.*, L. R., 3 C. P. 91; *Mahoney v. Ins. Co.*, L. R., 6 C. P. 252; *Board v. Pitt*, 3 C. & P. 518; *Campau v. North*, 39 Mich. 606; 33 Am. Rep. 433; *Butler v. Moore*, 1 McNally, 253; *Baker v. Arnold*, 1 Cai. (N. Y.) 258. Compare *Coopey v. R. R.*, L. R. 5 C. & P. 146; *Skinner v. R. R.*, L. R., 9 Ex. 398.

5. *Arkansas Stat.* 1883, p. 625, § 2862; *California Code C. P.* 1885, § 1881; *Colorado G. S.* 1883, p. 1062, § 4; *Dakota Comp. Laws* 1887, p. 910, § 5313; *Idaho R. S.* 1887, p. 679; *Indiana R. S.* 1887, p. 679, § 497; *Iowa Rev. Code*, 1884, p. 860; *Kansas Comp. Laws*, 1885, p. 645, § 323; *Michigan G. S.* 1882, p. 1889, § 7516, § 86; *Minnesota Gen. Stat.* 1881, p. 792, ch. 73, tit. 1, §

10; *Missouri R. S.* 1879, p. 690, § 4017; *Montana Comp. Stat.* 1887, p. 230, Civ. Code, § 650; *Nevada Gen. Stat. G. S.* 1885, p. 833, § 3406, § 84; *New York Code of Civ. Proc.* (4 Rev. Stat., p. 164), § 834; *Ohio Rev. Stat.* 1884, p. 1096, § 5241; *Oregon Gen. Laws* 1872, p. 251; *Utah Comp. Laws* 1876, p. 506; *Washington Code*, 1881, p. 102, § 392; *Wisconsin Rev. Stat.* 1878, p. 992, § 4075; *Wyoming Rev. Stat.* 1887, p. 590, § 2589.

It was said in *Masonic Mut. Ben. Assoc. v. Beck*, 77 Ind. 203; 40 Am. Rep. 295; *Edington v. Mutual L. Ins. Co.*, 5 Hun (N. Y.) 1, that the object of these statutes seems to be to place the communications made to physicians in the course of their professional employment, upon the same footing with communications made by clients to their attorneys in the course of their employment.

6. *Connecticut Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250; *Sloane v. New York Cent. R. Co.*, 45 N. Y. 125; *Dileber v. Home L. Ins. Co.*, 69 N. Y. 256; 25 Am. Rep. 182; *Cahen v. Continental Ins. Co.*, 41 N. Y. Super. Ct. 296; *Johnson v. Johnson*, 4 Paige (N. Y.) 460; *Norton v. Moberly*, 18 Mo. App. 457; *Briggs v. Briggs*, 20 Mich. 34; *In re Coleman's Will*, 111 N. Y. 220; *Corbett v. St. Louis etc. R. Co.*, 26 Mo. App. 621;

from the patient himself,¹ or acquired by the physician through his own observation or examination.² Further, it does not extend.³ (See EXPERT AND OPINION EVIDENCE, vol. 7, p. 508.)

Streeter v. Breckenridge, 23 Mo. App. 244.

It is proper for plaintiff's physician to testify that when called in professionally he was told by plaintiff that she had sued defendant, and would want him as a witness, since such testimony has no reference to plaintiff's condition. Cooley v. Foltz (Mich. 1891), 48 N. W. Rep. 176.

1. Edington v. Mutual L. Ins. Co., 67 N. Y. 185; Corbett v. St. Louis etc. R. Co., 26 Mo. App. 621; Streeter v. Breckenridge, 23 Mo. App. 244; Linz v. Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363; Gartside v. Connecticut Mut. L. Ins. Co., 76 Mo. 446; 43 Am. Rep. 765; Briggs v. Briggs, 20 Mich. 34; Heuston v. Simpson, 115 Ind. 62; 7 Am. St. Rep. 409; Williams v. Johnson, 112 Ind. 273; Masonic Mut. Ben. Assoc. v. Beck, 77 Ind. 203; 40 Am. Rep. 295; *In re* Darragh, 52 Hun (N. Y.) 591; Grattan v. Metropolitan L. Ins. Co., 92 N. Y. 274; 44 Am. Rep. 372; Dilleber v. Home L. Ins. Co., 69 N. Y. 256; 25 Am. Rep. 182; Norton v. Moberly, 18 Mo. App. 457; Johnson v. Johnson, 4 Paige (N. Y.) 460; Hanford v. Hanford, 3 Edw. (N. Y.) 468; Casey v. L. B. & S. C. R. Co., L. R., 5 C. P. 146; Skinner v. Great Northern R. Co., L. R., 9 Ex. 298; Excelsior Mut. Aid Assoc. v. Riddle, 91 Ind. 84; Campau v. North, 39 Mich. 606; 33 Am. Rep. 433; Hunn v. Hunn, 1 Thomp. & C. (N. Y.) 499.

2. Squires v. Chillicothe, 89 Mo. 226; Dilleber v. Home L. Ins. Co., 69 N. Y. 256; 25 Am. Rep. 182; Masonic Mut. Ben. Assoc. v. Beck, 77 Ind. 203; 40 Am. Rep. 295; Linz v. Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363; Grattan v. Mut. L. Ins. Co., 24 Hun (N. Y.) 43; Cahen v. Continental L. Ins. Co., 69 N. Y. 300; Edington v. Mut. L. Ins. Co., 13 Hun (N. Y.) 543; 67 N. Y. 185; Corbett v. St. Louis etc. R. Co., 26 Mo. App. 621; Gartside v. Connecticut Mut. L. Ins. Co., 76 Mo. 446; 43 Am. Rep. 765; Johnson v. Johnson, 4 Paige (N. Y.) 460; Hanford v. Hanford, 3 Edw. Ch. (N. Y.) 468; People v. Stout, 3 Park. Cr. (N. Y.) 670; 45 N. Y. 125; 5 Hun (N. Y.) 1; Masonic Mut. Ben. Assoc. v. Beck, 77 Ind. 203; 40 Am. Rep. 295.

Section 4019 Revised Statutes of Missouri, declares that a physician or surgeon shall be incompetent to testify "concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient, or do any act for him as a surgeon." *Held*, that the word "information," as here used, includes not only communications made by the patient, but knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity. All such he is forbidden to disclose. Gartside v. Connecticut Mut. L. Ins. Co., 76 Mo. 446. In Briggs v. Briggs, 20 Mich. 34, the court said: "Nor do we think the physician's evidence admissible. He had no knowledge upon the subject, except what he obtained in the course of his professional employment, and the case appears to be directly within the statute. . . . We do not understand the information here referred to, to be confined to communications made by the patient to the physician, but regard it as protecting with the veil of privilege whatever, in order to enable the physician to prescribe, was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose."

On a trial for murder, where the defense was insanity, the physician of the jail wherein defendant had been confined for six months was asked a hypothetical question based on facts which had occurred before defendant came to the jail. The physician stated that he thought it a practical impossibility for him to eliminate from his mind knowledge obtained while defendant was in jail. He was permitted to answer that, on the hypothetical facts propounded to him, defendant was sane. *Held*, that the answer was properly received. [Rappallo and Andrews, JJ., dissenting.] People v. Schuyler, 106 N. Y. 298.

3. Feeney v. Long Island R. Co., 116 N. Y. 375; 39 Am. & Eng. R. Cas.

The privilege is not necessarily terminated by the death of the patient.¹ It is held in *New York* that the seal of secrecy is not removed by the fact that, in a contest over the patient's will, the physician's testimony might throw light upon the point of testa-

639; *Wiel v. Cowles*, 45 Hun (N. Y.) 307; *Brown v. Rome etc. R. Co.*, 45 Hun (N. Y.) 439; *Stowell v. American Co-operative Relief Assoc.*, 52 Hun (N. Y.) 613; *Babcock v. People*, 15 Hun (N. Y.) 347; *Cooley v. Foltz* (Mich. 1891), 48 N. W. Rep. 176; *Henry v. New York etc. R. Co.*, 57 Hun (N. Y.) 76; *In re Darragh*, 52 Hun (N. Y.) 591; *In re Freeman*, 46 Hun (N. Y.) 458; *Guptill v. Verbeck*, 58 Iowa 98; *People v. Schuyler*, 106 N. Y. 208; *Renihan v. Dennin*, 103 N. Y. 573; 57 Am. Rep. 770; *Brown v. Rome etc. R. Co.*, 45 Hun (N. Y.) 439; *Linz v. Massachusetts Mut. L. Ins. Co.*, 8 Mo. App. 363; *Hewit v. Prime*, 21 Wend. (N. Y.) 79; *Campau v. North*, 39 Mich. 606; 33 Am. Rep. 433; *Collins v. Mach*, 31 Ark. 684; *Hoyt v. Hoyt*, 112 N. Y. 493; *People v. Brower*, 53 Hun (N. Y.) 217; *In re Darragh*, 52 Hun (N. Y.) 591.

In *Edington v. Aetna L. Ins. Co.*, 77 N. Y. 571, Earl, J., said: "Before information can be excluded under this statute it must appear that it was such as the physician acquired in some way while professionally attending a patient; and it must also be such as was necessary to enable him to prescribe as a physician, or to do some act as a surgeon. It is not sufficient to authorize the exclusion that the physician acquired the information while attending the patient; but it must be the necessary information mentioned. If the physician has acquired any information which was not necessary to enable him to prescribe, or to act as a surgeon, such information he can be compelled to disclose, although he acquired it while attending the patient; and before the exclusion is authorized, the facts must in some way appear upon which such exclusion can be justified.

In *Masonic Mut. Ben. Assoc. v. Beck*, 77 Ind. 203; 40 Am. Rep. 295, Wood, J., referring to the above opinion, said: "But the language of the opinion in that case upon which stress is laid, does not express the opinion of the court, but only of the

judge who wrote it, the other judges concurring in the result only." And Earl, J., himself, in delivering the opinion of the court in the recent case of *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, said: "It is also claimed that the statute should be so construed as only to prohibit the disclosures by a physician of any information of a confidential nature obtained by him from his patient while attending him in a professional capacity. Such was the view of the statute taken by me in my opinion in *Edington v. Aetna L. Ins. Co.*, 77 N. Y. 564; but my brethren were then unwilling to concur with me in that view. When the same question again came before the court, in *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617, I again attempted to enforce the same view upon my brethren, and again failed, and it was then distinctly held that the statute could not be confined to information of a confidential nature, and that the court was bound to follow and give effect to the plain language without interpolating the broad exception contended for." See *In re Darragh*, 52 Hun (N. Y.) 591.

The privilege may attach notwithstanding the presence of third persons in the sick room, where the consultation is had. *Cahen v. Continental etc. Ins. Co.*, 41 N. Y. Super. Ct. 296.

If the attending physician calls in another physician for consultation, the communications made to the latter are privileged. *Renihan v. Dennin*, 103 N. Y. 573; 67 Am. Rep. 770; *Aetna L. Ins. Co. v. Deming*, 123 Ind. 384; *Raymond v. Burlington etc. R. Co.*, 65 Iowa 152.

But where one applies to a physician for medicine to be administered to an absent third party, the physician is not precluded from testifying as to the applicant's statements against the latter's objection. *Babcock v. People*, 15 Hun (N. Y.) 347.

1. *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; 86 Am. Rep. 617; *Pierson v. People*, 18 Hun (N. Y.) 247; *Edington v. Aetna L. Ins. Co.*, 77

mentary capacity.¹ Whether the statutes protecting confidential communications between physician and patient extend to criminal cases is not well settled. The provision in the *California* Code is expressly limited to civil actions,² but in *New York*, the decisions seem to hold that the statute applies to criminal cases.³

b. HOW WAIVED.—The patient may waive the privilege.⁴ Whether, after his death, his executor or administrator may, can-

N. Y. 564; *Dreier v. Continental L. Ins. Co.*, 24 Fed. Rep. 670; *Cuptill v. Verback*, 58 Iowa 98; *Edington v. Mutual L. Ins. Co.*, 67 N. Y. 185; *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 56; 52 Am. Rep. 1; *Cahen v. Continental etc. Ins. Co.*, 41 N. Y. Super. Ct. 296; *Brigham v. Gott*, 51 Hun (N. Y.) 636; *Renihan v. Dennin*, 103 N. Y. 573; 57 Am. Rep. 770; *Masonic Mut. Ben. Assoc. v. Beck*, 77 Ind. 203; 40 Am. Rep. 295; *Groll v. Tower*, 85 Mo. 249; 55 Am. Rep. 358; *Pennsylvania L. Ins. Co. v. Wiler*, 100 Ind. 92; 50 Am. Rep. 769; *Fraser v. Jennison*, 42 Mich. 206; *In re Coleman's Will*, 111 N. Y. 220; *Heuston v. Simpson*, 115 Ind. 62; 7 Am. St. Rep. 409; *Loder v. Whelpley*, 111 N. Y. 239.

In *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 59; 52 Am. Rep. 1, the court by Earl, J., said: "The purpose of the law would be thwarted, and the policy intended to be promoted thereby would be defeated, if death removed the seal of secrecy from the communications and disclosures which a patient should make to his physician, or a client to his attorney or a penitent to his priest. Whenever the evidence comes within the purview of the statutes, it is absolutely prohibited, and may be objected to by any one, unless it be waived by the person for whose benefit and protection the statutes were enacted. After one has gone to his grave, the living are not permitted to impair his fame and disgrace his memory by dragging to the light communications and disclosures made under the seal of the statutes. An executor or administrator does not represent the deceased for the purpose of making such a waiver. He represents him simply in reference to rights of property, and not in reference to those rights which pertain to the person and character of the testator."

1. It has been urged that the statutory privilege should be deemed not

to extend to this class of cases. There are earlier decisions of inferior courts of the State to the contrary. See *Whelpley v. Loder*, 1 Dem. (N. Y.) 368; *Allen v. Public Administrator*, 1 Bradf. (N. Y.) 221; *Staunton v. Parker*, 19 Hun (N. Y.) 55; but the law is now settled finally by the court of appeals, as stated in the text. See *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 56; 62 Am. Rep. 1; *Renihan v. Dennin*, 103 N. Y. 573; 17 Am. Rep. 770; *Loder v. Whelpley*, 111 N. Y. 239. And see also *In re Darragh*, 52 Hun (N. Y.) 591; *Van Orman v. Van Orman*, 58 Hun (N. Y.) 606.

2. *California* Code Civ. Proc., § 181, subdiv. 4.

3. *People v. Stout*, 3 Park. Cr. (N. Y.) 670; *People v. Brower*, 53 Hun (N. Y.) 217; *People v. Murphy*, 101 N. Y. 126; 54 Am. Rep. 661.

But in *Hewit v. Prime*, 21 Wend. (N. Y.) 74, it was held that a physician consulted by the defendant as to the means of producing an abortion is not privileged from testifying. And in *Pierson v. People*, 79 N. Y. 424; 35 Am. Rep. 524, it was held that on a trial for murder, by poison, a physician is not prohibited from testifying to the results of his examination of the deceased, and to the statements of the deceased during such examination while attending him in his last illness.

4. *Morris v. Morris*, 119 Ind. 341; *Pennsylvania Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92; 50 Am. Rep. 769; *Territory v. Corbett*, 3 Mont. 50; *Blair v. Chicago etc. R. Co.*, 89 Mo. 334; *Carrington v. St. Louis*, 89 Mo. 209; 58 Am. Rep. 108; *Allen v. Public Administrator*, 1 Bradf. (N. Y.) 221; *Grand Rapids etc. R. Co. v. Martin*, 41 Mich. 669; *Gantside v. Connecticut Mut. L. Ins. Co.*, 76 Mo. 446; *Johnson v. Johnson*, 14 Wend. (N. Y.) 637; *Squires v. Chillicothe*, 89 Mo. 226; *Blair v. Chicago etc. R. Co.*, 89 Mo. 385; *Groll v. Tower*, 85 Mo. 249; 55

not be stated with certainty. In *New York* he may not, and it would seem upon principle that this should be so.¹ Where the patient desires to claim the privilege and objects to the admission of the incompetent testimony, he should do so when it is offered at the trial. A neglect to object then may operate as a waiver.² If the privilege is once waived it is waived for all time, and in any subsequent proceedings.³

3. To Spiritual Adviser.—According to the weight of authority communications made to spiritual advisers are not protected from disclosure in courts of justice.⁴ The question has arisen more frequently in relation to communications made under the seal of the Roman Catholic confessional. Under the Roman law such communications are inviolable, subject to certain exceptions with which it is not here necessary to deal, and in *England*, before the reformation, there is but little doubt that the same rule obtained.⁵ The current of public opinion is opposed to requiring such disclosures to be made public, and in many of the States this opinion is voiced by statutes.⁶ Even in the absence of statutes,

Am. Rep. 358; *Cahen v. Continental etc. Ins. Co.*, 41 N. Y. Super. Ct. 296; *Williams v. Johnson*, 112 Ind. 273; *Staunton v. Parker*, 19 Hun (N. Y.) 55; *Fraser v. Jennison*, 42 Mich. 206; *Renihan v. Dennin*, 38 Hun (N. Y.) 270.

It was held in *Andreveno v. Mutual Reserve F. L. Assoc.*, 34 Fed. Rep. 870, that the waiver might consist of a provision to that effect in a life insurance policy.

Where there are two physicians the patient does not, by calling one of his physicians as a witness, waive his privilege to object to the testimony of the other. *Mellor v. Missouri Pac. R. Co.* (Mo. 1890), 14 S. W. Rep. 758; *Record v. Saratoga Springs*, 46 Hun (N. Y.) 448.

On indictment for rape of a child of seven the privilege may be waived by the implied consent of her parents, and the fact that the prosecution was instituted by them, who, with the child, were the principal witnesses, and testified to the nature of the complaint for which the physician prescribed, warrants such implication. *Bigelow, J.* dissenting. *State v. Depoister* (Nev. 1891), 25 Pac. Rep. 1000.

1. *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 56; 52 Am. Rep. 1; *Lodger v. Whelpley*, 111 N. Y. 239; *Renihan v. Dennin*, 103 N. Y. 573; 57 Am. Rep. 770.

The following cases assert or have a

tendency to assert, the doctrine that the personal representative may waive the privilege. *Masonic Mut. B. Assoc. v. Beck*, 77 Ind. 203; 40 Am. Rep. 295; *Pennsylvania Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92; 50 Am. Rep. 769; *Morris v. Morris*, 119 Ind. 341; *Fraser v. Jennison*, 42 Mich. 206; *Groll v. Tower*, 85 Mo. 249; 55 Am. Rep. 358. It may be stated, however, that in each of these cases the doctrine is rather assumed than distinctly asserted.

2. *Hoyt v. Hoyt*, 112 N. Y. 493.

3. *McKinney v. Grand St. etc. R. Co.*, 104 N. Y. 352.

4. *Butler v. Moore*, 1 McNally 253; *Du Barre v. Livette*, Peake R. 161; *Com. v. Drake*, 15 Mass. 161; *Broad v. Pitt*, 3 C. & P. 519; *State v. Bostick*, 4 Harr. (Del.) 563; *Wilson v. Rastall*, 5 T. R. 753; *R—v. Griffin*, 6 Cox 219; *R—v. Hoggs*, 2 F. & F. 4; *Anonymous, Skinner* 404.

5. See Best on Evidence, §§ 583, 584, for a discussion of this subject.

6. *Arizona* Rev. Stat. 1887, p. 818, § 2039; *Arkansas* Stat. 1883, p. 625, § 2861; *California* Code of Civ. Proc. 1885, § 1881; *Colorado* Gen. Stat. 1883, p. 1063, § 9; *Dakota* Comp. Laws 1887, p. 910, § 5313; *Idaho* Rev. Stat. 1887, p. 679; *Indiana* Rev. St. 1887, p. 679, § 497; *Iowa* Rev. Code 1884, p. 860, § 3643; *Kansas* Laws 1885, p. 645, § 323; *Michigan* Gen. Stat. 1882, p. 1890, § 7515, § 85, ch. 262; *Minnesota* Gen. Stat. 1881, p. 792, ch. 73, tit. 1, § 10;

prosecuting officers and courts are reluctant to compel the production of such evidence.¹

V. SOCIAL MATTERS.—1. Communications Between Husband and Wife.—In view of the high importance of preserving intact the confidence and security of the marriage state, the law regards confidential communications between husband and wife as privileged, and refuses to permit either to be interrogated as to what occurred in their confidential intercourse during their marital relations.² The legislatures of the various States in extending the competency of husband and wife to testify for or against each other have generally reserved or affirmed the common law rule that they shall not be allowed to testify as to private conversations with each other.³ And the protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass

Missouri Rev. Stat. 1879, p. 690, § 4017; *Montana* Comp. Stat. 1887, p. 230, Civ. Code, § 650; *Nebraska* Comp. Stat. 1885, § 328; *Nevada* Gen. Stat. 1885, p. 833, § 4405; *New York* Code Civ. Proc. (4 Rev. Stat. 1882), p. 164, § 833; *Ohio* Rev. Stat. 1884, p. 1096, § 5241; *Oregon* Gen. Laws 1872, p. 251; *Utah* Comp. Laws 1876, p. 506; *Washington* Code 1881, p. 102; *Wisconsin* Rev. Stat. 1878, p. 992, § 4074; *Wyoming* Rev. Stat. 1887, p. 690, § 2589.

And the law of *France* is similar.

In *Gillooley v. State*, 58 Ind. 182, it was adjudged that communications received by a priest, otherwise than in the course of any discipline enjoined by the church, were properly testified to by the priest.

1. "I, for one," so Best, J., is reported to have said, in *Broad v. Pitt*, 3 C. & P. 519, "will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I will receive them in evidence." So it was declared by Alderson B. in *Rex v. Griffin*, 6 Cox C. C. 219, a case where it appeared that a chaplain in a work-house had frequent conversations, in his pastoral capacity, with the inmates, that it was better that the chaplain should not be called as a witness to prove confessions so received by him.

2. *Castello v. Castello*, 41 Ga. 613; *Goodrum v. State*, 60 Ga. 509; *French v. Wade*, 35 Kan. 391; *Succession of Wade*, 21 La. 343; *Waddans v. Humphrey*, 22 Ill. 661; *Drew v. Tarbell*, 117 Mass. 90; *Raynes v. Bennett*, 114 Mass. 424; *Baldwin v. Parker*, 99 Mass. 79; 96

Am. Dec. 697; *Dexter v. Booth*, 2 Allen (Mass.) 559; *Highan v. Vanosdol*, 101 Ind. 160; U. S. v. Guiteau, 1 Mackey (D. C.) 498.

A husband who contests the probate of his wife's will on the ground of undue influence cannot testify to a conversation of a confidential character had with his wife during marriage. *Maynard v. Vinton*, 59 Mich. 139; 60 Am. Rep. 276.

On bill filed by a wife for moneys received by her for her husband, she cannot be a witness to prove the admissions of her husband. *Gray v. Gray*, 39 N. J. Eq. 511.

The wife's evidence that her husband gave her money to take up certain notes was held inadmissible and properly rejected as facts coming to her knowledge by reason of the marital relation. *Washington v. Bedford*, 10 Lea (Tenn.) 246.

3. The statute in *New Jersey*, after making the husband and wife competent and compellable to give evidence as other witnesses, provides "that nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding, or in any action or proceeding for divorce on account of adultery, except to prove the marriage, or in any action for criminal conversation, nor shall any husband or wife be compellable to disclose any confidential communication made by one to the other during the marriage." *New Jersey* Revision, p. 378; *Wood v. Chetwood*, 27 N. J. Eq. 311.

between husband and wife.¹ It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband and wife are parties on the record. It is, however, limited to such matters as have been communicated during the marriage, and, consequently, a man who made a most confidential statement to a woman before he married her and it afterwards became of importance in a civil suit to know what that statement was, the wife, on being called as a witness and interrogated with respect to the communication, could, as it seems, be bound to disclose what she knew of the matter.² But if a confidential statement is made by either party after the marriage, it is privileged, even though the marriage relation has ceased by death or divorce.³ In *England*, this rule is extended to any conversation which happens between the husband and wife.⁴ But in the *United States*, the disqualification of the wife continuing after the death of her husband seems to be limited to private conversations,⁵ and non-confidential information is not privi-

So in *Michigan* a statute provides explicitly that neither the husband nor wife shall, during the marriage or afterwards, without the consent of both, be examined as to any communication made by the one to the other during the marriage. Howe Stat. § 7546.

The statutes of *Massachusetts* contain similar provisions. *Drew v. Tarbell*, 117 Mass. 90. See *Brown v. Wood*, 121 Mass. 137; *Dexter v. Booth*, 2 Allen (Mass.) 559. And so in *Missouri*. *Moore v. Wingate*, 53 Mo. 398; *Chesley v. Chesley*, 54 Mo. 347. So in *Kansas*, Civil Code, § 323. See *French v. Wade*, 35 Kan. 391.

Mr. Wharton says: "Under special statutes husband and wife in several jurisdictions have been made competent witnesses in suits affecting each other. These statutes, it may be generally remarked, in conferring competency, do not preclude the party from taking advantage of the right of withholding privileged communications which occur during coverture, and not in the presence of third parties; nor do they strip the parties of the right to decline to answer criminating questions. Privilege as it exists at common law can be asserted in all cases in which it is not specifically prohibited by statute." 1 Whart on Ev. (3d. ed) § 431. And see cases cited.

1. *O'Conner v. Marjoribanks*, 4 M. & Gr. 445.

2. 1 Taylor's Evidence, § 909. See *Otis v. Spencer*, 102 Ill. 622; 40 Am. Rep. 617.

3. *Stein v. Bowman*, 13 Pet. (U. S.)

209; *Coffin v. Jones*, 13 Pick. (Mass.) 444; *Barnes v. Camack*, 1 Barb. (N. Y.) 392; *Cornell v. Venartsdalen*, 4 Pa. St. 364; *Robb's Appeal*, 98 Pa. St. 501; *Griffin v. Smith*, 45 Ind. 366; *Stanley v. Montgomery*, 102 Ind. 102; *Crose v. Rutledge*, 81 Ill. 266; *Lingo v. State*, 29 Ga. 470; *Patton v. Wilson*, 2 Lea (Tenn.) 101; *Collins v. Mack*, 31 Ark. 684; *Williams v. Baldwin*, 7 Vt. 503; *State v. Phelps*, 2 Tyler (Vt.) 374; *Gray v. Cole*, 5 Harr. (Del.) 418; *Dexter v. Booth*, 2 Allen (Mass.) 559; *O'Conner v. Majoribanks*, 4 M. & Gr. 435, overruling *Beveridge v. Minter*, 1 C. & P. 364, and confirming *Monroe v. Twistleton*, Pea. Add. Cas. 219.

The husband of his deceased wife is not a competent witness to testify in any suit against the interest of her succession to any fact which took place during her lifetime. Succession of *Wade*, 21 La. Ann. 343. So where the plaintiff caused the deposition of one of the defendants to be taken prior to the trial, in which the witness gave testimony concerning communications had with her husband during the marriage and prior to his death, it was held that such testimony fell within the prohibition of the *Kansas* Code, which forbids husband or wife "to testify concerning any communication made by one to the other during marriage, whether called while that relation subsisted or afterwards." *French v. Wade*, 35 Kan. 391.

4. *Monroe v. Twistleton*, Pea. Add. Cas. 219.

5. *Robinson v. Talmadge*, 97 Mass. 171; *Dexter v. Booth*, 2 Allen (Mass.)

leged.¹ While the law will not permit husband and wife to testify as to their confidential communications with each other, yet a third person hearing the conversation between husband and wife may give evidence of it;² though a third person cannot be admitted to repeat what one of them said to him as to their confidential communications.³ So a wife is a competent witness as to the declarations and statements made by her husband to third persons in her presence,⁴ and the correspondence of husband and wife which is in the custody and control of a third person may be used as evidence in the case.⁵ So conversations between husband and wife in the presence of third persons are not privileged.⁶ But if the conversation is had in the presence of persons who are not shown to have taken any part in or paid any attention to the conversation, it will be incompetent evidence.⁷

2. Evidence Impeaching the Legitimacy of Children.—See *BASTARDY*, vol. 2, p. 129.

3. Evidence Offensive to Public Morals.—A learned text writer observes that there is no direct authority for the proposition that evidence is incompetent on the ground that it is indecent, offensive to public morals, or injurious to the feelings of third persons.⁸ But it has been held that evidence respecting sex of a third person, offered in action on a wager as to the sex, should not be received;⁹ nor evidence on the question whether a certain unmarried woman had borne a child.¹⁰ In each of these cases, the decision seems to have turned on the fact that the

559; *Kelley v. Drew*, 12 Allen (Mass.) 107; *Coffin v. Jones*, 13 Pick. (Mass.) 441; *Litchfield v. Merritt*, 102 Mass. 524. See *Schmied v. Frank*, 86 Ind. 250; *Tracy v. Kelly*, 52 Ind. 535; *Holts v. Dick*, 42 Ohio St. 26; 51 Am. Rep. 791; *Nolan v. Harden*, 43 Ark. 307.

Confessions of Crime.—In *Stein v. Bowman*, 13 Pet. (U. S.) 209, it was held that A, after the death of her husband could not be allowed to prove that her husband had confessed to her that he had committed perjury in a deposition read in the cause. See *People v. Mullings*, 83 Cal. 138.

1. *Haugh v. Blythe*, 20 Ind. 24; *Hanks v. Van Garder*, 59 Iowa 179; *Dickerman v. Graves*, 6 Cush. (Mass.) 308; 53 Am. Dec. 41; *Litchfield v. Merritt*, 102 Mass. 524; *Succession of Ames*, 33 La. Ann. 1317; *Stein v. Weidman*, 20 Mo. 17; *Stober v. McCarter*, 4 Ohio St. 513; *Gaskill v. King*, 12 Ired. (N. Car.) 211; *Elswick v. Com.*, 13 Bush (Ky.) 155; *Robb's Appeal*, 98 Pa. St. 501.

Husband's Cruelty.—The privilege does not exclude a wife from testifying

in divorce proceedings to her husband's cruelty. *Burdett v. Burdett*, 2 Mackey (U. S.) 469.

2. *Gannon v. People*, 127 Ill. 518.

3. *Brown v. Wood*, 121 Mass. 137.

4. *Mercer v. Patterson*, 41 Ind. 444.

5. *State v. Buffington*, 20 Kan. 599; 27 Am. Rep. 193. See *Tays v. Carr*, 37 Kan. 142.

6. *Floyd v. Miller*, 61 Ind. 224; *Pratt v. Delavan*, 17 Iowa 307; *Fay v. Guynon*, 131 Mass. 31; *Keator v. Demmick*, 46 Barb. (N. Y.) 158; *Allison v. Borrow*, 3 Coldw. (Tenn.) 414; 91 Am. Dec. 291; *State v. Center*, 35 Vt. 379. See *Westerman v. Westerman*, 25 Ohio St. 500.

7. *Jacobs v. Hessler*, 113 Mass. 160. See *Ayers v. Ayers*, 28 Mo. App. 97.

8. *Best on Evidence*, § 537, citing *Lord Mansfield*, who said, in *Da Costa v. Jones*, Cowp. 729: "Indecency of evidence is no objection to its being received where it is necessary to the decision of a civil or criminal right."

9. *Da Costa v. Jones*, Cowp. 729.

10. *Ditchburn v. Goldsmith*, 4 Campb. 152.

parties to the action had officiously, voluntarily, and imper-
tinentlly interested themselves in what was no affair of theirs.
Where, on the other hand, the reception of the evidence is neces-
sary for the purposes of civil or criminal justice, as, for example,
on a trial for rape, bastardy, or seduction, on the question of
the legitimacy of a claimant, or in an action for criminal con-
versation, there is no rule of law or practice justifying its
exclusion.¹

VI. COMMUNICATIONS NOT PRIVILEGED—1. Telegraphic Dispatches.—

Telegraphic dispatches are not privileged communications, though
it has been urged that the same rule could be applied as that
which precludes postmasters from disclosing the contents of let-
ters passing through the mails. The exemption in the case of
such letters depends on the Federal statute; and in the absence
of a statute relating to telegrams, the courts have declined to
recognize the analogy.²

2. *Miscellaneous Communications.*—The foregoing constitute the
principal exceptions to the general rule admitting evidence rele-
vant to the matter in hand. Secrets disclosed in the ordinary
course of business, or the confidence of friendship are not pro-
tected,³ nor confidential communications to parents from their
children,⁴ nor to servants from their masters.⁵ Nor does the

1. In *Greenleaf on Evidence*, § 253, this view of the subject is elaborated thus: "The mere indecency of disclo-
sures does not, in general, suffice to ex-
clude them where the evidence is neces-
sary for the purposes of civil or crim-
inal justice; as, in an indictment for a
rape, or in a question upon the sex of one
claiming an estate entailed, as heir male
or female; or upon the legitimacy of
one claiming as lawful heir; or in an
action by the husband for criminal con-
versation with the wife. In these and
similar cases the evidence is necessary,
either for the proof and punishment of
crime, or for the conviction of rights
existing before, or independent of, the
fact sought to be disclosed. But where
the parties have voluntarily and im-
pertinentlly interested themselves in a
question tending to violate the peace of
society by exhibiting an innocent third
person to the world in a ridiculous or
contemptible light, or to disturb his own
peace and comfort, or to offend public
decency by the disclosures which its
decision may require, the evidence will
not be received."

2. See on this point, *Com. v. Jeffries*, 7
Allen (Mass.) 548; 83 Am. Dec. 712;
National Bank v. National Bank, 7 W.
Va. 544; *Ex parte Brown*, 7 Mo. App.

494; 72 Mo. 83; 37 Am. Rep. 426;
State v. Litchfield, 58 Me. 267; U. S.
v. Babcock, 3 Dill. (U. S.) 566.

In the *American Law Register* for
February, 1879, is an article by Judge
Cooley, urging that, upon principle,
telegraphic dispatches should be privi-
leged. An argument to the same ef-
fect will be found in 20 Albany L. J.
108.

In 1 Wharton on Evidence, § 595 n.,
is cited an English case where, in 1878,
the court declined to order the produc-
tion, by the post-office, by which tele-
grams are communicated, of a telegram.
Mr. Wharton explains this ruling on
the ground that, in *England*, the gov-
ernment undertakes the forwarding of
telegrams, and that the judicial depart-
ment cannot compel an executive de-
partment to produce papers.

3. Best on Evidence, § 586; *Hoffman*
v. Smith, 1 Cal. (N. Y.) 157; *Smith v.*
Daniel, L. R., 18 Eq. 649; *Cady v.*
Walker, 62 Mich. 157. And see the
judgment of Lord Kenyon in *Wilson v.*
Rastall, 4 T. R. 758, and the cases from
the State trials there referred to.

4. Wharton on Evidence, § 607.

5. *State v. Isham*, 6 How. (Miss.)
35; *State v. Charity*, 2 Dev. (N. Car.)
543.

privilege extend to communications to the clerk,¹ banker,² or steward.³ By the law of nations, diplomatic agents may not be compelled to testify, and sometimes treaties protect consuls.⁴ Communications made by one defendant to another to enable him to defend the suit are not privileged;⁵ nor communications between an applicant for a patent and a patent officer touching an unissued patent.⁶

PRIVIES—PRIVITY—(See also JUDGMENTS, vol. 12, p. 92; PARTIES TO ACTIONS, vol. 17, p. 518).—The term "privity" denotes mutual or successive relationships to the same rights of property; and privies are distributed into several classes according to the manner of this relationship. Thus there are privies in estate, as donor and donee, lessor and lessee, and joint tenants; privies in blood, as heir and ancestor, and co-parceners; privies in representation, as executors and testator, administrators and intestate; privies in law, where the law, without privity of blood or estate, casts the land upon another as by escheat.⁷

A privy is a person who has an interest in an estate created by another; a person having an interest derived from a contract or conveyance, to which he is not himself a party. Thus, an heir is privy to the conveyance of his ancestor, an executor to the contract of his testator, and the assignee of a lessor to the contract of the original parties.⁸

Privy is also used in the sense of private, as privy seal, privy verdict, etc.⁹

1. *Lee v. Birrell*, 3 Camp. 337; *Webb v. Smith*, 1 C. & P. 337.

2. *Loyd v. Freshfield*, 2 C. & P. 325.

3. *Vaillant v. Dodemead*, 2 Atk. 524; *Falmouth v. Moss*, 11 Price 455.

4. *Wharton on Evidence*, § 607 a. And see *In re Dill*, 7 Sawy. (U. S.) 761.

5. *Betts v. Menzies*, 3 Jur., N. S. 885; *Whitbread v. Gurney*, Younge 541; *Sankey v. Alexander*, 8 Ir. R., Eq. 241.

6. *Edison's Electric Light Co. v. U. S. Electric Light Co.*, 44 Fed. Rep. 294.

7. 1 Greenl. Ev., § 189, quoted in *Coan v. Osgood*, 15 Barb. (N. Y.) 588.

A derivative kind of interest founded upon or growing out of the contract of another, as that which subsists between an heir and his ancestor, between an executor and testator, and between a lessor or lessee and his assignee. *Burrill's L. Dict.*, quoted in *Coan v. Osgood*, 15 Barb. (N. Y.) 588.

8. *Burrill's L. Dict.*, quoted in *Coan v. Osgood*, 15 Barb. (N. Y.) 588.

Privies are persons who are parties

to, or have an interest in, any action or thing, or any relation to another; they are of several kinds—privies in blood, as heir and ancestor, privies in representation, as the executor or administrator to the deceased; privies in estate, as the relation between donor and donee, lessor and lessee; privies in respect to contract; and privies on account of estate and contract together. *Gourad v. Gourad*, 3 Redf. Surr. Rep. (N. Y.) 267; *Lord v. G. N. & P. S. Co.*, 4 Sawy. (U. S.) 300, quoting *Bouv. L. Dict.*

Privy of Estate.—See **ESTOPPEL**, vol. 7, p. 4; **LEASE**, vol. 12, p. 1034; **REAL COVENANTS**.

Privy of Contracts.—See **CONTRACTS**, vol. 3, p. 863; **NOVATION**, vol. 16, p. 884; **PARTIES TO ACTIONS**, vol. 17, p. 518; **LIVERY STABLE KEEPERS**, vol. 13, p. 942; **LOGS AND LUMBER**, vol. 13, p. 1042.

Privies in Representation.—There is no privity between different administrations. See **FOREIGN EXECUTORS AND ADMINISTRATORS**, vol. 8, p. 427, **JUDGMENTS**, vol. 12, p. 91.

9. **Privy Verdict** is one given out of

PRIZE.—*a.* A prize is ordinarily some valuable thing, offered by a person for the doing of something by others, into the strife for which he does not enter.¹

b. A prize is properly something taken on the high seas from a common enemy against whom war is declared.²

c. In marine insurance, a capture, any taking or seizing, even unlawfully, by force.³

PRIZE-FIGHT.—(See also **AFFRAY**, vol. 1, p. 315; **ASSAULT**, vol. 1, p. 807).—The act of prize-fighting is the act of fighting for a prize or reward.⁴

Prize-fighting was not a distinctive offense at common law; but the combatants together with their aiders and abettors were indictable and punishable for assault, affray or riot, according to circumstances.⁵ And, if one of the principals died from injuries re-

court, before one of the judges thereof; and it is called *privy*, being to be kept secret from the parties until it is affirmed in court. Jacob's L. Dict., tit. Verdict, quoted in *Com. v. Heller*, 5 Phila. (Pa.) 124.

A *privy* verdict is when the judge hath left or adjourned the court; and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict *privily* to the judge out of court, which *privy* verdict is of no force, unless afterwards affirmed by a public verdict given openly in court; wherein the jury may, if they please, vary from the prior verdict. Jacob's L. Dict., tit. Verdict, quoting *Willard v. Shaffer*, 6 Phila. (Pa.) 520. See also **VERDICT**.

1. *Harris v. White*, 81 N. Y. 539.

2. See **INTERNATIONAL LAW**, vol. 11, p. 484; *Beek v. Tryall*, Carthew 32.

Property taken from an enemy; any goods the subject of marine capture. *Groning v. Union etc. Ins. Co.*, 1 Nott. & M. (S. Car.) 539.

3. Anderson's L. Dict., citing, *Dole v. New England Mut. etc. Ins. Co.*, 6 Allen (Mass.) 373.

4. *Sullivan v. State*, 67 Miss. 352.

In that case John L. Sullivan was indicted under the *Mississippi* Acts of 1882, p. 142, which prohibits "prize-fighting," but does not define the offense. The court by Cooper, J., said: "It thus appears that while these two lexicographers" (*Worcester* and *Webster*) "define a prize-fighter to be one who fights publicly for a reward, *Worcester* defines prize-fighting as the act of fighting for a prize, while *Webster* defines it as fighting in public for a re-

ward or wager, and prize-fight to be a contest in which the combatants fight for reward or wager. According to the lexicographers, it would seem to be left doubtful whether to constitute a prize-fight there must be a fighting in public." And it was held that the *Mississippi* statute was directed against prize-fighting which is public in character, and tends to disturb the peace and quiet of the community in which it occurs, and to debase not only the participants, but others who are admitted as spectators. (See this case also cited *infra*, this title.)

5. *Rex v. Perkins*, 4 C. & P. 537; 19 E. C. L. 515; *Reg. v. Brown*, C. & M. 314; 41 E. C. L. 175. See also *Rex v. Billingham*, 2 C. & P. 234; 12 E. C. L. 105; *Reg. v. Coney*, 8 Q. B. D. 534; *Sullivan v. State*, 67 Miss. 350; 2 Bishop on Crim. Law, § 35.

Spectators.—As to what constitutes a spectator of a prize fight, an aider and abettor, is a question upon which there has been some conflict of authority.

In *Rex v. Murphy*, 6 C. & P. 103, 25 E. C. L. 301, the court by Littledale, J., said: "My attention has been called to the evidence of those witnesses who have said that the prisoner did nothing; but I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter, if they encourage it by their presence. I mean, if they remain present during the fight; I say that if they were not causally passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything."

And in *Rex v. Perkins*, 4 C. & P. 537, 19 E. C. L. 515, the court by Patter-

ceived in the fight, his opponent and the other parties to the fight were guilty of manslaughter.¹

In most of the States, prize-fighting is now a statutory offense.² A party to a prize-fight may recover damages from his opponent for an assault and battery. The prize-fight being unlawful, the

son, J., said: "There is no doubt that prize fights are altogether illegal. . . . If all these persons went out to see these men strike each other and were present when they do so, they are all, in point of law, guilty of assault; there is no distinction between those who concur in the act and those who fight".

Mr. Russell states the doctrine thus: "There is no doubt that prize fights are altogether illegal; indeed, just as much so as that a person should go out to fight with deadly weapons, and it is not at all material which party strikes the first blow; and all persons who go to a prize fight to see the combatants strike each other, and who are present when they do so, are, in point of law, guilty of assault." 1 Russ. on Cr. 854. See also *Rex v. Bellingham*, 2 C. & P. 234; 12 E. C. L. 105; *Rex v. Hargrave*, 5 C. & P. 170, 24 E. C. L. 260.

But it appears that these cases have been overruled by a late English case, *Reg. v. Coney*, 8 Q. B. D. 534, where it was held that to prove a defendant to have been voluntarily at a fight and looking on, without other evidence, is not enough to justify a conviction for aiding and abetting the fight. See also *Spectators at Prize Fight*, 15 Central L. J. 217. And this view of the law is sustained by an eminent American authority, who uses the following language: "It may be said in a sort of general way, that all who by their presence countenance a riot or prize fight or any other crime—especially if ready to help should necessity require—are liable as principal actors. But this statement needs to be made more exact. A mere presence is not sufficient, nor is it alone sufficient in addition, that the person present, unknown to the other, mentally approves what is done. There must be something going a little further, as, for example, some word or act. The party to be charged 'must' in the language of Cockburn, C. J., 'incite or procure, or encourage the act.'" 1 Bishop. Cr. Law, §§ 632-633, and cases there cited.

The case in the opinion to which Lord Cockburn used the words quoted

by Mr. Bishop in the above paragraph, was as follows: Upon a quarrel two men agree to fight, and place in the hands of a third party a sum of money to be paid to the winner; beyond holding the stakes the third party had nothing to do with the fight, and was not present at it. The men fought and one of them received injuries from which he died. The stake-holder paid the winner the wager. *Held*, upon trial, that the stake-holder is not accessory before the fact to the manslaughter. *Queen v. Taylor*, L. R., 2 Cr. C. Res. 147; 12 Moak's Eng. Rep. 636.

Sparring Match.—The spectators of a sparring match are not *participes criminis*, so that their evidence, touching what occurred at the match, requires corroboration. There is nothing unlawful in sparring unless, perhaps, the men fight on until they are so weak that a dangerous fall is likely to be the result of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match, does not amount to manslaughter. *Reg. v. Young*, 10 Cox's Cr. Cas. 371.

1. *Rex v. Hargrave*, 5 C. & P. 170; 24 E. C. L. 260. See the preceding note. See also *HOMICIDE*, vol. 9, p. 588.

2. *New York Pen. Code*, § 458; *Mississippi Acts of 1882*, p. 142; *Idaho Code of 1887*, § 6957; *Massachusetts Gen. Stat. ch. 160*, § 17.

Sufficiency of the Indictment.—An indictment against two persons, under *Massachusetts Gen. Stat.*, ch. 160, § 17, which avers substantially in the words of the statute, that being inhabitants of the State, they, on a certain day, by a previous appointment made within the State, did leave the State and engage in a fight with each other without its limits, was held to be sufficiently certain. *Com. v. Barrett*, 108 Mass. 302. And see also *Com. v. Welsh*, 7 Gray (Mass.) 324.

But in *Sullivan v. State*, 67 Miss. 346, under *Mississippi Acts 1882*, p. 142, which in general terms provides "that it shall be unlawful for any person to engage in prize-fighting," without further definition of the offense, it was

consent of the plaintiff to fight is no bar to his action;¹ but his consent may be given in evidence in mitigation of damages.²

The maxim *volenti non fit injuria*, or what is commonly called leave and license, constitutes one of the general exceptions to the principles of liability for civil wrongs; but, the defense of consent, whether in criminal prosecution or in civil suit, has very distinct limitations. According to an eminent English writer, consent is not enough to justify bodily harm, unless there is some kind of just cause, such as extirpation of disease in the case of surgery; willful hurt is not excused by consent if it has no reasonable object. On this ground it is plain that prize fights are illegal "even when entered into by agreement and without anger or mutual ill-will."³ It is thus easy to distinguish prize fighting from other cases of consent, where while there is an intent to do bodily harm, there is a just cause (as in surgery); and, on the other hand, from all such pastimes as boxing with padded gloves, or playing at foils, where intent to do bodily harm is absent or specially negatived.⁴ By some writers, the illegality

held not sufficient to indict by using the statutory words. It must be charged that there was a fight for a reward or wager in a public place, or where the public were admitted as spectators; and, it was also held, that the offense can only exist where two persons engaged in the unlawful act, and it must be alleged and shown that they contended against each other.

1. *Matthew v. Ollerton*, Comb. 218; *Boulter v. Clark*, Bull N. P. 16; *Bell v. Hansley*, 3 Jones (N. Car.) 131; *Stout v. Wren*, 1 Hawks. (N. Car.) 420; 9 Am. Dec. 653; *Logan v. Austin*, 1 Stew. (Ala.) 476; *Adams v. Waggoner*, 33 Ind. 534; 5 Am. Rep. 231. See also *Dole v. Erskine*, 35 N. H. 503; *Com. v. Collberg*, 119 Mass. 350; 20 Am. Rep. 328; *ASSAULT*, vol. 1, p. 784.

2. *Adams v. Waggoner*, 33 Ind. 531; 5 Am. Rep. 231; *Logan v. Austin*, 1 Stew. (Ala.) 476.

3. See Pollock on Torts, ch. 4, where leave and license is considered as No. 10 of general exceptions to principles of liability for civil wrongs—conditions which, when present, prevent an act from being wrongful which in their absence would be a wrong. (The author shows how the maxim *volenti non fit injuria* on the one hand is not universally true, and, on the other hand, that it fails to cover cases where there is no consent specifically to suffer harm, but to abide the chances; as the case of a spectator at

a game). See also *CONSENT*, vol. 3, p. 663, 665.

See *Com. v. Collberg*, 119 Mass. 350; 20 Am. Rep. 328. See also *Reg. v. Coney*, 8 Q. B. D. 534.

4. "The distinction," says Sir Frederick Pollock, "seems to be, that agreement will not justify the willful causing or endeavoring to cause appreciable bodily harm, for the mere pleasure of the parties, or others." *Reg. v. Lewis*, 1 C. & R. 421. See *Foster's Crown Law*.

So fencing, or playing with blunt sabers is lawful, because the players mean no hurt to one another, as is shown by the use of masks and pads, but a duel with sharp swords, "after the manner of German students" is not lawful, "though the conditions be such as to exclude danger to life or limb.

... It seems to be what is called a question of mixed law and fact, whether a particular action or contest involves such intention to do real harm, that consent or assent will not justify it." See *Reg. v. Coney*, 8 Q. B. D. 534, where the court by Cave, J., said: "The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport and not likely or intended to cause bodily harm is not an assault, and that an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct, a blow struck in a prize fight is clearly

of prize fighting is put on the ground of breach of the public peace, where the defense of assault is of no avail as an excuse based on a breach of the law.¹ But this view seems unsatisfactory for lack of distinctness.² While differing, however, as to grounds, all writers agree that prize fighting is unlawful.³

an assault; but playing with single sticks or wrestling do not involve an assault; nor does boxing with gloves in the ordinary way." (See *Reg. v. Orton*, 39 L. T. 293.) So the opinion of Stevens, J., in *Reg. v. Coney*, 8 Q. B. D. 534, where he says "in cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defense to a charge of assault, even when considerable force is used; as, for instance, in cases of wrestling, single stick, sparring with gloves, base ball and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances." See Stevens Dig. of Crim. Law.

1. See Cooley on Torts, pp. 162 & 263, where he says, that while "consent is generally a full and perfect shield, when that is complained of as a civil injury which was consented to . . . ; in the case of a breach of the peace, it is different. The State is wronged by this and forbids it on public grounds. . . . There are three parties here, one being the State which of its own act does not suffer the others to deal on a basis of contract with the public peace." See *Adams v. Waggoner*, 33 Ind. 531; 5 Am. Rep. 231; *Com. v. Collberg*, 119 Mass. 350; 20 Am. Rep. 328. See also *State v. Beck*, 1 Hill (S. Car.) 363; *Champer v. State*, 14 Ohio St. 437. See Bishop on Crim. Law, § 35: "No concurrence of wills can justify a public tumult and alarm; therefore persons who voluntarily engage in a prize-fight and their abettors are all guilty of assault." See *Duncan v. Com.*, 6 Dana (Ky.) 295.

2. The term "breach of the peace" has a wide scope and is used in several senses. In strict pleading, every application of force, even the slightest is *vi et armis* and *contra pacem*. Bac. Abr. Trespass (I), 2, 1. The term, therefore, in this sense cannot add more than is contained in any action of trespass and cannot constitute a separate

ground. See Pollock on Torts, p. 139.

Further, breach of the peace, in the sense in which it is actually meant, necessarily involves and depends upon assault, and while the majority of authorities agree that a prize-fight is assault, still in so far as authorities differ on this point, breach of the peace offers no separate ground for the illegality.

Thus, the definition of Addison (see Addison on Torts, § 787) is: "An assault must be done against the will of the person assaulted, and, therefore, it cannot be said that a person has been assaulted by his own permission. If the act is done in the course of sport between persons taking liberties with each other by mutual consent, there is no assault." See *Christopherson v. Bare*, 11 Q. B. 477; *Reg. v. Martin*, 9 C. & P. 214; 38 E. C. L. 37; *Reg. v. Johnson*, 34 Law J. M. C. 192. See also Addison on Torts, § 835: "If the act complained of has been done by the leave and license or permission of the plaintiff, it is not an assault, and the leave and license may consequently be given in evidence under the plea of not guilty. If two persons agree to play cricket together and the one strikes the other with a ball in the course of the game, this is not an assault; for 'it is a contradiction in terms to say that the defendant assaulted the plaintiff by the leave and license or permission of the latter.'" *Christopherson v. Bare*, 1 Q. B. 477.

Finally if breach of the peace be taken as the ground for the illegality of prize-fighting, instead of the question of intent, as stated in the text, there is no clear rule of distinction between prize-fighting and other pastimes where the intent to do bodily harm was wanting.

3. 2 Bishop on Crim. Law, § 35; vol. 1, § 535. See *Reg. v. Brown, C. & M.* 314; 41 E. C. L. 175. See Cooley on Torts 163; Washburn Manual of Crim. Law: "A fighting with the fists is assault and battery, though the parties agree thus to fight, and have no ill-will towards each other."

PROBABILITY.—See note 1.

PROBABLE CAUSE.—See MALICIOUS PROSECUTION, vol. 14, pp. 24, 63; CAUSE, vol. 3, p. 45; SEARCHES AND SEIZURES.

PROBATE AND LETTERS OF ADMINISTRATION.—(See also CONFLICT OF LAWS, vol. 3, p. 499; COURTS, vol. 4, p. 477; DOMICILE, vol. 5, p. 857; EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165; FOREIGN EXECUTORS AND ADMINISTRATORS, vol. 8, p. 414; INSANITY, vol. 11, p. 105; JOINT EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1016; JUDGE, vol. 12, p. 2; REVOCATION; WILL.)

I. Probate, 162.

1. *Probate Jurisdiction, 162.*

a. *Courts Exercising Jurisdiction, 162.*

(1) *American, 162.*

(2) *English, 162.*

b. *Judicial Interest as Affecting Jurisdiction, 163.*

c. *Domicile as Affecting Jurisdiction, 164.*

d. *Situs of Property, 166.*

(1) *Personal Estate, 166.*

(2) *Real Estate, 172.*

e. *Foreign Wills, 173.*

2. *What Papers Require Probate, 174.*

a. *Papers Testamentary in Character, 174.*

b. *Papers Not Testamentary in Character, 176.*

c. *Extraneous Papers Referred to in a Will, 176.*

d. *Paper Appointing Executor, 178.*

e. *Paper Appointing Guardian, 178.*

3. *Duty of the Executor or Custodian of the Will to Produce it for Probate, 178.*

4. *Time Within Which Will Should be Produced for Probate, 178.*

5. *Procedure, 179.*

a. *The Petition, 179.*

b. *Probate in Common Form, 180.*

c. *Probate in Solemn Form, 180.*

6. *Effect of Probate, 181.*

7. *Proof of the Will, 183.*

8. *Partial Probate, 183.*

9. *Nuncupative Wills, 184.*

10. *Probate of Lost Wills (See LOST PAPERS), 184.*

II. Letters of Administration, 184.

1. *Intestacy Necessary to Grant of Administration, 184.*

1. **Probability.**—A committee of viewers found that a tract of land would, "in

2. *Death Necessary to Grant of Administration, 184.*

3. *Limitation as to the Value of the Estate in Certain States, 187.*

4. *Time Within Which Administration May be Granted, 187.*

5. *Appointment of Administrators. Construction of 31 Edw. III, ch. 11 and Derivative and Analogous Statutes, 188.*

a. *Husband, 188.*

b. *Widow, 190.*

c. *Next of Kin, 192.*

d. *Creditors, 193.*

e. *General Considerations Affecting the Choice of Administrators, 195.*

(1) *Suitableness, 195.*

(2) *Residence, 198.*

(3) *Age, 198.*

(4) *Corporations, 199.*

(5) *Illegitimates, 199.*

(6) *Amount of Interest, 199.*

(7) *Renunciation and Nomination by the Persons Entitled to Administration, 199.*

f. *Public Administration, 201.*

6. *Procedure, 204.*

7. *Effect of Decree, 206.*

8. *When Administration May be Dispensed With, 208.*

9. *Secondary and Limited Administration, 209.*

a. *Appointment of Administrators Cum Testamento Annexo, 209.*

b. *Appointment of Administrators de Bonis Non, 212.*

c. *Administration During Minority, 215.*

d. *Administration During Absence, 216.*

e. *Administration Pendente Lite, 216.*

f. *Special Administration, 218.*

all probability," continue to be held and used for railroad freight purposes.

I. PROBATE—1. **Probate Jurisdiction.**—In *Great Britain*, the *United States*, and other countries subject to institutions of English origin, where a man dies leaving personal property, his estate is administered and distributed under the supervision of a local court, whose jurisdiction is confined in whole or in part to such matters.

a. **COURTS EXERCISING JURISDICTION.**—(1) *American.*—In many of the *United States* there are special courts whose jurisdiction is confined wholly to matters of probate, and to the administration of decedents' estates. In *New England*, and many of the Western States, each county has a court of probate;¹ in *Pennsylvania* and various other States there is an orphans' court in each county;² in *Kentucky*, and in some Western and Southern States, the county court has probate jurisdiction.³ In *North Carolina*, the powers and jurisdiction of a probate judge are now exercised by the clerk of the superior court as an independent tribunal of original jurisdiction.⁴ In other States clerks have a certain probate jurisdiction in vacation.⁵

2. *English.*—In *England* prior to 1857, probate jurisdiction was in the ecclesiastical courts, and by local custom, in certain of the

Held, that a mere probability was not sufficient to affect the case under consideration, and that if a degree of probability, which amounted to a practical certainty was intended, the facts on which the conclusion was based should have been found, so that the court might see on what it rested. *New York etc. R. Co. v. New Britain*, 49 Conn. 40.

Probability Distinguished from Proof.—"It seems to us that there is a difference between probability and proof. The object of both words is to express a particular effect of evidence, but proof is the stronger expression. All the dictionaries give different definitions of probability. That of Worcester is 'Likelihood of the occurrence of an event in the doctrine of chance, or the quotient obtained by dividing the number of favorable chances by the whole number of chances,' and one in Webster is 'Likelihood, appearance of truth, that state of a case or question of fact which results from superior evidence or preponderation of argument on one side, inclining the mind to receive it as the truth, but having room to doubt.' 'Demonstration produces certain knowledge, proof produces belief, and probability opinion.'" *McGowen, J., in Brown v. Atlanta etc. R. Co.*, 19 S. Car. 39; 13 Am. & Eng. R. Cas. 487.

1. *Tompkins v. Tompkins*, 1 Story

(U. S.) 547; *Graham v. O'Fallon*, 3 Mo. 507. The name "Probate" is applied to such courts in the statutes of *Alabama, California, Connecticut, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, and New Hampshire.*

2. So also in *Delaware, Maryland and New Jersey.*

3. In *Kentucky* the county courts have jurisdiction to grant letters of administration. *Briscoe v. Brady*, 6 T. B. Mon. (Ky.) 134; *Renfro v. Trent*, 1 J. J. Marsh. (Ky.) 604; *Gray v. Gundry*, 2 J. J. Marsh. (Ky.) 133; *Thomas v. Tanner*, 6 T. B. Mon. (Ky.) 58; *Hyatt v. James*, 8 Bush (Ky.) 9.

County courts have jurisdiction over probate matters in *Colorado, Florida and Illinois.*

In *Arkansas*, the county and probate courts are distinct tribunals, although the same person is judge of both. Letters of administration granted by the county judge and issued by the clerk of the county court, are therefore invalid. *Hynds v. Imboden*, 5 Ark. 385.

In *Georgia*, probate courts are called Courts of Ordinary. In *New York*, Surrogate Courts. In *New Jersey*, Prerogative Courts.

4. **Clerks.**—*Edwards v. Cobb*, 9 N. Car. 4.

5. By the Revised Statutes of *Indiana* 506, the clerk of the probate

manorial courts. By the statute of 20 and 21 Vict., ch. 77 (1857) a new tribunal, known as the court of probate, was erected, and the jurisdiction of the ecclesiastical and manorial courts over decedents' estates was superseded.¹ By the Judicature Act of 1873, § 21, the Court of Probate was merged in the Probate, Divorce and Admiralty Division of the High Court of Justice.

b. JUDICIAL INTEREST AS AFFECTING JURISDICTION.—If a judge of probate has any interest in the estate, or has been appointed executor thereof, he cannot assume jurisdiction to probate the will or grant letters of administration.²

court has authority to grant letters of administration in vacation, when the right to administration is not controlled, and the court is bound to ratify such appointment, unless some valid objection be made to it. *Brown v. King*, 2 Ind. 520. See also *Drake v. Sigafos*, 39 Minn. 367.

The *Louisiana* act of January 17, 1838, No. 8, amending C. C. art. 1178, and conferring on probate judges the right to appoint administrators to estates under \$500 in value, does not embrace clerks. *Wilson v. Imboden*, 8 La. Ann. 140.

Letters of administration cannot be granted by a deputy clerk in his own name. *Stewart v. Cave*, 1 Mo. 752.

1. Schouler gives the following account of the early Probate Jurisdiction in *England*: "Jurisdiction over wills and their probate in *England* belonged, before ecclesiastical functions were exercised in such cases, to the county court or to the court baron of the manor where the testator died; and before these county tribunals all other matters of civil dispute were determined. This power of the probate existed down to a quite recent period in certain English manors, and so as to preclude the interference of the ordinary. The earl formerly presided over this county court; though subsequent to the introduction of Christianity the bishop sat with the earl. Soon after the Norman invasion, however, the ecclesiastical and temporal jurisdictions were separated; and gradually the bishops became invested with plenary authority as to matters which pertained to the estates of the dead. Some English writers appear to have regarded this authority as in fact usurped by the ecclesiastics. But Blackstone ascribes it rather to the crown's favor to the church, citing the observation of Perkins that the law considered spiritual men of

better conscience than laymen, and thought that they had more knowledge as to what things would conduce to the benefit of the soul of the deceased. And according to the great English commentator, the disposition of intestates' effects once granted in confidence by the crown to the ordinary, the probate of wills followed as of course; for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby. This ecclesiastical or spiritual jurisdiction attended as it was with flagrant abuses at which the papacy seems to have connived doubtless inspired dread and disaffection in the temporal courts and among the English laity; for restraints were put repeatedly, by statute or judicial construction, upon the ordinary authority, even in cases where he strove to enforce justice, and the necessity of probating wills was reduced to the narrowest limits." Schouler's *Executors and Administrators*, 14.

2. Thus in *Alabama*, if the probate judge has a claim against an insolvent estate, he is incompetent to assume jurisdiction, and the register must perform the judicial duty. *Thornton v. Moore*, 61 Ala. 347.

In *Massachusetts*, a probate judge is not disqualified from probating a will, by reason of the fact that one of the creditors of the estate is his father-in-law, if such creditor is not a party to the proceedings before him. *Alldrich's Appeal*, 110 Mass. 189.

In *Hall v. Thayer*, 105 Mass. 219; 7 Am. Rep. 513, it was decided that the judge of the probate court could not act upon an application for the appointment of his own brother-in-law as administrator *de bonis non cum testamento annexo*.

c. DOMICILE AS AFFECTING JURISDICTION.—As a general rule a court of probate has jurisdiction over the administration of an estate, if the decedent, at the time of his death, had his domicile within the limits of the jurisdiction of the court.¹ What was the decedent's last domicile is to be inferred from all the facts and cir-

The distinction between *Aldrich's Appeal* and *Hall v. Thayer*, is that in the latter the applicant was a near kinsman of the judge; while in the former the person interested in the estate was a creditor who had not as yet become a party. The court held, in *Aldrich's Appeal*, that the mere possibility of such a person becoming a party was not sufficient to disqualify the judge. Wells, J., said: "Whenever he does so become a party, the judge who is his near connection cannot act in the matter. But his remote and contingent interest for the protection of which the law gives him the right to become a party to proceedings before the court, does not of itself make him such, unless he sees fit to exercise that right."

In *Glavecke v. Tijirina*, 24 Tex. 663, it was held that a judge who owned jointly with the decedent, a tract of land, was not disqualified from appointing an administrator of the estate, approving accounts, or making other orders not referring to the tract of land.

If a probate judge refuses to assume jurisdiction on account of interest and the will is probated in an adjoining county, the probate judge of the latter county has jurisdiction to hear and determine all other proceedings necessary to a final administration of the estate. *Gregory v. Ellis*, 82 N. Car. 225.

See also *COURTS*, vol. 4, p. 447; *JUDGE*, vol. 12, p. 2.

1. *Domicile*.—The last domicile affords the suitable principal forum for procuring credentials of authority and settling the estate of a deceased person. But inasmuch as the collection of credits and effects, the payment of debts, the distribution of the residue, and the final settlement of the estate, are of universal convenience, the courts of one country or State do not feel compelled to wait until those of another have acted, nor to submit domestic claims to foreign jurisdiction; but, aside from the deceased person's last domicile and a principal probate appointment, a competent local and ancillary appointment is procurable, on the suggestion that

property requiring administration lies within the local jurisdiction. In other words, locality, with personalty belonging to the estate of a deceased person, may confer a local probate jurisdiction, regardless of the consideration of his last domicile. This general doctrine is amply recognized in the statutes of *England* and the several *United States* which relate to probate jurisdiction." *Schouler's Executors and Administrators* 34. *In re Delaplaine*, 45 Hun (N. Y.) 225; *Carroll v. Hughes*, 5 Redf. (N. Y.) 337; *Goodlett v. Anderson*, 7 Lea (Tenn.) 286; *Wood v. Matthews*, 73 Mo. 477; *St. John v. Hodges*, 9 Baxt. (Tenn.) 334; *Hatchett v. Berney*, 65 Ala. 39; *Estate of Gavin*, 18 N. Y. St. Rep. 399; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; 16 Am. Dec. 372; *Stevens v. Gaylord*, 11 Mass. 256; *Wilson v. Frazier*, 2 Humph. (Tenn.) 130; *Johnson v. Corpenning*, 4 Ired. (N. Car.) 216; *Collins v. Turner*, 2 Tayl. (N. Car.) 105; *McBain v. Wimbish*, 27 Ga. 259; *McCampbell v. Gilbert*, 6 J. J. Marsh. (Ky.) 592; *Estate of Harlan*, 24 Cal. 182; 85 Am. Dec. 58; *Watson v. Collins*, 1 Ala. Sel. Cas. 515; *Succession of Williamson*, 3 La. Ann. 261; *Ex parte Barker*, 2 Leigh (Va.) 720; *Moore v. Philbrick*, 32 Me. 102; 52 Am. Dec. 642; *Armstrong v. Bakewell*, 18 La. Ann. 30; *Providence Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788; *Atkinson v. Hasty*, 21 Neb. 663; *Holmes v. Oregon etc. R. Co.*, 6 Sawy. (U. S.) 262; *Tant v. Wigfall*, 65 Ga. 412; *Patillo v. Barksdale*, 22 Ga. 356.

In *Sommerville v. Lord Sommersville*, 5 Ves. Jr. 786, the rule is laid down that succession to the personal estate of an intestate is to be regulated by the law of the country in which he was domiciled inhabitant at the time of his death; without any regard whatsoever to the place either of the birth or the death, or the situation of the property at that time.

In *Talbot v. Chamberlain*, 149 Mass. 57, it appeared that, pending proceedings for the appointment of a guardian for an insane person, the latter moved to Iowa. The guardian was appointed

cumstances of the case;¹ but the rule prevails that "though one may have two domiciles for certain purposes, he can have only one for the purpose of succession."²

Where a person dies *in itinere*, the foreign country should not assume jurisdiction except, perhaps, as to property locally situated in that country.³ Where a person has left one domicile with the intention of settling in another, but dies on the journey, the cases vary as to which jurisdiction should grant letters of administration. In some States it has been held that letters should be granted in the place of destination,⁴ while others favor the old domi-

notwithstanding and assented to the change of residence. The insane person resided in Iowa until he died. *Held*, that the Iowa court had original jurisdiction of the probate of his will.

Indiana.—In *New York* an Indian of the Six Nations, is incapable of acquiring a domicile so as to confer probate jurisdiction. *Dole v. Irish*, 2 Barb. (N. Y.) 639; in *Alabama*, an Indian who died before his nation had become subject to the laws of the State, was held capable of acquiring a domicile so as to give jurisdiction to a probate court. *Brashear v. Williams*, 10 Ala. 630.

1. What Constitutes Residence.—In *Texas*, a mere temporary residence in any county does not give the court of that county exclusive jurisdiction to grant administration on the estate of a decedent under the statute. (Hart. Dig., art. 1030); it must have been a fixed domicile or residence. *George v. Watson*, 19 Tex. 354.

In *Harvard College v. Gore*, 5 Pick. (Mass.) 370, the decedent resided many years in the county of Middlesex, purchased and furnished a house in the county of Suffolk, and afterwards resided with his family during the summer season in Middlesex, where he paid his taxes, and in Suffolk during the winter season, and died while so residing in Suffolk. *Held*, that he was an inhabitant of Middlesex, and that the judge of that county rightfully took the probate of his will.

Burden of Proof.—In *Master v. Bienker*, 87 Ky. 1, the plaintiff averred that testatrix died a resident of Campbell county, Ky., the county wherein the will was probated and suit brought. Defendants denied this, and alleged affirmatively that her domicile was in *Louisiana*, and that the *Kentucky* court had no jurisdiction in the matter of probate and administration. *Held*, that the burden was on

defendants to show that said court had transcended its authority.

2. In *Sommerville v. Lord Sommersville*, 5 Ves. Jr. 750, the Master of the Rolls said: "The next rule is, that though a man may have two domiciles for some purposes, he can have only one for the purpose of succession. That is laid down expressly in *Denisart* under the title "Domicil," that only one domicile can be acknowledged for the purpose of regulating the succession to the personal estate. I have taken this as a maxim and am warranted by the necessity of such a maxim; for the absurdity would be monstrous if it were possible that there should be a competition between two domiciles as to the distribution of the personal estate. It could never possibly be determined by the casual death of the party at either. That would be most whimsical and capricious. It might depend upon the accident whether he died in winter or in summer, and many circumstances not in his choice, and that never could regulate so important a subject as the succession to his personal estate."

3. Death in Itinere.—In *Aspinwall v. Queen's Proctor*, 2 Curt. (U. S.) 241, it appeared that Hammond, a citizen of the *United States*, was killed in consequence of a fall from a coach while traveling from London to Liverpool in order to embark for the *United States*. The deceased left property in *England* to the amount of about £1,000. The American consul-general took possession of some of the effects, but *Bearing Bros.* declined to pay £627 due to the estate of the deceased, until an administration was obtained. An application was accordingly made to the court to grant administration to the consul-general. Administration was refused.

4. In *Burnett v. Meadows*, 7 B. Mon. (Ky.) 277; 46 Am. Dec. 517, a person who had a domicile in one State, started with his family to settle

cile.¹ In *England* and some of the *United States*, it has been held that if the domicile abandoned was an acquired domicile, then the domicile of origin would be the proper place in which to take out letters of administration.²

d. SITUUS OF PROPERTY.—(1) *Personal Estate*.—Where a person dies, leaving personal property elsewhere than at the place of his domicile, the probate court of the place where the property lies may assume probate jurisdiction without regard to the

in another State, and died on the journey. His family continued the journey with the property belonging to the decedent. The court held that letters of administration might be granted where the family settled.

The court said: "Inasmuch, however, as this property was *in transitu*, when he died, and afterwards reached its destination, and as many inconveniences would result from the absence of power in our county courts to regulate its administration, it should be regarded as being at the time of his death constructively in this State, under the circumstances here presented; solely, however, for the purpose of enabling a county court in this State to grant administration thereon." See Schoul. on Exrs. & Adms., pt. 1, § 23.

In *Olson's Will*, 63 Iowa 145, the testator, being in poor health, left his place of residence in Illinois, with the intention of making his future home elsewhere, and after staying a short time at each of several places in quest of health and business, he despaired of regaining his health, and finally settled down with his mother, who was a widow in Taylor county, Iowa, intending to remain there an indefinite time. Here he was married, made his will and soon afterward died. The court held that Taylor county, Iowa, was his domicile at the time of his death; that the circuit court of that county had jurisdiction of the probate of his will, and that the court would not entertain a motion to dismiss the proceedings by alleged creditors resident in Illinois, who claimed that the testator had his domicile in that State, and that the will should be probated there.

In *North Carolina* it has been held that where a decedent has no fixed residence, administration on his estate may be granted by the courts of the State where he died. *Leake v. Gilchrist*, 2 Dev. (N. Car.) 73. In *Missouri* the same rule prevails. *Bartlett v. Hyde*, 3 Mo. 490.

1. In *Cummings v. Hodgdon*, 147 Mass. 21, a minor's father was domiciled at the time of his death in Suffolk county. In the month following the father's death, the minor's mother took him with her to another county, where she lived until she died, but whether she changed her domicile in that county was not stated. The guardian of the minor never changed the latter's domicile, but always intended that he should return to Suffolk. The court held that letters might be granted by the probate court of Suffolk county. See also *Embry v. Miller*, 1 A. K. Marsh. (Ky.) 300; 10 Am. Dec. 732; *State v. Hallett*, 8 Ala. 159.

In *George v. Watson*, 19 Tex. 354, it was held that an allegation that the decedent, on whose estate administration was opened under the act of 1840, in Red River county, resided at the time of his death in Lamar county, and that his last place of residence was in Lamar county, was not a sufficient allegation of fact to show that the court of Red River county did not have jurisdiction, the court suggested that it should have been alleged that the residence in Lamar county was "fixed," that being the language of the act.

2. In *Somerville v. Lord Somerville*, 5 Ves. Jr. 786, the Master of the Rolls said: "The third rule I shall extract is, that the original domicile, or, as it is called, the *forum originis*, or the domicile of origin is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taken another as his sole domicile. I speak of the domicile of origin rather than that of birth; for the mere accident of birth at any particular place cannot in any degree affect the domicile. I have found no authority or *dictum* that gives for the purpose of succession any effect to the place of birth. If the son of an Englishman is born upon a journey in foreign parts, his domicile would follow that of

question of domicile.¹ There must, however, be a showing of

his father. The domicile of origin is that arising from a man's birth and connections." See also *Udney v. Udney*, L. R. 1 H. L. 458; *Lyall v. Paton*, 25 L. J. Ch. 746.

1. *Miller v. Jones*, 26 Ala. 247; *Broughton v. Bradley*, 34 Ala. 694; 73 Am. Dec. 474; *Watson v. Collins*, 37 Ala. 587; *Ikelheimer v. Chapman*, 32 Ala. 676; *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477; *Grimes v. Talbert*, 14 Md. 169; *Smith v. Munroe*, 1 Ired. (N. Car.) 345; *Royston v. Royston*, 21 Ga. 161; *Weaver v. Norwood*, 59 Miss. 665; *Wright v. Smith*, 19 Nev. 143; *St. Jurjo v. Dunscomb*, 2 Bradf. (N. Y.) 105; *Isham v. Gibbons*, 1 Bradf. (N. Y.) 69; *Plummer v. Brandon*, 5 Ired. Eq. (N. Car.) 190; *Willing v. Perot*, 5 Rawle (Pa.) 264.

Situs of Personal Property.—In *Florida*, a grant of administration to a husband for the estate of his wife, who died in *Georgia*, and left property in *Florida*, was held to be valid, and to entitle him to sue in that capacity in *Florida*. *Blewitt v. Nicholson*, 2 Fla. 200.

The *Mississippi* statute (H. & H. 395 § 35) provides that the granting of letters of administration on the estate of any intestate, and the hearing and determining the right of the same, shall pertain to the orphans' court of the county in which the intestate had, at the time of his death, a mansion, house, or known place of residence; and if he or she shall have no such known place of residence, then the orphans' court of the county where the intestate shall die, or of that wherein his or her estate, or the greater part thereof, shall be. *Held*, that the statute is to be construed to relate to the county where the estate may be at the time of the decease of the intestate. *Wright v. Beck*, 10 Smed. & M. (Miss.) 277. See also *Cocke v. Finley*, 29 Miss. 127.

In the *Estate of Scott*, 15 Cal. 220, a person died out of the State, leaving property in Santa Clara county, where an administrator was appointed. The widow of the decedent afterwards applied for the revocation of the letters on the ground that they should have been issued from San Francisco county. At the request of the widow and the administrator, the case was transferred to San Francisco county,

where the papers were filed, and the administrator applied for leave to sell real estate, but the court declined to take jurisdiction. *Held on mandamus*, that the Santa Clara court had jurisdiction and could not divest itself of it, and that the estate must be settled in that court. See also *People v. White*, 11 Ill. 341.

In *Kentucky*, it has been held that, though a probate court has no jurisdiction to grant probate of the will of a party not domiciled in *Kentucky*, who died in another State, unless assets are found in the county in which the court is established, yet the assumption of jurisdiction is *prima facie* evidence of the fact that such court had authority, and throws the burden of proof on the party denying it. *Fletcher v. Weir*, 7 Dana (Ky.) 345.

Where an act provides that if the testator had no place of residence in the State, probate shall be had in the district where the greater part of his estate is situated, exclusive jurisdiction is conferred upon the court so designated, and this jurisdiction cannot be affected by the consent of any or all of the parties. *Gallman v. Gallman*, 5 Strobb. (S. Car.) 207.

Administration may be granted in the State where the deceased left property, although no administration has been taken out in the State where he was domiciled. *Wood v. Matthews*, 73 Mo. 477.

"As between the several courts within the same State or sovereignty, jurisdiction attaches primarily to that tribunal which is invested with probate powers for the county or territorial district which includes the domicile of the testator or intestate at the time of his death, without regard to the place of his death or *situs* of his property." *Woerner's Am. Law of Administration*, p. 439, citing *McBain v. Wimbish*, 27 Ga. 259; *Johnson v. Beazley*, 65 Mo. 250; *McCampbell v. Gilbert*, 6 J. J. Marsh. (Ky.) 592; *Succession of Williamson*, 3 La. Ann. 261; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; 16 Am. Dec. 372; *Wilson v. Frazier*, 2 Humph. (Tenn.) 30.

In *Massachusetts*, where a decedent leaves personal property in two or more counties, the county probate court which first takes cognizance of the estate has exclusive jurisdiction.

property or debts to justify the appointment of an administrator.¹ But the character of the property is immaterial.²

Massachusetts Pub. Sts., ch. 156, § 3. See *People v. White*, 11 Ill. 341.

1. *Wright v. Smith*, 19 Nev. 143.

2. **Nature of the Property.**—A folding-chair is property sufficient to confer jurisdiction. *White v. Nelson*, 2 Dem. (N. Y.) 265.

A claim against an insurance company on a policy of insurance upon the life of the decedent, is an asset, and sufficient to confer on a surrogate's court of the county, where the principal office of such company is situated, jurisdiction to grant letters of administration upon decedent's estate (*New York Code Civ. Pro.*, § 2478), notwithstanding decedent died in another State, and was at that time a non-resident, and the policy is outside of the State. *In re Miller*, 5 Dem. (N. Y.) 381. See also *In re Butson*, 9 L. R. Ir. 21; *Holyoke v. Union Mut. L. Ins. Co.*, 22 Hun (N. Y.) 75; *Johnston v. Smith*, 25 Hun (N. Y.) 171.

Debts.—For the purposes of administration all simple contract debts are assets at the domicile of the debtor. In *Wyman v. Halstead*, 109 U. S. 654, Mr. Justice Gray said: "The general rule of law is well settled, that for the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets, where the debtor lives, without regard to the place where the instrument is found or payable." See also *Sullivan v. Fossdick*, 10 Hun (N. Y.) 173; *Yeomans v. Bradshaw*, Carth. 373; *Attorney Gen'l v. Bouwens*, 4 M. & W. 191; *Vaughn v. Barret*, 5 Vt. 333; *Pinney v. McGregory*, 102 Mass. 186; *Goodlett v. Anderson*, 7 Lea (Tenn.) 286; *Mondel v. Steel*, 1 Dowl. (N. S.) 155; *Slocum v. Sanford*, 2 Conn. 533; *Chapman v. Fish*, 6 Hill (N. Y.) 554; *Owen v. Miller*, 10 Ohio 136; 75 Am. Dec. 502; *Emery v. Hildreth*, 2 Gray (Mass.) 231; *Wilkins v. Ellett*, 108 U. S. 256; *Arnold v. Arnold*, 62 Ga. 627; *Ives v. Jacksonville Nat. Bank*, 28 Ill. App. 563; *Swaney v. Scott*, 9 Humph. (Tenn.) 327; *Grant v. Reese*, 94 N.

Car. 720; *Fox v. Carr*, 16 Hun (N. Y.) 434.

In *Robinson v. Epping*, 24 Fla. 237, it was held that administration might be granted in the county wherein the intestate had a suit pending for an unliquidated claim, this constituting "goods" within the meaning of the act regulating the appointment of administrators, and that the fact that the suit afterwards resulted unfavorably to intestate's estate should not render the letters void.

The Claim Against an Administrator who, knowing of the existence of a paper purporting to be the will of the alleged intestate, distributes the property to the next of kin, is assets sufficient to justify the issue of letters of administration with the will annexed after the admission of such will to probate. *In re Nesmith* (Supreme Ct.), 1 N. Y. Supp. 343.

Debt.—In *Pennsylvania*, where the estate within the commonwealth consists of only one item, and that a debt, letters of administration should be granted in the county where the debtor resides. *Sayre v. Helme*, 161 Pa. St. 299. See *Harberger's Will*, 37 Leg. Int. (Pa.) 246.

In *Iowa*, administration may be taken out when there are debts due from the estate, although there is nothing but real property left by the deceased, and although he may have been a non-resident of the State. But in such case it must be averred in the petition and appear that there are debts for which the real estate is liable, or no administration can be granted. *Little v. Sinnett*, 7 Iowa 324.

Debts Due by the State.—In *Virginia*, the circuit court of the county wherein is the seat of government has jurisdiction to grant administration on the estate of an intestate who resided and died in another State, having no estate in *Virginia* except a claim on the State for money. *Com. v. Hudgin*, 2 Leigh (Va.) 248.

In *Ex parte Dautherau*, 2 Brev. (S. Car.) 459, where the State was indebted to the intestate, it was held, that any judge of a court of ordinary within the State might grant administration, if there was within the State no other property of the intestate whereon to administer, and that the ad-

ministration which was first granted in such case should hold good.

United States Bonds deposited by citizens of another State, in *Pennsylvania*, for safekeeping, upon a special certificate of deposit, transferable by indorsement with the approval of the company, and upon the surrender of which the bonds are to be returned to the depositor, do not constitute, upon the depositor's death, a part of his assets in *Pennsylvania*. *Shakespeare v. Fidelity Ins. etc. Co.*, 97 Pa. St. 173.

A bond, certificate of stock, or other instrument ordinarily transferable will confer a probate jurisdiction wherever it may be found. In *Beers v. Shannon*, 73 N. Y. 292, it was held that a debt upon a bond has its *situs* where the bond is, not where the obligor resides; and when, therefore, a non-resident owner of a bond dies out of the State in which he resided, leaving the bond in the State, and leaving a will of personal property executed according to the laws of the State where he resided, which is duly remitted to probate there, the bond is assets in the county where it is; and, although the obligor resides out of the county, the presence of the bond gives to the surrogate of the county jurisdiction to issue letters testamentary, upon production of a copy of the will duly authenticated as provided by the statute.

Debts by Specialty.—In the old case *Byron v. Byron*, Cro. Eliz. 472, it was held that debts by specialty are goods of the deceased in that diocese where they happen to be at the time of his death. The case is reported as follows: "Debt as administrator of Byron upon an obligation. The case was, that the intestate died in Lancashire, but the obligation was at London at the time of his death; and the bishop of Chester in whose diocese the intestate died, committed administration to F. S. who released to the defendant; and the archbishop of Canterbury committed the administration to the plaintiff; and this release was pleaded in bar, and it was thereupon demurred.—*Warberton*. Every debt follows the person of the debtor; and Chester is within the province of York, where the archbishop of Canterbury has nothing to do.—*Anderson*. Where one dies who has goods in divers dioceses in both provinces there Canterbury shall have the prerogative; otherwise there would be two administrations committed, which is *res inaudita*. The debt is

where the bond is, being upon a specialty; but debt upon a contract follows the person of the debtor; and this difference has been oftentimes agreed, *vide Dyer* 305. And if the archbishop of Canterbury hath not any prerogative in York, but that several administrations ought to be committed; yet at leastwise administration for this bond ought to be committed by the archbishop of Canterbury. Wherefore this release is not any bar."

Shares.—In *Georgia* shares in the capital stock of a railroad corporation are *bona notabilia* in the county where the stock books are kept, transfers made, and dividends paid. *Arnold v. Arnold*, 62 Ga. 627.

Promissory Notes.—See *St. John v. Hodges*, 9 Baxt. (Tenn.) 334; *Goodlet v. Anderson*, 7 Lea (Tenn.) 286; *Eppeng v. Robison*, 21 Fla. 36; *Owen v. Miller*, 10 Ohio St. 136; 75 Am. Dec. 502.

Claim of Damages for Death.—A right of action created by statute merely, and contrary to the common law, will not confer probate jurisdiction beyond the limits of the State which has passed the statute. In *Illinois R. Co. v. Cragin*, 71 Ill. 177, it was held that the right of action created by statute in *Illinois*, in favor of the administrator of a person whose death was caused by the wrongful act or negligence of a railroad company in *Illinois*, could not be regarded as property in the State of *Iowa*, in such sense as to confer jurisdiction in that State to grant letters of administration upon the estate of the deceased.

In *Kansas*, a claim for damages, under the statute, to be recovered by the administrator of one whose death is caused by another, is prosecuted for the benefit of the widow and next of kin, and, therefore, is not "estate" of the deceased. If, under such circumstances, an administrator is appointed and it appears that the decedent was a non-resident and left no property in the State except the claim for damages, such appointment is void. *Perry v. St. Joseph etc. R. Co.*, 29 Kan. 420.

See also generally, **CONFLICT OF LAWS**, vol. 3, p. 521.

Miscellaneous Cases in Which Administration Has Been Refused.—Where the right to grant administration upon the estate of a deceased member of a partnership depends on whether there was the required amount of property in the county which could be legally

If the goods of an intestate are brought into a county in good faith, after the death of the decedent, the probate court may assume jurisdiction, and grant letters of administration upon the estate.¹ The same rule applies where a debtor of a decedent

used as assets of the deceased, and it appears that all the personal property belonged to the firm, and with its real estate, was insufficient to pay the debts of the firm, the deceased had no interest in the personal property which could be administered upon as his estate; and this, although there was sufficient real estate in the county, the record title of which was in the name of the deceased, but which had been purchased with partnership funds and for partnership purposes. *In re Shaw*, 31 Me. 207.

A resident of Arkansas died there, intestate, owning property there and personal effects in Louisiana. *Held*, that the heirs, who were in possession of the Louisiana property, and the Arkansas administrator, could resist successfully the appointment of the public administrator to administer in Louisiana. *Succession of Smith*, 40 La. Ann. 105.

A resident of Maine died there, leaving a yacht. The Maine administrator took possession of the yacht in Massachusetts and sold it. Except the yacht, there were no assets of the estate in Massachusetts. *Held*, that there was no estate on which to found an ancillary administrator in Massachusetts. *Allen, J.*, in delivering the opinion of the court, said: "We think that there was no estate of the decedent to be administered upon in this commonwealth. The yacht was in Maine at the time of his decease, and the appointment of the appellate related back and gave him a title and right of possession to it from that time, which will be recognized and enforced in other jurisdictions. *Bullock v. Rogers*, 16 Vt. 294; *Valentine v. Jackson*, 9 Wend. (N. Y.) 302; *Holcomb v. Phelps*, 16 Conn. 127. Even if the property had never been in the State of Maine, it seems that the taking possession and sale of it here by the appellant, would have been valid, there being no creditors of the intestate here. *Hutchins v. State Bank*, 12 Met. (Mass.) 421; *Luce v. Manchester etc. R. Co.*, 63 N. H. 588; *Petersen v. Chemical Bank*, 32 N. Y. 1; *Trecothick v. Austin*, 4 Mason (U. S.) 16; *Doolittle v. Lewis*, 7

Johns. Ch. (N. Y.) 45; 11 Am. Dec. 389. It is contended in behalf of the appellee, that where chattels of a person are at his decease in the hands of his bailee, in another State from that of his domicile, the administrator of the place of domicile cannot sell them in the other place without taking possession, and cannot take possession without the consent of the bailee. We need not consider the proposition because it does not apply to the case at bar. It appears that the property was in the place of the intestate's domicile at the time of her decease, and it does not appear that it was in the hands of her bailee."

1. In *Pinney v. McGregor*, 102 Mass. 186, Judge Gray carefully considered this question as follows: "By the law of *England*, simple contract debts due to the deceased are *bona notabilia* in the diocese where the debtor resides. It is said indeed in the text books of approved authority, that the debtor must have resided there at the time of the intestate's death, though we do not find that this has been expressly adjudged. 1 *Williams on Executors* 279, and authorities cited. The canons of 1 James I (1603) upon the subject, however, speak of the deceased being 'at the time of his death' possessed of goods and chattels or good debts in any other diocese or peculiar jurisdiction than that in which he died. 1 *Williams on Executors*, 267, 268; but it is observable that, in the leading cases in the courts of common law, in which the administration granted in one county was declared void, the allegation was that the debtor resided in another county, not only at the time of his death, but also ever since, or at the time of the grant of administration. *Yoemans v. Bradshaw*, Carth. 373; 3 Salk. 70; 12 Mod. 107; Comb. 392; Holt 42; *Hillard v. Cox*, 1 Salk. 37; 2 Salk. 747; 1 Ld. Raym. 562; 3 Ld. Raym. 313. And in the case of *Yockney v. Foyster*, cited and approved by Sir John Nichol in *Scarth v. Bishop of London*, 1 Hagg. Eccl. 636, in which the only effects within the province were brought there

after the death of the party, Sir William Wynne held that, if the court of chancery had held a grant of probate there to be necessary in order to file a bill in equity to recover the property, the ecclesiastical court 'in aid of justice' might grant letters of administration.

"Our statute declares that 'the probate court for each county shall have jurisdiction of the probate wills, granting administration of the estates of persons who at the time of their decease were inhabitants of or resident in the county, and of persons who die without the State, leaving estates to be administered within such county.' Gen. Stats., ch. 117, § 2. It does not in terms say 'leaving estates in such county at the time of their decease.' The section embodies the Rev. Sts., ch. 64, § 3, and ch. 83, § 5, which were substantial re-enactments of the St. of 1817, ch. 190, §§ 1, 16. In *Pickquet Appellant*, 5 *Pick.* (Mass.) 65, the court held that the earliest of these statutes should receive a liberal construction, to enable the representatives of deceased foreign creditors to collect the debts of the deceased here in the only way in which by our laws they could be recovered, that is to say, through the power of administration granted by the laws of this commonwealth; and that a debt due from a citizen of this commonwealth to a foreign subject at the time of his death should therefore be deemed estate left by him in this commonwealth, within the meaning of that statute. The same rule of construction must be applied to this case."

"Before that statute, the probate courts of the commonwealth exercised the jurisdiction of granting administration on property belonging or debts due to persons residing abroad, in order to enable them to be collected in this State, because, without any such appointment, no suit could be brought in Massachusetts for the assets or debts of the deceased, either in the courts of the commonwealth or of the United States. *Goodwin v. Jones*, 3 *Mass.* 514; 3 *Am. Dec.* 173; *Stevens v. Gaylord*, 11 *Mass.* 256; *Picquet v. Swan*, 3 *Mason (U. S.)* 469; *Noonan v. Bradley*, 9 *Wall. (U. S.)* 394. In *Dawes v. Borlston*, 9 *Mass.* 337, and *Wheelock v. Pierce*, 6 *Cush. (Mass.)* 288, it seems to be assumed that a debtor or goods of the intestate coming or being brought into the commonwealth after the death

of the testator would give jurisdiction to support an administration. The *dictum* of Mr. Justice Bigelow in *Bowdoin v. Holland*, 10 *Cush. (Mass.)* 18, that 'it is undoubtedly true that if the deceased had at the time of his death neither domicile nor assets within the commonwealth, the judge of the probate had no jurisdiction in the premises,'—is not to be taken in its strictest sense. It was there held that *prima facie* evidence that a deceased non-resident had conveyed real estate in this commonwealth in fraud of his creditors was sufficient to warrant the grant of administration here, even if no similar grant had been made in the State of his domicile; and the question asked by the learned judge upon that point is equally applicable to this. 'If the will is never proved in the place of the testator's domicile, and is purposely withheld from probate, have creditors in this State no means of procuring administration on their deceased debtor's estate, and thereby reaching his property here. To limit the power of granting administration to cases in which the goods are, or the debtor resides in the commonwealth at the time of the death of the intestate, would be to deny the creditors and representatives of the deceased, whether citizens of this or another State, all remedy whenever goods are brought into this State, or a debtor takes up his residence here, after the death of the intestate. The more liberal construction of the statute is necessary to prevent a failure of justice.'

"In *Borer v. Chapman*, 119 *U. S.* 587, it was held, that an administration of the assets of a decedent situated in a State other than that of his domicile, under the laws and the courts of such other State, is merely ancillary; and although the statutes of such State and the proceedings under them may purport to bar all claims against the estate of the decedent, assets finally distributed there, and brought into the State of the domicile of the deceased by his executor or legatee, remain assets in the State of the domicile for the payment of any unpaid creditors choosing that forum; and such assets are impressed with a trust which such a creditor has a right to have administered for his benefit. Mr. Justice Matthews, in delivering the opinion said: "The administration of the estate of Gordon, in California, under the orders of the probate court of

settles in another jurisdiction than that in which he lived during the decedent's lifetime.¹

(2) *Real Estate*.—In some of the *United States*, the *situs* of real estate confers jurisdiction upon the local probate court, to grant letters of administration. The object of such a policy is to give local creditors an opportunity to assert their rights against the real estate of the decedent, in case they should be unable to secure payment of their debts in other ways.²

San Francisco, was merely ancillary; the primary administration was that of the testator's domicile, Minnesota. Chapman was not a citizen of California, nor resident there; he was no party to the administration proceedings; he was not bound to make himself such. If he had chosen he could have proved his claim there and obtained payment, but he had the right to await the result of the settlement of that administration, and look to such assets of Gordon as he could subsequently find in Minnesota, whether originally found or brought there from California by the executors or legatees of Gordon's estate. The assets in California finally distributed there, and brought into Minnesota by the executor or by any legatee, remained assets in Minnesota for the payment of any unpaid creditors choosing that forum. Such assets were impressed with a trust which such creditor had a right to have administered for his benefit."

In *Carroll v. Hughes*, 5 Redf. (N. Y.) 337, a person domiciled in Pennsylvania died, leaving creditors there, but no next of kin except in New York and Ireland. His brother J, residing in New York State, took possession of most of the personal property, about \$30,000, brought it to New York and obtained letters in New York on the ground of assets arriving there after the death. C was afterwards appointed administrator in Pennsylvania, and on J's accounting charged fraud, and prayed an order of return of the property. J denied any fraudulent intent. *Held*, that the validity of J's appointment could not thus be questioned, and, having rendered services, he was entitled to his expenses and commissions.

In *New York*, the coming into a county of the State after decedent's death, of a promissory note held by him executed in another State and secured by a mortgage on land in that State, gives the surrogate of such county jurisdiction of

proceedings for the probate of decedent's will; such note being "personal property." *New York Code Civ. Pro.*, § 2473, subd. 3; *In re Hooper*, 5 Dem. (N. Y.) 242.

If, however, property has been brought from elsewhere to give merely a colorable jurisdiction the court should refuse to grant letters. *Schouler's Executors and Administrators* 36.

Property legally situated within one State, at the time of the death, and already disposed of and administered in its courts by its laws, cannot be affected by administration or the want of it, in another State to which a legatee carries property delivered to him by order of the probate court. *Wells v. Wells*, 35 Miss. 638; *Suarez v. Mayor etc. of N. Y.*, 2 Sandf. Ch. (N. Y.) 173.

1. *Fox v. Carr*, 16 Hun (N. Y.) 434.

2. *Real Estate*.—In *Hart v. Coltrain*, 29 Wend. (N. Y.) 378, *Bronson, J.*, said: "Although the letters are granted with a primary reference to the personal assets, and do not *per se* confer any authority on the administrator over the lands of the deceased, yet when the personalty proves insufficient for the payment of the debts, the administrator may have an order for the sale of the real estate.

Under the act of 1813, although it should appear affirmatively that there was no personal estate, I think the judge of surrogate might grant administration with a direct view to the sale of the real estate of the deceased. If he could not, then there would be no remedy for a creditor in a case where the heir at law resided out of the State, although there might be an abundance of real property to satisfy all claims upon the intestate."

In *Alabama*, the word "assets," as used in the provision of the code authorizing the grant of letters of administration on the estate of a non-resident who dies intestate, includes lands situated in the county in which the let-

c. **FOREIGN WILLS.**—The proper place to probate the will of a decedent, is in the probate court of the county where the decedent was last domiciled, and this is the case irrespective of the place where the will was made, or the country or State where the decedent happened to die.¹ If administration is granted in the jurisdiction of the decedent's last domicile, this is the principal administration, and an appointment granted elsewhere, on account of local assets, is ancillary merely.²

Where a person has made a will, valid under the laws of his domicile, and subsequently changes his domicile to a State or country where the will does not comply with the local requirements of a valid will, and then dies, the will cannot, in the absence of legislation to the contrary, be admitted to probate in the place of the last domicile.³ To remedy this defect, statutes

ters are granted; and the statute applies to the estate of a non-resident alien, who dies intestate owning such lands. *Nicrosi v. Giuly*, 85 Ala. 365. This rule was also applied in *Bishop v. Lalouette*, 67 Ala. 197, where a resident of France died there, leaving no other property in Alabama than land.

See also *Temples v. Cain*, 60 Miss. 478; *Lees v. Wetmore*, 58 Iowa 170; *Posenthal v. Reinck*, 44 Ill. 202; *Sheldon v. Rice*, 30 Mich. 296.

The "proper county," in cases of non-residents dying and leaving lands in the State, is the county where such lands, or a part of them lie, and in such county, administration should be granted. *Bowles v. Rouse*, 8 Ill. 409; *Sprayberry v. Culberson*, 32 Ga. 299; *Rutherford v. Clark*, 4 Bush (Ky.) 27.

In *Slatter v. Carroll*, 2 Sandf. Ch. (N. Y.) 573, it was held that, where there are real assets of the estate of a deceased person within its jurisdiction, although no administration has been taken within the State, a court of equity will not hesitate to administer them.

1. *Stark v. Parker*, 56 N. H. 481; *Converse v. Starr*, 23 Ohio St. 491; *Carpenter v. Denoon*, 29 Ohio St. 379; *Campbell v. Sheldon*, 13 Pick. (Mass.) 8; *Hood v. Lord Barrington*, L. R., 6 Eq. 218.

Under the *New York Code of Civil Procedure*, if a testamentary paper is shown to have been executed in conformity with the laws of *New York*, it is, so far as regards the formalities of execution, entitled to probate whatever and by whomsoever executed, whatever the nature of the property whose disposition it seeks to effect, and wherever such property may be sit-

uated. *In re McMulin*, 5 Dem. (N. Y.) 295.

2. *Merrill v. New England L. Ins. Co.*, 103 Mass. 245; 4 Am. Rep. 548; *Childress v. Bennett*, 10 Ala. 751; 44 Am. Dec. 503; *Goodall v. Marshall*, 11 N. H. 88; 35 Am. Dec. 472; *Ordonaux v. Helie*, 3 Sandf. Ch. (N. Y.) 512; *Fay v. Haven*, 3 Met. (Mass.) 109; *Adams v. Adams*, 11 B. Mon. (Ky.) 177; *Spraddling v. Pipkin*, 15 Mo. 117; *Clark v. Clement*, 33 N. H. 563; *Green v. Rugely*, 23 Tex. 539; *McCord v. Thompson*, 92 Ind. 565; *Dial v. Gary*, 14 S. Car. 573; 37 Am. Rep. 737; *Reynolds v. McMullen*, 55 Mich. 568; 54 Am. Rep. 386; *Collins v. Bankhead*, 1 Strobb. (S. Car.) 25; *Perkins v. Stone*, 18 Conn. 270.

The reason that the administration of the last domicile is regarded as the principal administration, is based on the international doctrine that the law of the domicile of the owner of personal property governs in regard to the right of succession, whether such owner dies testate or intestate. *Crispin v. Doglioni*, 9 Jur., N. S. 653; L. R., 1 H. L. 301; *Wilkins v. Ellett*, 108 U. S. 256.

The principal letters need not precede the ancillary. *Bowdoin v. Holland*, 10 Cush. (Mass.) 17; *Burnley v. Duke*, 1 Rand. (Va.) 108; *Shepherd v. Rhodes*, 60 Ill. 301; *Stearns v. Gaylord*, 11 Mass. 256; *Pinney v. McGregory*, 102 Mass. 192; *Rosenthal v. Renick*, 44 Ill. 202; *Cosly v. Gilchrist*, 7 Dana (Ky.) 206.

3. "If the testator, having made a will in accordance with the law of his domicile, subsequently changes his residence and acquires a new domicile in another State, the will becomes void,

have been enacted in *England*, and in several of the *United States* which provide that if a will is valid under the laws of the State or country where it was made, or where the testator was last domiciled, it may be admitted to probate, although it does not comply with the requirements of the law of the local jurisdiction.¹

2. What Papers Require Probate.—*a. PAPERS TESTAMENTARY IN CHARACTER.*—All papers which are testamentary in character

unless it conforms to the law of his last domicile." Woerner's Am. Law of Administration 495; Story Conf. of Laws, § 473; Schouler's Ex. & Adm. § 17.

In *Missouri*, it has been held that a will made in another State by a person then a resident of such State, but who afterwards returned to *Missouri*, and died there, was invalid if not made according to the laws of *Missouri*. *Nat v. Coons*, 10 Mo. 543; *Stewart v. Petrus*, 10 Mo. 755.

In *Moultrie v. Hunt*, 23 N. Y. 394, it was decided that the validity of the execution of a will of personal property depends upon the law of the place where the testator was domiciled at the time of his death, not at the time of the execution of the will. See also *Dupuy v. Wurtz*, 53 N. Y. 556. In the latter case the facts were as follows: The testatrix, a resident of and domiciled in New York, went abroad with her husband in 1859, on account of her health. She spent her winters at Nice, occupying rooms at a hotel; one room for storing her property she hired by the year; the summers she spent traveling. She made her will at Nice in 1868, executed in accordance with the laws of *New York*, but not according to the requirements of the French law. Up to that time she kept her house in New York city unoccupied, intending and expecting to return as soon as her health would admit. About that time she began to abandon the hope of restored health and of a return, still claiming, however, in her letters and in her will, her residence in New York. Afterward she rented her house in New York, retaining one room to store her effects, and declared in letters and orally that she did not expect to return to her home in New York. In other respects she continued to live as before. She retained her investments in New York and made none abroad. Held, that the evidence failed to establish an intention to adopt a foreign domicile, and it not appearing that the testatrix had acquired a new domicile as

respects her succession, she did not lose by her relinquishment of her plan of return, her domicile in New York, and that the will was valid.

1. In *England*, by the statute 24 and 25 Vict. 114, 1861, 1862, it is provided that a will of personal estate made out of the United Kingdom by a British subject, shall be deemed well executed, whatever may be the domicile of the testator at the time of making the will, or of his death if made according to the forms required by the law of the place where made, or of the place of the domicile of the testator at the time of making the will, or of the laws then in force in that part of her majesty's dominions where he had his domicile of origin. Also that no subsequent change of domicile shall affect the validity or construction of the will. See *In re Reid*, L. R., 1 P. & D. 74.

In *Massachusetts*, a similar statute has been passed. *Massachusetts* Pub. Stats., ch. 127, § 4. This statute protects a nuncupative will, valid in the place where it was made, though invalid in *Massachusetts*. *Docomb v. Docomb*, 13 Allen (Mass.) 88.

See also *Matter of Gilleran*, 50 Hun (N. Y.) 399; *Estate of Gavin*, 18 N. Y. St. Rep. 399; *Dickey v. Vann*, 81 Ala. 425.

In *re Delaplaine*, 45 Hun (N. Y.) 225, an Austrian holographic unattested will was held admissible to probate in New York.

A will executed and proved according to the law of the domicile of the testator, upon a filing of a copy of the record of the probate containing a copy of the will, in the State of *New Hampshire*, pursuant to the laws of that State, may operate to transmit real property situated in that State, although not executed according to the requirements of the *New Hampshire* statute of wills. *Kennard v. Kennard*, 63 N. H. 303.

The validity of a will executed and duly proved in another State cannot be attacked collaterally in the State of *Oregon*. *Wells v. Neff*, 14 Oregon 66.

and contain provisions relating to the disposition of real or personal property should be probated.¹ In *England*, prior to the Court of Probate Act of 1857, a distinction was made between wills of real and personal property. It was held, that the former must always be presented to a probate court, while probate of the latter was unnecessary and improper. If, however, the will disposed of both real and personal property, it was required to be proved entirely in a court of probate, though such probate was without prejudice to the heirs. Under the act of 1857, probate of all papers of a testamentary character is made in the court of probate, and where a will contains a disposition of real estate, the heirs and devisees are required to be cited, and where this is

In *Helme v. Sanders*, 3 Hawks. (N. Car.) 566, Henderson, J., said that the object of taking letters testamentary, in order to collect a debt due to the testator, in another State, after probate of the will in the State of his domicile, is to furnish the court with the documentary proof, which it can recognize as genuine, of the original probate. The will is not to be proved anew, but the fact of the former probate is to be made matter of record in the probate court of the State where the suit is to be brought.

A provision is usually made by statute for filing an authenticated copy of a will, in case of a deceased non-resident, if the will has been duly probated in the State or country of the testator's last domicile. See *Keith v. Keith*, 97 Mo. 223; *Winslow v. Donnelly*, 119 Ind. 565; *Slavi v. Parker*, 56 N. H. 481; *Converse v. Starr*, 23 Ohio St. 491; *Pennsylvania* act of April 23, 1889, P. L. 48; *Texas* Stat. March 23, 1887; Gen. L. 1887, ch. 56, p. 38; *New York* act of June 4, 1888, L. 1888, ch. 495, p. 786; *New Jersey* Statute of April 23, 1888, acts 1888, ch. 318, p. 473; *Kirby v. Lake Shore etc. R. Co.*, 120 U. S. 130.

1. **Codicills** should be probated, even though the codicil contains nothing but a revocation of a former will. *Laugh-ton v. Atkins*, 1 Pick. (Mass.) 535.

Execution of Power.—Where a will is made in execution of a power, it must be probated. See *Sugd. on Pow.* (6th ed.) 21; *Tattnall v. Hankey*, 2 Moore P. C. C. 342; *Goldsworthy v. Crossley*, 4 Hare 140.

Power of Attorney.—A paper, in the form of a power of attorney, may be admitted to probate, if intended to operate as a testamentary disposition of property. *Rose v. Quick*, 30 Pa. St.

225. So also may a deed. *Frew v. Clarke*, 80 Pa. St. 171; or bill of exchange; *Jones v. Nicholay*, 2 Rob. (La.) 288. A promissory note. *Cover v. Stem*, 67 Md. 449. Entries in check book, containing testamentary words in the stub part relating to the check executed on the check side, were held to be admissible to probate, although there was no signature except that on the check, the stub and check being separated by perforated lines. *Lambaert's Estate*, 48 Leg. Int. (Pa.) 187. In general, if a writing shows an intent to dispose, in whole or in part of a person's estate upon his decease, a probate is proper. *Patterson v. English*, 71 Pa. St. 454; *Clingan v. Micheltree*, 31 Pa. St. 25; *Succession of Echrenberg*, 21 La. Ann. 280; *Wood's Estate*, 36 Cal. 75; *Robinson v. Schly*, 6 Ga. 515; *Johnson v. Yancey*, 20 Ga. 707; *Symmes v. Arnold*, 10 Ga. 506; *Walker v. Jones*, 23 Ala. 448; *Mosser v. Mosser*, 32 Ala. 551; *Dunn v. Bank of Mobile*, 2 Ala. 152; *Means v. Means*, 5 Strobb. (S. Car.) 167; *Ragsdale v. Booker*, 2 Strobb. Eq. (S. Car.) 348; *Brown v. Shand*, 1 McCord (S. Car.) 409; *Wheeler v. Durant*, 3 Rich. Eq. (S. Car.) 452; *Jackson v. Jackson*, 6 Dana (Ky.) 657; *Allison v. Allison*, 4 Hawks (N. Car.) 14; *Carey v. Dennis*, 13 Md. 1; *Rohrer v. Stehman*, 4 Watts (Pa.) 442; *Millege v. Lamar*, 4 Desaus. (S. Car.) 617; *M'Gee v. M'Cants*, 1 McCord (S. Car.) 517; *Wilbar v. Smith*, 5 Allen (Mass.) 194; *Lyles v. Lyles*, 2 Nott & M. (S. Car.) 531; *Millican v. Millican*, 24 Tex. 426; *Masterman v. Maberly*, 2 Hagg. 247; *Goods of Morgan, L. R.*, 1 P. & D. 214; *Moye v. Kittrell*, 29 Ga. 677; *Edwards v. Smith*, 35 Miss. 197; *Thorncroft v. Lashmar*, 2 Sw. & Tr. 794; *Taylor v. D'Egville*, 3 Hagg. 206; *Bright v.*

done, the decree establishing the will is valid against all parties.¹

In the *United States*, no discrimination is made between wills of real and personal property.²

b. PAPERS NOT TESTAMENTARY IN CHARACTER.—Papers which do not pretend to be testamentary, such as a letter, not executed and attested according to law, do not require to be probated.³

c. EXTRANEOUS PAPERS REFERRED TO IN A WILL.—Where a will, properly executed and witnessed, refers to a paper not so executed and witnessed, containing directions as to the disposition of the executor's estate, such paper, if in existence at the date of the will and clearly identified as the paper referred to, is a part of the will, and should be admitted to probate as such.⁴

Adams, 51 Ga. 239; *Frew v. Clarke*, 80 Pa. St. 171; *Daniel v. Hill*, 52 Ala. 430; *In re Marsden*, 1 Sw. & Tr. 552. See also WILLS.

In *In re Beebe*, 19 N. Y. St. Rep. 833, the following paper was admitted to probate: "After my mother's death, my cousin A is my heir. This writing is instead of a formal will which I intend to make B executrix."

In accordance with provisions of the charter of a savings fund society, a depositor therein, by writing in its books, appointed and directed that all moneys so deposited by him, with the interest thereon, should be paid after his death to a person named, if not otherwise disposed of by will. *Held*, that this writing was testamentary in character. *Armstrong's Estate*, 2 Pa. Co. Ct. Rep. 166.

1. 1 Williams on Executors 388; Schouler's Executors and Administrators 74.

2. In *Tennessee*, a will insufficiently attested as to realty, may be probated as to personalty. *Davis v. Davis*, 6 Lea (Tenn.) 543. In some of the Southern States more witnesses are required for a will of realty than for one of personalty.

3. *Letters.*—Thus a writing bearing even date with a paper having the form of and purporting to be the last will and testament of the party, and disposing clearly and absolutely of all his estate—which writing refers to the paper as the party's "will" and speaks of itself as "a letter" written for the information and government of the executors, so far only as they see fit to carry out the testator's present views and wishes—has no testamentary obligation, even though it direct the

persons to whom it is written to allow such and such persons to have specific benefits named in specific items of property. *Lucas v. Brooks*, 18 Wall. (U. S.) 436.

A paper which disposes of no property has, generally speaking, no testamentary character and need not be probated. *Van Straubenzee v. Monck*, 3 Sw. & Tr. 6.

4. *Extraneous Papers.*—In *Allen v. Maddock*, 11 Moore, P. C. 427, a codicil headed "This is a codicil to my last will and testament," was duly executed and attested in 1856; upon search among the papers of the testatrix after her death, there was found, inclosed in a sealed envelope, on which were written the words: "Mrs. Ann Foote's will," a will executed by her in 1851, but not so attested as to have any validity as a will, and no other testamentary paper of any description was found. The court held that this will was sufficiently identified as the last will referred to by the codicil of 1856, and was incorporated with and made valid by that codicil, and that the two should be admitted to probate as together constituting the last will and codicil of the testatrix.

In *Newton v. Seaman's Friend Soc.*, 130 Mass. 91, the testator by a codicil expressly revoked a part of his will which gave directions for the payment of a legacy, and ordered and directed his executors to pay the legacies mentioned in his will and codicils, as nearly as might be, according to the directions written in a book by Melvin W. Pierce, signed by the testator and witnessed by Pierce. The book referred to contained such directions, so written, signed, and witnessed, specifying the

property out of which the legacy was to be paid. The court held that the book should be admitted to probate.

In *Goods of Durham*, 1 *Notes of Cases* 365; 3 *Curt. Eccl.* 57, a widow made a will devising and bequeathing all her real and personal estate upon the trust expressed in the will of her late husband, which she described by its date and as having been afterwards revoked. It was held that the revoked will of her husband should be admitted to probate as part of her will.

In *Goods of Dickens*, 1 *Notes of Cases* 398; 3 *Curt. Eccl.* 60, a testator left property to his eldest son, in trust for himself and the other children as expressed in an indenture of settlement made between him and the testator two years before. The court held that the indenture was part of the will, and that a notarial copy should form part of the probate.

In *Goods of Willesford*, 1 *Notes of Cases* 404; 3 *Curt. Eccl.* 77, a testator left a will and codicil, and, on the first page of the will, referred to "the paper hereunto annexed, as a further distribution of my effects." At his death the will and codicil were found in a sealed packet, and attached to the will by a pin was a paper containing such a disposition and stated by the testator to be the paper referred to in the will. This paper was admitted to probate as part of the will.

Testatrix bequeathed certain articles to her executor, "to dispose of the same in the manner specified in my letter to him of this date." At the date of the execution of the will the letter was not written, but was afterwards dictated by testatrix. *Held*, that the letter was properly excluded from probate as a part of the will; and that, although the bequests were void for uncertainty, yet, as they formed but a small part of the estate, the will was properly admitted to probate. *Estate of Shillaber*, 74 *Cal.* 144.

Testatrix, the day before undergoing an operation which ended fatally, wrote two letters; the first, which was addressed to a personal friend, gave directions as to certain articles of plate to which testatrix had affixed the names of various donees; in the second, which was addressed to her executor, and, which was only attested as a codicil, she mentioned having written the first letter. *Held*, that the second letter, which constituted a valid codicil, incorporated the first let-

ter, and that the first letter incorporated the papers therein referred to. *Symes v. Appelbe*, 57 *L. T.*, N. S. 599.

Where, however, the extraneous paper referred to is the property of another person, who refuses to surrender it, the court will not order its production, but will direct probate of the will without the incorporation of the paper. In the *goods of Sibthorp*, *L. R.*, 1 *P. & D.* 105, *Wilde, J.*, said: "The court is not justified in seeking to elucidate a testator's intentions by compelling third persons to produce private deeds which may form part of the title to estates in which the testator had no concern. If the result be that the probate is imperfect, it arises from the necessity of the thing, and the fault lies with the testator, or with those who advised him to make a will in such a form. The court does at times insist on a document other than the testamentary instrument forming a part of the probate, and the reason for its doing so is two-fold. First, those interested under the will are interested in having set out in the probate, under the sanction of the court, any document which is referred to in the will in such a way as to be incorporated with it, and it may be that if that was not done the court of construction might hold that such document was not part of the will. Secondly, it is convenient that the ultimate destination of the residue should be on record in the registry, in order that if the chain of representation should be broken, the court may have before it means of ascertaining who is entitled to a grant for the further distribution of the estate. In this case, as regards the first reason, the parties applying for the probate do not wish to have the document set out in it; and as regards the second reason, although no doubt it is desirable that the destination of the residue should, if possible, appear upon the probate, yet if that can only be done by forcing on people who do not desire it the production of an instrument in which third persons only are interested, the court will not insist upon it. If it can be done otherwise, the court ought to require it. If an affidavit is made showing that the persons who have the custody of the deed refuse to allow that portion of it which concerns the distribution of the residue to be copied and inserted in the probate, then the probate must go without it. Very likely it may turn

d. PAPER APPOINTING EXECUTOR.—A paper containing a mere nomination of an executor, without any disposition of property, is a will, and should be admitted to probate.¹

e. PAPER APPOINTING GUARDIAN.—A paper executed as a will which simply appoints a guardian for minor children, is not entitled to probate.²

3. Duty of the Executor or Custodian of the Will to Produce it for Probate.—After the death of a testator it is the duty of the executor to propound the will for probate,³ but any other person interested in the will may propound it,⁴ and any other person in whose custody it is, may be compelled to produce it in order that it may be proved by some person entitled to probate it.⁵ If any one is interested in the estate, or supposes that he is entitled to a legacy or devise under the will, he may petition for a citation to have the will produced.⁶ A person who suppresses a will may be committed for contempt by the probate court,⁷ or he may be punished as for a criminal offense.⁸

4. Time Within which Will Should be Produced for Probate.—In the absence of legislation there seems to be no fixed limit of time within which a will may be admitted to probate. In *England* and the *United States*, statutes have been passed which require the production of the will within a reasonable time after the death of the decedent.⁹ If for any reason the will has not been pro-

out on examination of the deed that a portion of it sufficient to ascertain the ultimate disposition of the residue may be extracted and incorporated in the probate without hurting those to whom the deed belongs. But it is for them to say what they will do. It is their deed, and the court will not force them to produce it. I decree probate of the will and codicils subject to the production of the affidavit I have mentioned."

1. Schouler's Executors and Administrators 76. Goods of Jordan, L. R., 1 P. & D. 555; Goods of Lancaster, 1 Sw. & Tr. 464; O'Dwyer v. Geare, 1 Sw. & Tr. 465; Miller v. Miller, 32 La. Ann. 437. See Goods of Barden, L. R., 1 P. & D. 325.

2. Goods of Morton, 3 Sw. & Tr. 422. But Schouler questions whether this holds true in States where the probate court has original jurisdiction in the appointment of guardians as well as executors. See Schoul. Wills, § 294; Schouler's Executors and Administrators 76.

3. 3 Redfield on Wills (3rd ed.) 8; Schoul. Exrs. & Adms., § 53; 2 Minor's Insts. (3rd ed.) 1044.

4. 2 Minor's Insts. (3rd ed.) 1044;

Stone v. Huxford, 8 Blackf. (Ind.) 452; Bliss' Ann. Code (N. Y.), § 2614.

An agent of a party interested may apply for probate. Russell v. Hartt, 87 N. Y. 19.

5. Schoul. Exrs. & Adms., § 53; 3 Redfield on Wills, p. 14; Massachusetts Gen. Stats., ch. 92, § 16.

6. "The application for probate of a will of personal estate may be made either by an executor or by any other person interested in the estate under the will. And where the executor institutes proceedings in his own name only, any other person who has an interest in establishing the will, and who would be precluded if the decision was against the validity, has an unquestionable right to intervene, and thus make himself a party to the proceeding, if he is unwilling to trust the protection of his rights to the party by whom such proceedings were instituted." Foster v. Foster, Paige (N. Y.) 48.

7. Brick's Estate, 15 Abb. Pr. (N. Y.) 12.

8. Stebbins v. Lathrop, 4 Pick. (Mass.) 33.

9. In Massachusetts, a statute requires every custodian of a will within

duced for a number of years after the death of testator, it is proper to admit it at any time upon due proof of its validity.¹

5. **Procedure—*a*. THE PETITION.**—In the *United States*, the executor usually presents the will to the probate court with the petition setting forth the circumstances of the death, the place of the last domicile of the deceased, and praying for the probate of the paper or papers presented, and for letters testamentary. Affidavit is made as to the truth of the facts set forth in the petition.²

thirty days after the notice of the death of the testator, to deliver it in the probate court which has jurisdiction of the case, or to the executor named in the will. *Massachusetts Gen. Stats. ch. 92, § 16*.

1. In *Massachusetts*, a will may be admitted to probate at any time in order to establish title to real estate. *Shumway v. Holbrook*, 1 Pick. (Mass.) 115; 11 Am. Dec. 153. In *Waters v. Stickney*, 12 Allen (Mass.) 1, it was held that the probate court, fourteen years after admitting a will to probate, might admit to probate a codicil written upon the same leaf, which had escaped attention and was not passed upon at the time of the probate of the original will. Mr. Justice Gray said: "It has been directly, adjudged by this court that a will may be proved even thirty years after the death of the testator, though original administration could not by statute be granted after twenty years;" and again, "if no will had been proved, the lapse of time would not prevent both will and codicil from being proved now."

In the recent case of *Haddock v. Boston etc. R. Co.*, 146 Mass. 155, a will was admitted to probate in 1885, the testatrix having died in 1822. *Devens, J.*, after discussing the earlier cases, said: "While it is true that in neither of these cases has it been decided that a will disposing of lands can be admitted to probate after sixty years, yet there is no suggestion in any of them that there is any limitation of time to such proof, and the language used is quite explicit to the contrary. In view of the decisions made, and the repeated expressions directly relevant to the cases considered used in argument by judges of this court, we cannot treat this inquiry as the defendant desires we should, as practically a new question. We must deem it one that has been fairly passed upon and decided. It may be that the inconveniences which might arise from the probate of a will

many years after the death of the testator are such that a statute limiting the period might be properly enacted. That course has in some States been adopted. *Connecticut Gen. Stats. 1875, tit. 18, ch. 11, § 11*; *Maine Rev. Stats. ch. 64, § 1*. But Statutes of Limitation are arbitrary, and the considerations which apply to positive laws of this character are legislative rather than judicial. In every instance where a great length of time has elapsed after the death of the testator, possessory titles may have been acquired which will prevail against the record. What is due to the just rights of the devisees is to be considered with reference to other rights of property, or to the repose of the community, but such considerations belong to the domain of legislation. So long as one can produce the evidence necessary to obtain the probate of a will, we can see no legal reason why one who relies upon it should not be allowed to prove it as he would be permitted to prove a deed, however ancient, under which he claimed title. The fact that he could not offer in evidence a will not admitted to probate, as he might an ancient deed, would certainly afford no reason why its authority should not be established in the probate court by its regular course of procedure."

2. In Philadelphia the blank form of petition is as follows: "The petition of _____ respectfully sheweth that is the executor named in the last will and testament of _____ dated the _____ day of _____ A. D. 18 ____ That said _____ was a resident of Philadelphia county, State of Pennsylvania, and departed this life at number _____ in the county of _____ and State of _____ on the _____ day of _____ A. D. 189 ____ at _____ o'clock _____ M.

The said testator was possessed of personal property to the value of \$ _____ and real estate (less incumbrance) to the value of \$ _____. Therefore the said _____ respectfully applies for

b. **PROBATE IN COMMON FORM.**—The probate of a will in common form is made, when the executor presents it to the probate court without having cited any of the parties interested, and produces witnesses who testify to its validity. In *England* and some of the *United States*, wills are usually probated in common form, upon the oath of the executor, and this is done upon the presumption that the writing presented is valid in all respects.¹

Probate of a will in common form is conclusive until overturned by direct proceedings.²

c. **PROBATE IN SOLEMN FORM.**—A will is probated in solemn form when all parties in interest are cited or notified to appear at

probate of the said last will and testament and for letters testamentary thereon."

1. *Wms. Exrs.* (6th ed.) 320; *Brett v. Brett*, 2 Add. 224; *Goods of Hare*, 3 Curt. 54; *Goods of Edmonds*, 1 Hagg. 698; *Goods of Tolcher*, 2 Add. 16; *Goods of Gibbs*, 1 Hagg. 376; *Goods of Taylor*, 1 Hagg. 642; *Palmer v. Dent*, 2 Robt. (N. Y.) 284; *Armstrong v. Baker*, 9 Ired. (N. Car.) 109; *Kinard v. Riddlehoover*, 3 Rich. (S. Car.) 258; *Jones v. Moseley*, 40 Miss. 261; *Martin v. Perkins*, 56 Miss. 204; *George v. George*, 47 N. H. 27; *Noyes v. Barber*, 4 N. H. 408.

Probate in Common Form.—In a recent case in *Arkansas*, the clerk of the probate court, to whom a will was presented for probate in vacation, took the depositions of the subscribing witnesses thereto, and admitted the will to record as duly probated. At the next term of the court, the will with such depositions was presented to the court, which thereupon found that the will "duly witnessed and regular in all things," and declared it to be the last will of the testatrix, and confirmed the action of the clerk. The supreme court held that, as the court had jurisdiction to take probate in common form without causing parties interested to be summoned, its judgment not stopping with confirmation of the act of the clerk, but admitting the will to record on proofs submitted, was not void. *Petty v. Ducker*, 51 Ark. 281.

2. In *England* and in those of the States of the Union which follow the English practice, the executor who has proved a will in common form may be compelled by any one interested to prove it again in solemn form. In *Satterthwait v. Satterthwait*, 3 Phill. 1, a probate of a codicil, granted in common form in 1808,

was upon the citation of the executor by a next of kin to prove it in solemn form revoked in 1818; and in *Finucane v. Gayfere*, 3 Phill. 405, a will probated in common form in 1807, was revoked by a probate in solemn form in 1820. Williams in his work on Executors, says: "The difference between the common form and the solemn form, with respect to citing the parties interested, works this diversity of effect, viz: that the executor of the will proved in common form may, at any time within thirty years, be compelled, by a person having an interest, to prove it *per testes* in solemn form."

In some of the States, statutes provide a limited time within which a probate in common form may be contested. *Roy v. Segrist*, 13 Ala. 810; *Nalle v. Fenwick*, 4 Rand. (Pa.) 285; *Parker v. Brown*, 6 Gratt. (Va.) 554.

In *Martin v. Perkins*, 56 Miss. 204, it was held that probate in common form could not be pleaded as *res judicata* in a direct proceeding to determine the validity of the will.

In *Ward v. Glenn*, 9 Rich. (S. Car.) 127, a married woman executed a will, disposing of her separate estate, which was admitted to probate in common form. More than four years having elapsed, the husband applied for letters of administration, which the ordinary refused to grant. It was held that the refusal was proper; that the will of a *feme covert* is not absolutely void, there being exceptions to the general rule, and the ordinary having exclusive and general jurisdiction to admit to probate the wills of all persons, the grant of probate without appeal admitted her capacity, which could not be questioned, nor letters of administration granted while the probate was unrevoked.

the time of probate, and the will is then duly proved by witnesses.¹ In many of the *United States*, there is no personal service of the citation, but only a publication of a copy in a newspaper circulating in the county of the testator's last domicile.² In some States, notice must be personally served on each party in interest or mailed to their address.³ If, however, all parties in interest sign a waiver of notice, publication and service may be dispensed with.⁴

6. Effect of Probate.—The effect of probate is merely to ascertain the original validity of the will. It is not in any particular the foundation of the executor's title, for that is derived solely from the will itself at the moment of the testator's death.⁵ After

1. In *Noyes v. Barber*, 4 N. H. 409, Richardson, C. J., said: "We understand a probate in solemn form to be a probate made by a judge, after all persons whose interests may be affected by the will have been notified, and had an opportunity to be heard on the subject."

2. **Notice.**—Under the *Iowa* statute admitting wills to probate upon notice upon publication (Code § 2341), the court acquires jurisdiction without proof of actual notice to any of the parties interested. *In re Middleton*, 72 Iowa 424.

Under the requirements of the *Montana* statutes, that notice of hearing of a petition for probate of a will shall be published at least three times when published in a weekly newspaper (Rev. Stat., p. 195, §§ 13, 16), where such notice is published on two days only, an order made thereon admitting a will to probate is void. A recital in the order that such notice was published according to law was not conclusive, when the record shows the contrary. *In re Charlebois*, 6 Mont. 378.

The published notice of an application to admit a will to probate fixed July 24 as the time for the hearing, but the record showed that the hearing was, in fact, had on Aug. 7. *Held*, that it would be presumed, in the absence of proof to the contrary, that other business prevented the hearing on the day named, or that it was postponed for the convenience of the parties, to the subsequent day. *Field v. Apple River Log Driving Co.*, 67 Wis. 569.

A notice of an application for admission to probate of a will was published for the length of time and in the manner prescribed by statute. *Held*, that mere failure to file proof of such publication, until after the time set

for hearing, did not oust the court of jurisdiction, nor render its judgments void. *Roberts v. Flanagan*, 21 Neb. 503.

3. *Cobb's Est.*, 49 Cal. 600; *Bartell's Est.*, Myr. Prob. (Cal.) 130.

4. A *Massachusetts* statute provides that, when it appears to the court by the written consent of the heirs at law, or other satisfactory evidence, that no person interested in the estate intends to object to the probate of the will the court may grant probate thereof upon the testimony of one only of the subscribing witnesses. *Massachusetts Gen. Stat.*, ch. 92, § 19.

5. In *Ex parte Fuller*, 2 Story (U. S.) 327, STORY, J., in discussing a statute of *Maine* which provided that no will should be effectual to pass real or personal estate, unless it should have been duly proved and allowed in the probate court, said: "The argument is, that under this clause, a will is a mere nullity before probate; that the probate gives it life and effect from that time, and not retroactively. It appears to me that this section is merely affirmative of the law, as it antecededly stood. The will before probate is, in no just juridical sense, a nullity. The very language of the section prohibits such an interpretation. The will must still be the foundation of the whole title, inchoate and imperfect, if you please, until its validity is ascertained by the probate, but still a will, and not a nullity."

It would be an anomaly in the use of language to speak of the probate of a nullity. The probate ascertains nothing but the original validity of the will as such. The act of the testator gave it life; his death consummated the title, derivatively from himself; and the probate only ascertains that the instrument in fact is what it purports on its face to be. It might as well be said

a will has been duly probated, the decree of the court of probate unappealed from, is conclusive, and cannot be inquired into collaterally.¹

that a will of real estate, at the common law, is a nullity until a jury has ascertained its validity, whereas the verdict ascertains only the fact that the title under the will is perfect, because it was duly executed by a competent testator, and therefore took effect by relation from the time of his death."

"The probate operates back, by relation, to the death of the testator, and all the property of the testator in his hands must, I think, be considered as assets in his hands for that purpose, whether it be money, stock, or debts due to the testator, which he had recovered, and it is the same whether he has recovered the debt or owed it. There is no time at which it can be said that the debt was gone, except at his death. If he had died without proving the will, I think it could not have been recovered after six years had elapsed. One person, it is true, cannot create the relation of trustee and *cestui que trust* between himself and another, except with the consent of such other person, but when such person consents and proves the will, I am of the opinion the act must have reference back to the death. I cannot find any case on the point, and it must therefore be determined on general principles; and I am of the opinion that whenever the executor takes probate it refers back to the testator's death, and that any property in his hands becomes assets to be administered." *Ingle v. Richards*, 28 Beav. 366.

See also *Willard v. Hammond*, 21 N. H. 385; *Hartnett v. Wandell*, 60 N. Y. 349; 19 Am. Rep. 194; *Succession of Vogel*, 20 La. Ann. 81; *Wilson v. Wilson*, 54 Mo. 213; *Strong v. Perkins*, 3 N. H. 517; *Hall v. Ashby*, 9 Ohio 96; 34 Am. Dec. 424; *Dixon v. Ramsay*, 3 Cranch (U. S.) 319; *Hill v. Tucker*, 13 How. (U. S.) 458; *Fleeger v. Poole*, 1 McLean (U. S.) 189; *Rex v. Netherseal*, 4 T. R. 258; *Wood v. Mathews*, 53 Ala. 1; *Pitts v. Melser*, 72 Ind. 469.

Upon the probate of a will in which no executor is named, and the appointment of the administrator *cum testamento annexo*, the personal property vests in the administrator by relation from the death of the testatrix. *Drury v. Natick*, 10 Allen (Mass.) 169.

The doctrine that letters testamentary, when issued, relate back to the death of the testator, and legalize all intermediate acts of the executor, must be understood to cover those acts only which might have been done had he been executor at the time. *Bellinger v. Ford*, 21 Barb. (N. Y.) 311.

In *Willamette Falls etc. Co. v. Gordon*, 6 Oregon 175, it was held that a will not regularly probated could not be used to establish title to lands devised.

In some of the States a different rule seems to prevail. Thus in *Arkansas*, rights may be protected under an unprobated will by showing the validity of the will in any court. *Arrington v. McLemore*, 33 Ark. 759.

In *Richards v. Pierce*, 44 Mich. 444, it was held, that the fact that a will has not yet been proved does not prevent a devisee of lands or his assignee from bringing ejectment.

1. *Strong v. Perkins*, 3 N. H. 518; *Tompkins v. Tompkins*, 1 Story (U. S.) 547; *Cassels v. Vernon*, 5 Mason (U. S.) 334; *Patten v. Tallman*, 27 Me. 17; *Hess v. Hess*, 5 Watts (Pa.) 187; *Holliday v. Ward*, 19 Pa. St. 485; 57 Am. Dec. 671; *Lovett v. Mathews*, 24 Pa. St. 330; *Shinn v. Holmes*, 25 Pa. St. 142; *Cochran v. Young*, 104 Pa. St. 333; *McCay v. Clayton*, 119 Pa. St. 133; *Taylor v. Tibbatts*, 13 B. Mon. (Ky.) 177.

In *Judson v. Lake*, 3 Day (Conn.) 318, in a trial in the common law court in an action of ejectment, one of the parties relied upon a title by devise by the will of a married woman that had been allowed and approved by the probate court. The opposing party objected to its validity as a will, upon the ground that the testatrix was a married woman, but it was held by the supreme court that the decree of the court of probate establishing a will containing a devise of real estate by a *feme covert*, was conclusive upon the heirs at law of the testatrix, until disapproved on appeal or set aside in due course of law.

In *Poplin v. Hawke*, 8 N. H. 124, the court held that the decree of the probate court, allowing the probate of the will of a married woman, was conclusive as to the validity of the will, and

7. Proof of the Will—Matters relating to the proof of the testator's signature, the publication of the will, the mode of attestation by witnesses, the character of the attestation clause, and other kindred subjects, are treated in the article *WILLS*. The subject of testamentary capacity is treated under *INSANITY*, vol. 11, p. 105; and *TESTAMENTARY CAPACITY*.

8. Partial Probate.—In *England*, a will may be in part admitted to probate, and in part refused. This is the case where the probate court is satisfied from the evidence that a clause has been inserted by fraud without the knowledge of the testator in his lifetime, or where he has been fraudulently induced to insert it in his will; and the same rule applies where a clause has been forged after the testator's death.¹

In the *United States*, the whole will is usually admitted to probate without any reservation of the void or illegal parts. Thus in *Pennsylvania* it has been decided that the register's

that the matter could not be questioned collaterally. A similar conclusion was reached in *Parker v. Parker*, 11 Cush. (Mass.) 519.

A judgment of the probate court, granting letters of administration, cannot be impeached collaterally on the ground that the decedent resided in a different county. *Tant v. Wigfall*, 65 Ga. 412.

Letters of administration will not be revoked on an infant's estate if he, in fact, left property. *Wheeler v. St. Joseph etc. R. Co.*, 31 Kan. 640.

1. In *Allen v. McPherson*, 1 H. of L. 191, which was an appeal from the Lord Chancellor, dismissing a bill for want of jurisdiction, which set up that a particular clause in the will had been inserted through a fraud practiced upon the testator, the House of Lords held that it was exclusively within the province of the ecclesiastical court to determine what was the will of the testator, and whether the clause in question formed a part of it, and that the determination by that court of that and by the admission of the paper to probate, with or without that clause, was not open to be re-examined in any other court or proceeding.

In *Barton v. Robins*, 4 Phill. 455, a clause was rejected which had been fraudulently inserted in the testator's lifetime. In *Plume v. Beale*, 1 P. Wms. 388, a forged clause was rejected. In *Goods of Duane*, 2 Sw. & Tr. 500, a clause introduced without instructions. In *Billinghurst v. Wickerns*, 1 Phill. 187, a part of the will executed at a time when the testator was incapacitated.

In the *Goods of Wartnaby*, 4 Notes of Cases 476, a scurrilous imputation on the character of another man was excluded from the probate. See also the *Goods of Honeywood*, L. R., 2 P. & D. 251; *Marsh v. Marsh*, 1 Sw. & Tr. 528.

Where there is a variance between the will, as finally drawn, and the instructions, if the testator has had an opportunity to see the will and examine it before execution, the probate court will make no correction, but will allow the whole to be proved. In *Harter v. Harter*, 3 L. R. P. & D. 11, the testator gave oral instructions for a will to his attorney, who made a memorandum of them in his presence. The residuary clause was as follows: "And the residue equally amongst all the sons, including the eldest son for the time being, on attaining twenty-one." From the memorandum a draft will was drawn, which disposed of the residue in the following terms: "The trustees to stand possessed of all the residue and remainder of my real estate in trust to divide the same, etc." The draft will was left with the testator, and on his suggestion certain alterations were made in it, but not in reference to the words of the residuary clause above given. The will with such words, was executed by the testator. It was held that the court of probate could not correct the mistake, if mistake there was, either by the omission of words, or by the insertion of other words.

In *Guardhouse v. Blackburn*, L. R., 1 P. & D. 100, specific words had been inserted by an attorney in a codicil

jurisdiction is confined to the question whether the paper has been legally executed, and is the will of the testator. Other questions are left for subsequent decision.¹

9. Nuncupative Wills.—Nuncupative wills are not favored by courts of probate, and the strictest proof as to the facts of such a will is required.²

10. Probate of Lost Wills.—See LOST PAPERS, vol. 13, p. 1059.

II. LETTERS OF ADMINISTRATION.—1. **Intestacy Necessary to Grant of Administration.**—Before a valid grant of general administration can be made, it must appear to the court that the decedent died intestate.³ If letters of general administration are granted during the pendency of a contest over a will, or after a will has been probated, they are null and void.⁴

2. Death Necessary to Grant of Administration.—Letters of administration, granted upon the estate of a living person, are absolutely void, and it makes no difference if, through long continued absence, he is presumed to be dead. In such a case the presumption may be overthrown, and a decree granting the letters may be impeached collaterally.⁵

by mistake and without instructions. It appeared, however, that the codicil had been brought to the attention of the testatrix. The court refused to reject the codicil.

1. In *Baxter's Appeal*, 1 Brews. (Pa.) 451, it was said, "Though a writing propounded as a will may contain one or more dispositions of property unlawful or void for any reason, it by no means follows that it is not to be admitted to probate. It may contain other useful provisions not at all affected by the cause of the alleged invalidity." See also *Hegarty's Appeal*, 75 Pa. St. 503; *George v. George*, 47 N. H. 27; *Bent's Appeal*, 35 Conn. 523; 38 Conn. 26.

2. *Haus v. Palmer*, 21 Pa. St. 296; *Leamann v. Bonsall*, 1 Add. 389; *Parsons v. Parsons*, 2 Me. 298; *Welling v. Owings*, 9 Gill. (Md.) 467; *Bronson v. Burnett*, 1 Chand. (Wis.) 136; *Woods v. Ridley*, 27 Miss. 119; *Rankin v. Rankin*, 9 Ired. (N. Car.) 156.

"So little are nuncupative wills favored with the ecclesiastical courts, that not only must all the provisions of the Statute of Frauds be strictly complied with to entitle such a will to probate; but added to this, and independent of that statute altogether, the *factum* of a nuncupative will is required to be proved by evidence more strict and stringent than that of a written one, in every single partic-

ular." 1 Wms. on Executors 158. See also NUNCUPATIVE WILLS, vol. 16, p. 1006.

3. *Bulkley v. Redmond*, 2 Bradf. (N. Y.) 281.

4. *Slade v. Washburn*, 3 Ired. (N. Car.) 557; *Ryno v. Ryno*, 27 N. J. Eq. 522; *Landers v. Stone*, 45 Ind. 404; *Watson v. Glover*, 77 Ala. 323.

5. In the leading case of *Jochumsen v. Suffolk Sav. Bank*, 3 Allen (Mass.) 87, it was held that a depositor in a savings bank may maintain an action to recover the amount of his deposit, although the bank had previously paid the deposit to a person who had been appointed administrator of the depositor, after the depositor had been absent from home for more than seven years without having been heard from. *Dewey, J.*, in delivering the opinion of the court said: "It was further urged as a ground for sustaining the appointment of the administrator, that upon the case as it existed at the time of granting letters of administration, the facts would well warrant the decree making such appointment, and give jurisdiction to the court of probate. The position taken is, briefly, that seven years' absence, upon leaving one's usual home or place of business, without being heard of, authorizes the judge of probate to treat the case as though the party were dead. The error consists in this, that those facts are only presump-

tive evidence of death, and may always be controlled by other evidence showing that the fact was otherwise. The only jurisdiction is over the estate of the dead man. When the presumption arising from the absence of seven years is overthrown by the actual personal presence of the supposed dead man, it leaves no ground for sustaining the jurisdiction."

In *Devlin v. Commonwealth*, 101 Pa. St. 273, 47 Am. Rep. 101, it was held that the grant of letters of administration by the register of wills upon the estate of a person who had been absent for fifteen years and was presumed to be dead, but who was really alive was absolutely void. See also *D'Arusment v. Jones*, 4 Lea (Tenn.) 251; 40 Am. Rep. 12; *Hooper v. Stewart*, 25 Ala. 408; *Burns v. Van Loan*, 29 La. Ann. 560; *Griffith v. Frazier*, 8 Cranch (U. S.) 23; *Fisk v. Newell*, 9 Tex. 13; *Plume v. Howard Sav. Institution*, 46 N. J. L. 211.

A contrary rule is laid down in *Roderigas v. East River Sav. Bank*, 63 N. Y. 460. In this case it was held that where letters of administration are issued upon the estate of one supposed to be dead, and proof of death is made, and the defendant, upon demand and presentation of the letters, pays over in good faith to the administrator the amount of a deposit made by the supposed decedent, an action cannot be maintained to recover the amount of the deposit, although it appears that the supposed decedent was not dead at the time the letters were issued. Earle, J., in delivering the opinion of the court said: "The claim is that, if death has not occurred, although the surrogate may have been satisfied by the clearest proof before him that death had occurred, his proceedings are a nullity for want of any jurisdiction to act. The consequence is that they furnish no protection to any one. The surrogate, who has in good faith ordered the sale of property and the distribution of money, may, in after years, be made liable for the whole estate. After many years it may be a question whether the intestate died in one month or in another month, earlier or later; and shall the jurisdiction of the surrogate and the validity of his proceedings and his protection against liability depend upon how this question may be determined by a jury upon disputed evidence. If the surrogate's proceedings are to be held null and void in case he errs as to the fact of

death, the same must follow if he errs as to the place of death, and as to the other facts mentioned in § 23, above cited. The fact of inhabitancy is frequently one difficult to be determined. It is one the surrogate must determine before he can issue letters, and its determination frequently depends upon disputed and fallible evidence; and if error as to the fact of death will leave him with no jurisdiction, so will error as to the fact of inhabitancy, and the consequence will be that in such a case his proceedings will give no protection to any one. A construction of the statutes which will lead to such results will make the laws as to the jurisdiction and proceedings of the surrogates' courts difficult and hazardous to execute, and should not be tolerated unless the language used will admit of no other construction. I am of opinion, taking into consideration the various provisions of the statutes, that it was the intention of the legislature to confer upon surrogates' courts sole and exclusive jurisdiction over the subject of granting letters of administration; and as part of the jurisdiction to determine the facts, upon sufficient evidence, upon which their action must rest. . . . As my conclusion in this case is based upon the construction of the statutes of this State regulating the jurisdiction and proceedings of the surrogates' courts, decisions from other States made under statutes not the same can furnish us little aid; but the following authorities tend somewhat to sustain the conclusion I have reached. *Bumstead v. Read*, 31 Barb. (N. Y.) 661; *Bolton v. Brewster*, 32 Barb. (N. Y.) 389; *Morrell v. Dennison*, 8 Abb. Pr. (N. Y.) 401; *Holcomb v. Phelps*, 16 Conn. 127; *Roborg v. Hammond*, 2 Har. & G. (Md.) 429; *Parhan v. Moran*, 4 Hun (N. Y.) 717.

There is a *dictum* adverse to my conclusion in *Allen v. Dundas*, 3 T. R., 125, and also in *Griffith v. Frasier*, 8 Cranch (U. S.) 9. In *Jochumsen v. Suffolk Sav. Bank*, 3 Allen (Mass.) 87, the precise question involved in this case, of the payment by the savings bank to an administrator of a depositor appointed in his lifetime, was decided under the *Massachusetts* statutes adversely to the views I have expressed. It was held that the depositor could recover notwithstanding the prior payment by the bank to the administrator. In *Bolton v. Jacks*, 6

Robt. (N. Y.) 166, there is a learned discussion of the question of the jurisdiction of courts, and it was there held that if a surrogate admitted to probate a will of a testator not at the time of his death an inhabitant of his county, he acted without jurisdiction, and that his proceeding was void and could be attacked collaterally. I believe the decision to be unsound in this respect.

A further criticism of cases to which our attention has been called would not be useful. The question for our decision is not free from doubt; a decision either way would be confronted with some authority and meet with some logical difficulties."

The case of *Roderigas v. East River Sav. Institution*, 63 N. Y. 460; 20 Am. Rep. 55, has been severely criticised. Judge Redfield, in 15 Am. Law Reg. 212, says that it is perhaps without precedent in America or England. In concluding his review he says: "When we come to find all this set aside and ignored by one of the ablest courts in the country, and the opposite views maintained and applied to a state of facts where no court could possibly claim jurisdiction any more than it could obtain jurisdiction of one who was never born, we must confess to a new sense of the uncertainty of the law." The case was also severely criticised by a writer in 10 Am. Law Rev. 787.

In a later decision in the same case in 75 N. Y. 316, the court held that the letters were void, but simply on the ground that they had been issued by a clerk and not by the surrogate, and that no proof of death had been offered or made.

In *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. (U. S.), Choate, J., said: "In the case of *Roderigas v. East River Sav. Institution*, 63 N. Y. 460; 20 Am. Rep. 55, one of the learned judges (Miller, J.) who concurred in the decision of the majority of the court, expressed the opinion that the statutes under consideration as applied in that case, could not be regarded 'as divesting a person of his property, or interfering with rights, without due process of law, in violation of a constitutional right.' Although it does not appear, in the opinions given, that the judges especially referred to the prohibitory provisions in the Fourteenth Amendment to the Constitution of the United States, yet, as the provision in the constitution of the State

of New York is substantially the same, it must be assumed, since otherwise the judgment rendered could not have been given, that, in the opinion of the four judges who concurred in the decision, the plaintiff was not deprived of his property without due process of law. But, whether the three dissenting judges dissented on this or some other ground does not appear. The weight of this case as an authority, on a point on which it is not controlling, is however, greatly impaired by the dissent of three out of seven judges constituting the court, there being nothing to show that they did not dissent on this very ground.

"In considering this question, the first inquiry is, whether by force of the laws of *New York*, and of the proceedings under them, if they are held valid, the plaintiff has been "deprived of his property" by the State of New York, within the meaning of the constitutional provision. For, if he has not been deprived of his property, or, if he has not been so deprived by the State of New York, it necessarily follows, that the constitutional provision has not been violated, and it need not be further considered whether the means employed in doing what has been done are properly described as 'due process of law.' An examination of the opinion of the case of *Roderigas v. East River Savings Institution* shows that the court did not hold that, for all purposes, and in favor of all persons, as against the supposed decedent, the title to his property vested in the administrator, but only that it so vested in favor of innocent third persons who had dealt with the administrator on the faith of the letters. The case before the court did not call for anything further than this, and I think it is entirely consistent with the opinions delivered, that, if the defendant had not paid the deposit to the administrator, and the supposed decedent had himself demanded it, the proceedings in the surrogate's court, and the issue of the letters, would not have been held to be a defense. In other words, the decision was not strictly that, by virtue of the appointment of the administrator and the issue of the letters, the title passed, as it undoubtedly does in the case of a deceased person, but that, for the protection of the defendant, and for equitable reasons, the supposed decedent was estopped to deny, as against the

A person sentenced to imprisonment for life as a punishment for crime is not civilly dead, and letters of administration cannot be granted on his estate.¹

A grant of letters of administration is *prima facie* evidence of the death of the person on whose estate the administration is granted.²

3. Limitation as to the Value of the Estate in Certain States.—In some of the States of the Union it is provided by law, that administration shall not be granted upon the estate unless it amounts to a certain specified sum.³

4. Time Within which Administration May be Granted.—In some States there are statutes which limit in express terms the time within which original administration may be granted. Thus, in *Massachusetts*, an original administration is void, if made more than twenty years after the decedent's death.⁴ In *Tennessee*, administration cannot be granted after twenty years from the death of the intestate, except to distributees who were infants or married women at his death.⁵ In *Texas*, no administration can be granted after four years from the death of intestate.⁶ In *Con-*

defendant, that the letters were valid, that the fact of death was as found by the surrogate, and that the title had passed."

1. *Frazer v. Fulcher*, 17 Ohio 260; *Graham v. Adams*, 2 Johns. Cas. (N. Y.) 408; *O'Brien v. Hagan*, 1 Duer (N. Y.) 664; *Cannon v. Windsor*, 1 Houst. (Del.) 148; *Avery v. Everett*, 110 N. Y. 317; but the rule is different in *Kansas*, *Maine* and *Missouri*, where by express statute it is provided that the estates of convicts under imprisonment for life are to be administered as if they were naturally dead.

2. *Siebert v. True*, 8 Kan. 52.

A supposed loss of life, as the basis of a grant of letters of administration, by reason of shipwreck, an earthquake, a war, a plague, an explosion, and like perils, is within the sound discretion of the judge to determine, founded on the facts of each particular case. *Succession of Vogel*, 16 La. Ann. 139.

In *New York* it has been held that, in the absence of proof, it will be assumed that the surrogate made the proper examination as to the manner of the intestate's death; and this is so, although the petition does not affirmatively show the fact. The statute which requires the surrogate to examine the applicant for the letters, as to the time, etc., of death is merely directory. *Farley v. McConnell*, 7 Lans. (N. Y.) 428.

3. *Bean v. Bumpus*, 22 Me. 549; *Pinney v. McGregory*, 102 Mass. 89; *Pace v. Oppenheim*, 12 Ind. 533.

4. *Wales v. Willard*, 2 Mass. 120. Under *Massachusetts* Gen. St., ch. 94, §§ 3, 4, providing that original administration may be granted more than twenty years after the death of an intestate on any property belonging to the estate which thereafter first comes to the knowledge of a person interested therein, if administration is applied for within five years after the property becomes known, knowledge is not necessarily to be imputed to the person applying for administration from the fact that he was the brother of the intestate and knew of his death, nor from the fact that the property consisted of a mortgage of land and a note secured thereby, which mortgage was duly recorded. *Parsons v. Spaulding*, 130 Mass. 83.

5. Where the distributees were infants or married women at the intestate's death, thirty years are allowed, and letters testamentary, or of administration granted after that period are void. *Townsend v. Townsend*, 4 Coldw. (Tenn.) 70.

6. *Loyd v. Mason*, 38 Tex. 212. In general, a grant of administration, after a lapse of fourteen years from the death of the intestate, should be regarded as a nullity. But there may be special reasons which would even support a grant, as, for instance,

necticut, the limitation is seven years,¹ and in *Pennsylvania*, twenty-one years.²

In the absence of statutory regulation, a reasonable time within which to apply for letters, is in general allowed.³

5. Appointment of Administrators—Construction of 31 Edw. III, ch. 11 and Derivative and Analogous Statutes.—The Statute 31 Edw. III, ch. 11, provides that in cases of intestacy, "the ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods." The statute 21 Hen. VIII, ch. 5, § 3, provides, that in case any person die intestate, or that the executors named in any testament refuse to prove it, the ordinary shall grant administration, "to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good."

Later legislation in *England* and the *United States* has followed the policy of the statutes of Edward III and Henry VIII, the general rule being that administration shall be granted according to the beneficial interest in the estate.

a. HUSBAND.—At common law a husband, being entitled to all of his wife's personal estate, was deemed the proper person to whom the administration of her effects should be granted.⁴ The right of the husband to administer upon his wife's estate, has been confirmed by statute in *England*, and in most of the *United States*.⁵ In some States, however, if a husband has deserted his

a money demand or claim of the estate lately fallen due. *Cochran v. Thompson*, 18 Tex. 652.

A grant of administration in 1850 upon the estate of a Texas volunteer killed in 1836, was held to be without authority, there being no clear proof that any debts existed against the estate. *Duncan v. Veal*, 49 Tex. 603.

1. *Lawrence's Appeal*, 49 Conn. 411.

2. Although the act of March 15, 1832, prohibits the registers from granting original letters of administration on the estates of persons who have been dead twenty-one years, unless ordered by a register's court, yet such letters are not absolutely void. *Foster v. Commonwealth*, 35 Pa. 148.

3. *Todhunter v. Stewart*, 39 Ohio St. 181. In *England* a delay of more than three years must be explained satisfactorily. "In every case where probate or administration is for the first time applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars, and should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of the delay as they may see fit." Rule 45 P. R., Non-Contentious Business.

In *North Carolina*, where a man dies intestate, and, there being no administration on his estate, the next of kin takes possession of it, no legal estate vests in them, however long they may possess it. If an administrator is appointed even ten years afterwards, the legal title then vests in him, and relates back to the death of the intestate. The possession of the next of kin, in the meantime, though claiming it as their own, is no bar to his recovery of the property. *Whit v. Ray*, 4 Ired. (N. Car.) 14.

4. *Schouler's Executors and Administrators* 127; *Williams on Executors* 410; *Fairbanks v. Hill*, 3 Lea (Tenn.) 732; *Shumway v. Cooper*, 16 Barb. (N. Y.) 556; *Clark v. Clark*, 6 W. & S. (Pa.) 85; *Weaver v. Chace*, 5 R. I. 356.

5. *Schouler's Husband and Wife*, § 405. In *North Carolina*, the statute of distribution does not apply to the estates of *femes covert* dying intestate; in such a case, the husband may administer and recover the property for his own use; and if any other person administers, he will be a trustee for the husband. *Hoppiss v. Eskridge*, 2 Ired. Eq. N. Car.) 54.

wife, or misconducted himself, he may be excluded from administration;¹ and where a marriage has been absolutely void, or an absolute divorce has been obtained, the husband has no right to administer.² The husband's right to administer may also be de-

The *New York* acts of 1848 and 1849, to protect married women, do not affect the husband's right to administer the personalty, in case of intestacy; he has the right to administer, and retain the estate, after payment of debts, to his own use. *McCosker v. Golden*, 1 Bradf. (N. Y.) 64. And see *Lush v. Albutis*, 1 Bradf. (N. Y.) 456; *Valance v. Bausch*, 8 Abb. Pr. (N. Y.) 368; 28 Barb. (N. Y.) 633; *Shumway v. Cooper*, 16 Barb. (N. Y.) 556; *Dewey v. Goodenough*, 56 Barb. (N. Y.) 54.

In *Rhode Island* a husband, though not resident within the State, is entitled to administration of his deceased wife's estate. *Weaver v. Chace*, 5 R. I. 356. See also *Robins v. McClure*, 100 N. Y. 328; 53 Am. Rep. 184.

In *Tennessee*, a husband is not deprived by § 2206a of the Code of his right to administer upon the estate of his deceased wife. *Fairbanks v. Hill*, 3 Lea (Tenn.) 732.

See also *Goodrich v. Treat*, 3 Colo. 408; *Byrd v. Gibson*, 1 How. (Miss.) 568; *Hubbard v. Barcas*, 42 Md. 422; *Clark v. Clark*, 6 W. & S. (Pa.) 85; *Willis v. Jones*, 38 Md. 175; *Hart v. Soward*, 12 B. Mon. (Ky.) 391.

In *Alabama* a husband is not entitled to administration on his wife's estate, to the exclusion of her children, or one appointed at their request. *Randall v. Shrader*, 17 Ala. 333. See also *Succession of Williamson*, 3 La. Ann. 261; *Goodrich v. Treat*, 3 Colo. 408.

The husband of a woman who is entitled to administer upon an intestate, does not, by the marriage, succeed to her right. *Richards v. Mills*, 31 Miss. 450. *Ellmaker's Estate*, 4 Watts (Pa.) 34.

In *Alabama*, on the marriage of the administratrix, her husband is invested with all the rights of administration. *Dowty v. Hall*, 83 Ala. 165; *Pistole v. Street*, 5 Port. (Ala.) 64. See *Ferguson v. Collins*, 8 Ark. 241.

1. *Cooper v. Maddox*, 2 Sneed (Ky.) 135.

But in *Coover's Appeal*, 52 Pa. St. 427, a different rule prevailed. There a husband charged with adultery left

home with his wife's knowledge, there being no evidence of desertion; she died about two months afterwards, he being still absent, and administration of her estate was granted to another. *Held*, that the husband was entitled to administration. See also *Nusz v. Grove*, 27 Md. 391; *Altemus's Case*, 1 Ashm. (Pa.) 49.

2. The nullity of a marriage, voidable merely, must first be pronounced by a court of competent jurisdiction, before the fact of its invalidity can be taken advantage of in any proceeding. If not declared void, it remains good and legal for all purposes; and either party surviving the other has a prior right, under the statutes, to letters of administration. In *Elliott v. Gurr*, 2 Phill. 16, Sir John Nicholl, in the prerogative court of Canterbury, said in reference to a voidable marriage: "The marriage was within the prohibited degrees; for the husband was the sister's son of the woman's former husband, that is, her nephew by affinity; but the marriage was declared void in the lifetime of the parties. Now, the difference between void and voidable is so clear that no person who ever looked into any elementary book on the subject is ignorant of it. The canonical disabilities, such as consanguinity and affinity, and certain corporal infirmities, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained; and such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties. Civil disabilities, such as a prior marriage, want of age, idiocy and the like, make the contract void *ab initio*, not merely voidable; these do not dissolve a contract already made; but they render the parties incapable of contracting at all; they do not put asunder those who are joined together, but they previously hinder the junction; and if any persons under these legal incapacities come together, it is a meretricious and not a matrimonial union, and, therefore, no sentence of avoidance is necessary. The present is not a void, but a voidable marriage, and, therefore, not having been de-

feated by a settlement or agreement made during the lifetime of his wife.¹

b. WIDOW.—The widow's right to administer upon the estate of her deceased husband is not co-extensive with the right of the husband to administer upon his wife's estate. Under the statute of 21 Henry VIII, the court has discretion to grant administration "to the widow, or the next of kin, or to both." As a general rule the courts, both in *England* and the *United States*, in the exercise of their discretion, grant letters to the widow in preference to the next of kin;² but in some States it is expressly provided

clared void in the lifetime of the parties, is valid to all civil purposes; and to all such purposes the deceased died the wife of William Gurr, and he was her husband, and their issue are legitimate; one of the civil rights of the husband is, that of administration to his wife, which is held to be within the statute 29 Car. 2, ch. 3, both the administration and the property belonging exclusively to the husband,—it is not an ecclesiastical, but a civil right, though it is a right administered in this court." See also *White v. Lowe*, 1 Redf. (N. Y.) 376; *Browning v. Reane*, 2 Phill. 69.

A divorce *a mensa et thoro* does not deprive the husband of the right of administration on his wife's estate. Nor will a written agreement for separation, in contemplation of a divorce, with covenants as to property, be presumed to have intended a relinquishment of the right to administer in case the husband survives, nor will such construction be given, no divorce having been decreed. *Willis v. Jones*, 42 Md. 422; *Altemus's Case*, 1 Ashm. (Pa.) 49.

1. Where the personal property of the wife was so settled, by a deed executed before marriage and duly recorded, that, upon her dying intestate in her husband's lifetime, the trustee was to convey the same to her legal heirs—held, that her nearest blood-relation was entitled to the administration of her estate, in the event of her thus dying in preference to her husband. *Bray v. Dudgeon*, 6 Munf. (Va.) 132.

A husband is in general entitled to administer upon his deceased wife's estate; but where, by ante-nuptial agreement between them, he is not entitled to any share therein, but the same goes to her child by a former marriage, the guardian of the child will be entitled to administer upon her estate in preference to the husband. *Fowler v. Kell*, 14 Smed. & M. (Miss.) 68.

A and B in contemplation of marriage, agreed that all the property of the intended wife, B, and estate of every description to which she was then entitled or might thereafter become entitled, should be conveyed to a trustee, for the use and benefit of the wife, her heirs and assigns forever, without impeachment of waste, said property to be under exclusive control of said B, her heirs, etc., without the interference, in any manner, of said A; the said B, her heirs, etc., to receive and enjoy the rents, etc., with power to B to sell and dispose of said estate by last will, as if she was *feme sole*. After marriage, and the death of the wife, without a will, held, that such contract was not a temporary surrender only of the marital rights, but an entire abandonment of them; and that A was not entitled to administration upon her estate. *Ward v. Thompson*, 6 Gill & J. (Md.) 349.

Under the 29th section of the statute of 1797, of *Kentucky*, a husband was held to be entitled to the administration of his deceased wife's estate, who had died intestate, although, by an ante-nuptial settlement, she was to hold her estate separate. *Hart v. Soward*, 12 B. Mon. (Ky.) 391.

2. *Goods v. Browning*, 2 Sw. & Tr. 634; *Goods of Newbold*, L. R., 1 P. & D. 285.

In *Iowa* a widow's right to administer is not absolute, even though the statute imposes no limitations on the right. *O'Brien's Estate*, 63 Iowa 622.

If a widow or any other party applying for administration, is evidently unsuitable to discharge the duties of the trust, they are not entitled thereto. *Stearns v. Fiske*, 18 Pick. (Mass.) 24.

The widow, if suitable, is exclusively entitled to administration, unless among the next of kin there is some fit person whom the judge of probate may think

by statute that the widow shall be preferred to children and other kindred.¹ The widow must, however, be actually the widow

should be joined with her. *M'Gooch v. M'Gooch*, 4 Mass. 348.

In *Tennessee* the court has a discretionary power as to the appointment of a widow. *Wright v. Wright, Mart. & Y. (Tenn.)* 43; *Wilson v. Frazier*, 2 *Humph. (Tenn.)* 30; *Swan v. Swan*, 3 *Head (Tenn.)* 163; *Phillips v. Green*, 4 *Heisk. (Tenn.)* 350. See also as to the discretion of the court, *Cobb v. Newcomb*, 19 *Pick. (Mass.)* 336; *McClellan's Appeal*, 16 *Pa. St.* 110; *Gyger's Estate*, 65 *Pa. St.* 311.

A non-resident widow failed to apply to be appointed administratrix of her husband's estate, and his father (the next in order) was appointed. *Held*, that his letters would not be revoked on the widow's application. *Ehlen v. Ehlen*, 64 *Md.* 360.

In *California* the Civil Code, § 1389, which renders a non-resident surviving wife incompetent to serve as the administratrix of her husband's estate, does not take away the right to nominate the administrator given her by § 1365, the latter section being in no respect in conflict with § 1383, revoking letters of administration. *In re Stevenson*, 73 *Cal.* 164.

A non-resident widow may be objectionable, even though a statute imposes no absolute limitation upon her. *O'Brien's Estate*, 63 *Iowa* 622; *Ehlen v. Ehlen*, 64 *Md.* 360.

1. In *Mississippi*, the statute (*H. & H.* 395) gives the widow of an intestate the preference of administering on his estate; nor will that preference be taken away by the fact of her having once administered on the estate and then renounced her administration, or of her claiming causes of action against the estate which were resisted by the heirs. *Pendleton v. Pendleton*, 6 *Smed. & M. (Miss.)* 448.

A died November 28, 1844, and, at the December term of the probate court, in the same year, his son applied for and obtained letters of administration upon his estate. At the January term, 1845, and within sixty days of the death of her husband, the widow of A applied for letters of administration, and for the removal of her son. *Held*, that the widow was entitled to take out letters of administration in preference to the son, and that the probate court was right in removing

the son and conferring the appointment on the widow. *Muirhead v. Muirhead*, 6 *Smed. & M. (Miss.)* 451. • In *Pennsylvania*, as between a widow and a child of a deceased son of a decedent, the widow is entitled to administration. *Gyger's Estate*, 65 *Pa. St.* 311. And illiteracy and poverty will not deprive her of her statutory preferred right. *Bowersox's Appeal*, 100 *Pa. St.* 434; 45 *Am. Rep.* 387.

In *Louisiana*, the widow was preferred. *Dietrich Succession*, 32 *La. Ann.* 127; *Burton v. Burgier*, 30 *La. Ann.* 478; *Succession of Sutton*, 20 *La. Ann.* 150; *Sears v. Wilson*, 5 *La. Ann.* 689.

In *Georgia*, in a contest for the administration between the widow and the sole heir-at-law, and a creditor of the intestate, whose debt is disputed, or who sets up a claim to property of which the intestate died seised (and *a fortiori*, where he claims in both characters), the widow will be preferred, notwithstanding the alleged insolvency. *Lynch v. Lively*, 32 *Ga.* 575.

In *South Carolina*, the widow is first entitled to letters of administration on the estate of her deceased husband; but it does not follow that she may transfer her right to a stranger, and that the ordinary is bound to appoint her nominee, though the wishes and preferences of those having the greatest interest in preserving the estate are entitled to great weight. *McBeth v. Hunt*, 2 *Strobh. (S. Car.)* 335.

A judge of probate granted letters of administration to the sister of an intestate, in ignorance of the fact that he had left a widow. Within five weeks from the time of her husband's death, the widow, who had been absent, applied for letters. *Held*, that the judge was justified in revoking the letters granted, and in appointing the widow administratrix. *Rollin v. Whipper*, 17 *S. Car.* 32.

See also in general on the widow's preference, *Munsey v. Webster*, 24 *N. H.* 126; *English v. McNair*, 34 *Ala.* 40; *Rambo v. Wyatt*, 32 *Ala.* 363; 70 *Am. Dec.* 544; *Libbey v. Mason*, 112 *N. Y.* 525, *rev'd* 42 *Hun (N. Y.)* 470; *Lathrop v. Smith*, 24 *N. Y.* 417; *Shropshire v. Withers*, 5 *J. Marsh. (Ky.)* 210; *Feustmann v. Gott*, 65

of the decedent. If there has been no valid marriage, or if there has been an absolute divorce from her husband, she has no right to administer upon his estate.¹ And an ante-nuptial agreement may defeat the right to administer.²

c. NEXT OF KIN.—As a general rule the right of administration follows the right of property, and persons are usually selected for administration in the order of their preference in distribution. In *England*, the order in which next of kin are entitled to administer is, first, children and their lineal descendants to the remotest degree; second, the parents of the deceased; third, brothers and sisters; fourth, grandfathers and grandmothers; fifth, uncles or nephews, great-grandfathers and great-

Mich. 592; Sharpe's Appeal, 87 Pa. St. 163; Goddard v. Goddard, 3 Phill. 638; Goods of Rogerson, 2 Curt. 656; Goods of Newbold, L. R., 1 P. & D. 285; McClellan's Appeal, 16 Pa. St. 110; Pendleton v. Pendleton, 6 Smed. & M. (Miss.) 448; Lathrop v. Smith, 24 N. Y. 417; McBeth v. Hunt, 2 Strobb. (S. Car.) 335; Curtis v. Williams, 33 Ala. 570.

1. Where a wife leaves her husband and renounces all conjugal intercourse a considerable time before his death, she becomes not such a widow, after his death, as was contemplated by an act authorizing the widow to administer upon her husband's estate and to appropriate \$300 of it to her own use. Odiorne's Appeal, 54 Pa. St. 175; 93 Am. Dec. 683.

The cohabitation from which the fact of marriage may be presumed must be matrimonial, and not illicit, in its inception. Thus, one's petition for letters as B's widow was refused; her statements as to the character and conduct of the parties being contradictory, and she not controverting suspicious circumstances in evidence against her. Byrnes v. Dibble, 5 Redf. (N. Y.) 383.

In O'Gara v. Eisenlohr, 38 N. Y. 296, letters of administration were refused to a woman where it appeared that, at the time she was married to the decedent, he had another wife living. But see Smith v. Smith, 1 Fed. Rep. 621; 46 Am. Dec. 121.

Where a wife was divorced *a mensa et thoro* on account of her adultery, she was refused administration in Goods of Davies, 2 Curt. (U. S.) 628. See also Wells v. Brook, 25 W. R. 463.

Where a decree of divorce had been vacated and annulled after the death of the husband—*held*, that the wife

was thereby restored to her rights under the marriage, and that a decree of the register and the register's court, annulling letters of administration which had been previously granted to a stranger, and granting them to the widow, was properly made. Boyd's Appeal, 38 Pa. St. 246.

Neither the fact of a separation by mutual consent between husband and wife, extending from a few months after marriage to the husband's death, nor of the inability of the wife to read or write, disqualifies her from acting as administrator of his estate. Nusz v. Grove, 27 Md. 391. S. P. Altemus's Case, 1 Ashm. (Pa.) 49.

Where a marriage was duly solemnized in Texas according to law, while Texas was subject to the laws of Mexico, but the husband had a former wife living in Missouri, of which fact the second wife was ignorant until after the death of the husband, such second wife was held entitled to administration, in exclusion of the son of her husband by the first marriage. Smith v. Smith, 1 Tex. 621; 46 Am. Dec. 121.

Where an uncle married his niece in 1856, and the marriage, not being made public, remained undissolved until his death in 1861, the widow was held entitled to letters of administration on his estate. Parker's Appeal, 44 Pa. St. 309.

Where a man marries again after divorce, his second wife is entitled to administration on his estate. Ryan v. Ryan, 2 Phill. 332; Nusz v. Grove, 27 Md. 391.

2. A widow, who has relinquished her rights to her husband's estate, in virtue of her marriage, by an ante-nuptial agreement, has no right to the administration of his estate, nor to object to the validity of the probate of

grandmothers, and, sixth, cousins. In the *United States*, the same order is usually maintained.¹

d. CREDITORS.—In most of the *United States* where the widow, next of kin, and others who have a prior right and are suitable, neglect, within the time allowed by law, to apply for administration, a creditor, having right of action against the deceased, may be appointed administrator.² In some of the States, the first

his will. *Maurer v. Maurer*, 5 Md. 324.

1. See NEXT OF KIN, vol. 16, p. 703.

2. Where administration cannot be granted to the nearest of kin, it should be granted to the next after him, and if any of them claim the administration within the time prescribed by law, a creditor should be postponed. *Carthey v. Webb*, 2 Murph. (N. Car.) 268.

In *Nebraska*, during the first thirty days after the death of an intestate, the right of administration is conferred upon the next of kin (or widow if there is one), or such person as they may select, if suitable and competent to discharge the trust. After the expiration of that time the right is conferred upon the principal creditors of the estate. If no such persons are competent or willing to accept the trust, it is the duty of the county judge to select such other person or persons as he may think proper. And for this purpose the discretion is vested in the county judge, to be exercised for the best interest of the estate and those interested therein. *Alkinson v. Hasty*, 21 Neb. 663.

The next of kin of one deceased intestate suffered thirty days to elapse after his death, without taking any measures to obtain administration of his estate. A creditor of the intestate then applied, by petition to the judge of probate, to be appointed administrator, and the judge ordered public notice to be given (which was done) to all persons interested in the estate of the intestate, to appear and show cause why the prayer of the petition should not be granted. At the time and place appointed by the notice, the father of the intestate appeared for the purpose of objecting to the petition, and being inquired of by the judge whether he wished to take the administration, replied that he would have nothing to do with it. The judge of probate thereupon proceeded and granted administration to the petitioner, and the father appealed. *Held*, that the declaration of the appellant, not being recorded,

was not an effectual renunciation, and that such public notice, especially as the appellant had actual notice and appeared, was sufficient. *Arnold v. Sabin*, 1 Cush. (Mass.) 525.

In *Michigan* a probate court is a court of record (ch. 248 How. St. *Michigan*), and will take judicial notice that, at the time of filing the petition by a creditor, more than thirty days after the decease of the intestate, the widow or next of kin has neglected to apply for administration, such period being required by How. St. *Michigan*, § 5849, to elapse before others than the widow or next of kin can apply. *Wilkinson v. Conalty*, 65 Mich. 614.

After the expiration of the thirty days from the death of the decedent, within which period, according to Code *West Virginia*, § 4, ch. 85, the husband or wife is first entitled to administration, a wider discretion is vested in the court and it may appoint a creditor or a stranger, if no distributee applies; but, if a suitable distributee then applies, he is entitled to the preference. *Bridgeman v. Bridgeman*, 38 W. Va. 212.

Under a statute authorizing a grant of letters of administration on the estate of one leaving property in the State, upon application of "any person interested" therein, a creditor residing in another State may apply. *Branch v. Rankin*, 108 Ill. 444.

Though administration may be granted to a creditor or to a stranger, if no application is made by a distributee in thirty days, yet a distributee is legally entitled to it whenever he does apply, if he is competent and gives security, and has not before refused, though thirty days may have elapsed. *Cotton v. Taylor*, 4 B. Mon. (Ky.) 357.

In 1835, application was made, by an officer of the Charitable Marine Society of Baltimore, for letters of administration on the estate of a seaman who died abroad. This was resisted by A, who had funds of the deceased, and claimed to retain a portion of them for services

creditor applying is entitled to administration;¹ in others the largest creditor.² The debt must be proved³ but the right to administer is not defeated by the fact that the claim has been

rendered. The deceased had no kindred. *Held*, that A, on proving himself to be a creditor, would be entitled to administration, and that in the absence of such proof, the orphans' court would grant letters in their discretion. *Hoffman v. Gold*, 8 Gill & J. (Md.) 79.

Upon the death of a man who has never been married, if his father renounces, his brothers are entitled to administer in preference to any creditor. *Lathrop v. Smith*, 35 Barb. (N. Y.) 64.

Where a creditor would avail himself of the lands of the deceased for the payment of his debt, he should apply for administration, if the next of kin refuse to take it; and in that character he may have a license to sell the lands for that purpose. *Nitchell v. Lunt*, 4 Mass. 654.

An original independent proceeding by a creditor for temporary letters of administration of his debtor's estate, being unauthorized by statute, cannot be maintained. *Saw Mill Co. v. Dock*, 3 Dem. (N. Y.) 55.

Administration, when letters are issued on petition, can only be granted to, or on application by, one or more of the persons specified in *Michigan Comp. L.* § 4379, viz., creditors and distributees; and, as between these, only in this order, and under the contingency specified, of their being competent or willing to take the trust. *Breen v. Pangborn*, 51 Mich. 29.

There being no administrator, a creditor of the intestate cannot demand that a receiver be appointed to administer. *Walker v. Drew*, 20 Fla. 908.

If a judge of probate is satisfied that a creditor of a deceased non-resident has reasonable grounds for an averment that the debtor has fraudulently conveyed his real estate within this commonwealth, he ought to grant administration upon the estate of such person, in order that the question of fraud may be fully tried in a court of common law. *Bowdoin v. Holland*, 10 Cush. (Mass.) 17.

A creditor, having a right of action against the deceased which survives, is entitled to administration on the estate, where the next of kin refuse it. Otherwise if the cause of action does not survive.

Mitchell v. Lunt, 4 Mass. 654; *Royce v. Burrell*, 12 Mass. 395; *Stebbins v. Palmer*, 1 Pick. (Mass.) 71; 11 Am. Dec. 146.

A distributee must be preferred to a creditor as administrator when they both apply together. *Haxall v. Lee*, 2 Leigh (Va.) 267.

For rights of creditors to administer in *Louisiana*, see *Succession of McKinney*, 4 La. Ann. 25; *Hair v. McDade*, 10 La. Ann. 534; *Monget v. Penny*, 7 La. Ann. 134; *Succession of Petit*, 9 La. Ann. 207.

See also in general, on rights of creditors to administer, *Mullanphy v. County Court*, 6 Mo. 563; *Munsey v. Webster*, 24 N. H. 126; *Hill v. Alspaugh*, 72 N. Car. 402; *Freek's Appeal*, 114 Pa. St. 29; *Elma v. Da Costa*, 1 Phill. 177; *Goods of Brackenbury*, 25 W. R. 698; *Arnold v. Sabin*, 1 Cush. (Mass.) 525; *Smith v. Sherman*, 4 Cush. (Mass.) 408.

1. In *New York*, the creditor first applying has the preference. *Laws of New York*, 1867, ch. 782, § 6.

2. In *North Carolina*, the creditor for the greatest amount will be appointed administrator *de bonis non*, other things being equal. *Cutlar v. Quince*, 2 Hayw. (N. Car.) 60.

In a contest between two creditors, for administration of the estate of their debtor, the question is not who is the largest creditor, but who represents the greatest interest, and any facts bearing upon this point should be submitted to the jury. *Freeman v. Worrill*, 42 Ga. 401.

In *Wilkinson v. Conalty*, 65 Mich. 614, the petition for administration purported to be made by creditors of the deceased, but did not aver that it was made by principal creditors. *How. St. Michigan* 5849, permits principal creditors, in certain cases, to be appointed administrators. *Held*, that the matter of competency as administrator is one for judicial decision, and the omission of such averment is not a defect.

See also *Curtis v. Williams*, 33 Ala. 570; *Lentz v. Pilert*, 60 Md. 296; 45 Am. Rep. 732; *Goods of Von Desen*, 43 L. T. 532; *Ex parte Ostendorff*, 17 S. Car. 22.

3. *Thompson v. Buckner*, *Riley Ch.*

barred by the Statute of Limitations,¹ or that there are no assets above exemptions.² A claim which accrued after the death of the decedent, as for funeral expenses, is sufficient to give the right to administer;³ but a debt assigned after the death of the decedent does not constitute the assignee such a creditor as to entitle him to administration.⁴ In some States creditors have no preference.⁵

c. GENERAL CONSIDERATIONS AFFECTING THE CHOICE OF ADMINISTRATORS.—(1) *Suitableness*.—As amongst persons equally entitled by law to administer, the court at its discretion will choose the most suitable.⁶ Even where persons have a legal preference, they may be set aside if obviously unsuitable for the trust.⁷ Amongst various considerations which have influenced the courts in choosing administrators, are

(S. Car.) 33; 2 Hill Ch. (S. Car.) 499.

1. *Ex parte* Caig, T. U. P. Charlt. (Ga.) 159. In *Pennsylvania*, a power of attorney from a surviving executor, which was ten years old, was held too stale whereon to base an application for a vacant administration. *Bleakley's Estate*, 5 Whart. (Pa.) 361.

2. *Wheat v. Fuller*, 82 Ala. 572. In *Sturges v. Tufts*, R. M. Charlt. (Ga.) 17, where it appeared that the estate of a deceased person was not equal, or but barely so, to the payment of debts, administration was granted to a creditor, in preference to the next of kin.

3. *Lentz v. Pilert*, 60 Md. 296; 45 Am. Rep. 732; *Newcombe v. Beloe*, L. R., 1 P. & D. 314.

4. *Pearce v. Castrix*, 8 Jones (N. Car.) 71; *Goods of Coles*, 3 Sw. & Tr. 181; *Downward v. Dickenson*, 3 Sw. & Tr. 564.

5. *Cain v. Haas*, 18 Tex. 616; *McCandlish v. Hopkins*, 6 Call (Va.) 208.

6. *Discretion as to Suitableness*.—Thus between brothers, administration will be granted to the one most interested to execute it faithfully. *Moore v. Moore*, 1 Dev. (N. Car.) 352.

In the *Succession of Chaler*, 39 La. Ann. 308, it was held that when two beneficiary heirs are contestants for the administratorship of the ancestor's succession, a large discretion is vested in the judge who makes the appointment, and, unless manifestly wrong, his conclusion will not be disturbed.

In *West Virginia*, as between distributees, the county court judges as to fitness for the trust. *Bridgman v. Bridgman*, 30 W. Va. 212.

In *Pennsylvania*, where the class primarily entitled to administer upon a decedent's estate consists of several persons, the register may grant letters to all jointly if they wish it, or select one of them and commit the administration to him. *Brubaker's Appeal*, 98 Pa. St. 21.

In *North Carolina*, the next of kin of a deceased person, after the widow, have the right amongst them of administration on the estate of a deceased relative; but this right is not vested in one more than another, and the degree of propinquity does not give a legal priority. The court will choose from the class the person best qualified to take care of the estate. *Atkins v. McCormick*, 4 Jones (N. Car.) 274.

See also in general, *Thompson v. Hucket*, 2 Hill (S. Car.) 347; *Dalrymple v. Gamble*, 66 Md. 298; *Atkinson v. Hasty*, 21 Neb. 663; *Garrison v. Cox*, 95 N. Car. 353; *Wheat v. Fuller*, 82 Ala. 572.

7. "*Personal suitableness*, for instance, is a very important element, whether in determining the appointment as between the widow and next of kin of an intestate, or where one or more next of kin alone are concerned. Favorably as our law treats the widow's claim to administer, even though the intestate's next of kin were his own children, a widow evidently unsuitable may be passed over in favor of the next of kin; but if the next of kin are all unsuitable, the widow, being competent, is entitled to the sole administration; while if both widow and next of kin are unsuitable, the application of all should be refused. And so, too, where only next of kin of a certain class are con-

moral fitness and integrity,¹ business experience,² insolvency,³

cerned in the administration, if one is suitable and the others unsuitable, the suitable one will be taken; if two or more are equally entitled, equally suitable, and equally strenuous to be appointed, the court has power to appoint one or more of them; but if all are unsuitable the appointment must be otherwise bestowed. From among two or more persons equally akin to the deceased, the court may choose the most suitable at discretion." Schouler's *Executors and Administrators* 137.

1. Moral Fitness.—In *Coope v. Low-erre*, 1 Barb. Ch. (N. Y.) 45, it was held that where a surrogate has a discretion to select between two or more individuals of the same class, in granting administration, he may properly take into consideration moral fitness in making such selection.

Drunkenness and Improvidence.—The statute of *New York* declares, that letters of administration shall not be granted "to any person who shall be adjudged incompetent by the surrogate to execute the trust by reason of drunkenness, improvidence, or want of understanding." Under this statute it was held that a professional gambler was incompetent by reason of improvidence. *McMahon v. Harrison*, 6 N. Y. 443; 10 Barb. (N. Y.) 659. But see *Harrison v. McMahon*, 1 Bradf. (N. Y.) 283.

An applicant for letters of administration will not be precluded from receiving them, by reason of intemperance, unless it be of such a gross character as would warrant overseers of the poor in designating him an habitual drunkard, under the statutes of *New York*, or a jury in adjudging him so to be. *Elmer v. Kechele*, 1 Redf. (N. Y.) 472.

Administration will not be refused on the ground of improvidence, not shown to be so great as to be likely to endanger the safety of the estate. *In re Cutting*, 5 Dem. (N. Y.) 456.

To render one incompetent to serve as executor, on the ground that he is "improvident, or wanting in understanding," it is not sufficient to show that he has an ill-regulated temper, lacks self-control, and is accustomed to use abusive language towards those named as co-executors. *McGregor v. McGregor*, 3 Abb. App. Dec. (N. Y.) 92.

Testatrix, a woman of the town, appointed as her executor a man whom she had supported upon her gains, and with whom she had cohabited. Held, that he was not a fit person, and letters testamentary were refused. *Plaisance's Estate*, Myr. Prob. (Cal.) 117.

Where the judge of probate refused administration of an estate to the next of kin of the deceased, on the ground of *mania a potu*, as a fact within the knowledge of the court—held, to be irregular. A judge cannot decide upon facts within his own knowledge, unless he is sworn as a witness. *Smith v. Moore*, 3 How. (Miss.) 40.

Conviction of an Infamous Crime.—Conviction of an infamous crime disqualifies one from being an administrator, if the conviction has been within the State. *O'Brien's Estate*, 67 How Pr. (N. Y.) 503.

2. Business Experience.—The Civil Code of *Louisiana*, art. 1043, provides that the probate judge must select the "most solid" person. To determine the question of "solidity," the judge should look to the business capacity, experience, property, and integrity of the respective applicants. Succession of *Chaler*, 39 La. Ann. 308. See also *Stephenson v. Stephenson*, 4 Jones (N. Car.) 472; *Williams v. Wilkins*, 2 Phill. 100; *Martin v. Duke*, 5 Redf. (N. Y.) 597; *Shilton's Case*, 1 Tuck. (N. Y.) 73.

3. Insolvency.—Insolvency ordinarily disqualifies a person, though otherwise competent, to be appointed an administrator. In *Cornpropst's Appeal*, 33 Pa. St. 537 the court said: "The register is at liberty to pass by the incompetent individual and grant letters to others who would not have been entitled to them, but for that incompetency. The act does not define the grounds of disqualification. They are to be sought for in the decisions of the English ordinary, and in the practice of this State, before the passing of the Act 15th of March 1832. There is no doubt that insolvency is one. Those interested in the estate are entitled to the security of an administrator's personal liability, as well as to that of his bail. If letters may be granted to an insolvent person, they have but the single security of the sureties in the administration bond. Besides, likelihood to prove insolvent is a

adverse interests,¹ sex,² marriage,³ illiteracy⁴ and insanity.⁵

ground for removal under the 22nd section of the Act of Assembly of the 29th of March, 1882. Certainly the register may not appoint one whom it would be the duty of the orphans' court to remove, unless he should give other and further security than the register may require.

In *Levan's Appeal*, 112 Pa. St. 294. it was held that a man, earning \$42 a month, sober, steady, and industrious, who owes \$20 on old debts, is not disqualified from administering an estate. See also *Succession of Martin*, 13 La. Ann. 557; *Hovey v. McLean*, 1 Dem. (N. Y.) 396.

1. Adverse Interest.—A person who holds another trust, the interests of which conflict with those of the estate, should not be appointed administrator. *State v. Reinhardt*, 31 Mo. 95; *Wright v. Wright*, 72 Ind. 149; *Hassinger's Appeal*, 10 Pa. St. 454; *Jones v. Whitehead*, 66 Ga. 290; *Heron's Estate*, 6 Phila. (Pa.) 87; *Bieber's Appeal*, 11 Pa. St. 157.

Debtor.—A debtor to the estate should not be appointed. *Territory v. Valdez*, 1 N. Mex. 533; *Succession of Chaler*, 39 La. Ann. 308.

Hostility to Distributees.—If the applicant for administration is hostile to one or more of the distributees, he will not be appointed. *Bridgman v. Bridgman*, 30 W. Va. 212; *Drew's Appeal*, 58 N. H. 319; *Pickering v. Pendexter*, 46 N. H. 69; *Moody v. Moody*, 29 Ga. 515; *Heron's Estate*, 6 Phila. (Pa.) 87; *Webb v. Needham*, 1 Add. 494.

Surviving Partner.—A surviving partner, ordinarily, should not be appointed administrator of his deceased partner's estate, to the exclusion of one who is likely to prove more disinterested. *Brown's Estate*, 11 Phila. (Pa.) 127; *In re Garber's Estate*, 74 Cal. 338; *Cornell v. Gallagher*, 16 Cal. 367; *Altenu's Estate*, 32 La. Ann. 364; *Heward v. Slagle*, 52 Ill. 336.

Miscellaneous.—For certain miscellaneous cases of adverse interest as a disqualification, see *Hall v. Thayer*, 105 Mass. 219; 7 Am. Rep. 513; *Plowman v. Henderson*, 59 Ala. 559; *Bingham v. Cranshaw*, 34 Ala. 683.

2. Sex.—In some of the States there are statutes which prefer the male next of kin to the female. *New York Rev. Stat.* 74, § 28; *Cook v. Carr*, 19 Md. 1. And sometimes, on practicable con-

siderations of suitableness, the same preference is made, apart from statutory authority. *Schouler's Executors and Administrators* 139.

3. Marriage.—In some States it is provided by statute that single women shall be preferred to married women. Thus in *Maryland* the Act of 1798, ch. 101, sub-ch. 5, § 19, which declares that in the grant of letters of administration, a *feme sole* shall be preferred to a married woman, applies to a case where an intestate left two daughters, one of whom was married and the other was not. *Smith v. Young*, 5 Gill (Md.) 197; *Owings v. Bates*, 9 Gill (Md.) 463; *In re Curser*, 89 N. Y. 401.

Cverture does not incapacitate from administration if the married woman is otherwise entitled. *Gygers' Estate*, 65 Pa. St. 311; *In re Curser*, 89 N. Y. 401; *Binnerman v. Weaver*, 8 Md. 517.

But in *Texas* letters of administration cannot be granted to a married woman, even with the consent of her husband, if he refuses to join in the application and the trust. *Nickelson v. Ingram*, 24 Tex. 630.

Statutes sometimes deprive the husband from succeeding by the marriage to his wife's right of administration. *Richards v. Mills*, 31 Miss. 450; *Barber v. Bush*, 7 Mass. 510. In *Alabama* a woman may resign administration on her marriage. *Rambo v. Wyatt*, 32 Ala. 363; 70 Am. Dec. 544.

4. Illiteracy.—As a general rule inability to read or write does not incapacitate a person to act as administrator. Thus in *Wilkey's Appeal*, 108 Pa. St. 567, it was held that the fact that the widow of a decedent was illiterate, and over seventy years of age, should not deprive her of her right to administer her husband's estate, where she appeared to have "as good business capacity as most farmers' wives." See also *Nusz v. Grove*, 27 Md. 391; *Emerson v. Bowers*, 14 N. Y. 449.

A different rule, however, prevails in *North Carolina*. In *Stephenson v. Stephenson*, 4 Jones (N. Car.) 472, it was held that in the appointment of an administrator, a person who cannot write nor read writing, and has no experience in keeping accounts, or in settling estates, is incompetent within the meaning of the statutes.

5. Insanity.—An insane person is

(2) *Residence*.—In most of the States mere non-residence does not disqualify a person from acting as administrator; but it is often considered an objection; and, as among next of kin, those resident, if in other ways suitable, should be preferred to those who are non-resident.¹ In some of the States non-residence is an absolute disqualification;² while in others, non-residents are permitted to administer if they qualify with resident sureties.³

(3) *Age*.—Infancy and extreme old age are disqualifications. In some of the States it has been held that an infant cannot lawfully be appointed administrator;⁴ but in *Louisiana* it seems that a minor may act, even though she may be married.⁵ In *Mississippi*, the court may appoint a suitable person adminis-

unsuitable for the trust of administration. *Goods of Phillips*, 2 Add. Ecc. 335.

1. *Jones v. Jones*, 12 Rich. (S. Car.) 623; *Ex parte Barker*, 2 Leigh (Va.) 719; *Bridgman v. Bridgman*, 30 W. Va. 212; *McGregor v. McGregor*, 3 Abb. App. Dec. (N. Y.) 92; *In re Williams*, 44 Hun (N. Y.) 67; *McCreary v. Taylor*, 38 Ark. 393; *Child v. Gratiot*, 41 Ill. 357; *Wickwire v. Chapman*, 15 Barb. (N. Y.) 302; *Smith v. Munroe*, 1 Ired. (N. Car.) 345; *Goods of Burch*, 2 Sw. & Tr. 139.

In *Chicago etc. R. Co. v. Gould*, 64 Iowa 343, it was held that a non-resident should not be appointed save under special justifying circumstances.

In *Bridgman v. Bridgman*, 30 W. Va. 242, it was held that the courts, in the exercise of a sound discretion, should not appoint a non-resident distributee an administrator so long as any other distributee competent to act and willing to assume the trust was within the jurisdiction of the court. In *Sellings' Estate* (Surr. Ct.), 2 N. Y. Supp. 634, an administration of an estate was granted to a non-resident married daughter, in preference to a dissolute, irresponsible and dishonest son of the intestate, though a resident of the State.

In *California*, the non-residence of a widow does not affect her right to preference in nominating an administrator, as against the claim of the public administrator to administer. *Robie's Estate*, Myr. Prob. (Cal.) 226.

In *re Williams*, 5 Dem. (N. Y.) 292, a person died a resident of Tennessee. On application for letters in New York, it was held that as between a New York relative and a nearer Tennessee relative, the latter should be preferred.

In *Rhode Island*, non-residence does not create an insuperable objection to

a grant of letters. *Hammond v. Wood*, 15 R. I. 66.

In *New Hampshire* it has been held that where several persons are of the same degree of kindred to the deceased, one living out of the State is not entitled to administration as of right; but in case those living in the State have interests adverse to the heirs and creditors, the judge of probate may properly appoint the one residing out of the State. *Pickering v. Pendexter*, 46 N. H. 69.

2. In *Frick's Appeal*, 114 Pa. St. 29, it was held that a non-resident has no right to letters of administration. *Trunkay, J.*, in delivering the opinion of the court, said: "Among the reasons for refusing administration to a non-resident, is that he should be within the jurisdiction of the courts of this State. He is a trustee, answerable as such for the conduct of the trust estate, and interested parties when their rights are withheld should not be confined to the slow process against sureties." See also *Sarkie's Appeal*, 2 Pa. St. 157; *Child v. Gratiot*, 41 Ill. 357; *Radford v. Radford*, 5 Dana. (Ky.) 156; *Beech's Estate*, 63 Cal. 458.

In *Wisconsin*, the policy of the law discourages the appointment of non-resident administrators. *Sargent's Estate*, 62 Wis. 130.

3. *Frick's Appeal*, 114 Pa. St. 29; *Massachusetts Public Stat.*, ch. 132, § 8; *Robie's Estate*, Myr. Prob. (Cal.) 226. And see *Ex parte Barker*, 2 Leigh (Va.) 719; *Jones v. Jones*, 12 Rich. (S. Car.) 623.

4. *Carow v. Mowatt*, 2 Edw. (N. Y.) 57; *Collins v. Spears*, Walk. (Miss.) 310; *Cluett v. Mattice*, 43 Barb. (N. Y.) 417.

5. *Briscoe v. Tarkington*, 5 La. Ann. 692.

trator during minority, and is not limited to the next of kin.¹ In *New York*, the guardian of a minor son of an intestate is not entitled to administration in preference to the minor's adult sister.²

(4) *Corporations*.—A corporation cannot act as an administrator, unless expressly authorized so to do by its charter.³

(5) *Illegitimates*.—Whether an illegitimate child is entitled to administration or not depends upon the local statutes of distribution, the right to administration following the right to share in the distribution of the estate.⁴ Thus where illegitimates, in default of lawful children inherit from their mother, they are entitled to the administration of her estate.⁵

(6) *Amount of Interest*.—As a general rule the person who is entitled to the estate of a decedent is entitled to administration, and, other things being equal, the person having the largest interest in the estate will have the preference.⁶

(7) *Renunciation and Nomination by the Person Entitled to Administration*.—Where the widow or the person having the first right to administration renounces and requests the nomination of another person, the court is not bound to grant such a request, but may exercise its discretion. In some States the person next entitled after the person who has renounced has the legal right to the administration, which cannot be defeated.⁷ In other States

1. *Pitcher v. Armat*, 5 How. (Miss.) 288.

2. *Cottle v. Vanderheyden*, 11 Abb. Pr., N. S. (N. Y.) 17.

3. *Thompson's Estate*, 33 Barb. (N. Y.) 334; *Porter v. Trall*, 30 N. J. Eq. 106. In *Maryland*, letters cannot be granted to a corporation, even though it be the universal legatee under the will of decedent. *Georgetown College v. Browne*, 34 Md. 450. In *New Jersey* letters will be granted under such circumstances to one of the members of the corporation. *Matter of Kirkpatrick*, 22 N. J. Eq. 463. In *Delaware*, where foreign administrators are permitted to maintain actions, the power of a corporation as administrator, granted in another State, was recognized. *Deringer v. Deringer*, 5 Houst. (Del.) 528.

In several States corporations are empowered by express statute to act as executors and administrators. This is the case in *Pennsylvania*, *New York*, *New Jersey* and *Missouri*.

4. *Govane v. Govane*, 1 Har. & M. (Md.) 346; *Succession of Hebert*, 33 La. Ann. 1099; *In re Pico*, 56 Cal. 413; *Public Administrator v. Hughes*, 1 Bradf. (N. Y.) 249.

5. *Ferrie v. Public Administrator*, 3 Bradf. (N. Y.) 249.

6. *Long v. Huggins*, 72 Ca. 776; *Leverett v. Dismukes*, 10 Ga. 98; *Johnson v. Johnson*, 15 R. I. 109; *Sweezy v. Willis*, 1 Bradf. (N. Y.) 495; *Chalder's Succession*, 39 La. Ann. 308; *Thomton v. Winston*, 4 Leigh (Va.) 152; *Bridgman v. Bridgman* (W. Va.) 3 S. E. Rep. 580; *Matter of Kirkpatrick*, 22 N. J. Eq. 463; *McCully's Estate*, 13 Phila. (Pa.) 296; *Murdock v. Hunt*, 68 Ga. 164; *McClellan's Appeal*, 16 Pa. St. 110.

7. In *McClellan's Appeal*, 16 Pa. St. 110, *Rogers, J.*, said: "If the widow renounces administration, it shall be granted to the children, or other next of kin, in preference to strangers or even to creditors. The discretion given to the register is limited to a selection from those asking, if competent, in each class in their order. Tol. 86; Wms. Exrs. 246. When the widow renounces her right to administer, it is the duty of the register to select from the children, or next of kin, a person or persons competent to perform the duties of administration, preferring males to females. In making the choice among this class, doubtless,

great respect ought to be paid to the recommendation of those persons who have the most interest in the assets, on the reasonable presumption that those who have the greatest interest to increase the estate are most fit to advise as to the administration. Thus far the cases go, but no further. It has never been understood, as is contended, that the widow or next of kin, or both combined, having the greatest stake in the estate, can pass by any one of the children, or next of kin, competent and willing to take, and vest the appointment in a stranger. On the contrary, directly the reverse is ruled in *Williams' Appeal*, 7 Pa. St. 259. There, two of the sons of the testator, who were his executors, having renounced, the register, at their request, granted letters of administration to a stranger, to which a third son and two of the daughters assented. A fourth son and a daughter, having petitioned for a revocation, it was held that the register was bound to revoke the letters and grant administration to the person who consented to act. The facts of the case cited are precisely similar, with the immaterial exception that here the widow concurred in the nomination. There, as here, all the persons entitled of the first class declined, except the claimant and his sister, and the court affirmed the register's court, reversing the decision of the register, who had given the administration to two strangers, put in nomination by persons of the first class. Judge Coulter correctly says that although the executors (also next of kin) may relinquish their own right, they cannot take away the rights of others."

In *Maryland*, the legal right to administer cannot be delegated. *Georgetown College v. Browne*, 34 Md. 450.

In *New Jersey*, where the next of kin waive their claims to administration, a stranger may be appointed; but the next of kin have no right to dictate the selection. *In re Cresce*, 28 N. J. Eq. 236.

In *Guldin's Estate*, 81* Pa. St. 362, it was held that a married daughter, unless unfit, is entitled to administer her father's estate, although his other children, having renounced their right, request that the administration be granted to a stranger.

Where a widow, by a writing duly attested, but without appearing in court, relinquishes her right of ad-

ministration, and requests that A be appointed, the court may, nevertheless, appoint B, a creditor of the deceased, and the widow cannot object thereto, unless she personally appears in court for that purpose. *Triplett v. Welle*, Litt. Sel. Cas. (Ky.) 49.

Where a widow makes an absolute renunciation of her right to administer, the register has a right to grant letters of administration to any one of the sons of the decedent—he is not bound to prefer an elder to a younger. *Shomo's Appeal*, 57 Pa. St. 356.

One having the priority of right to the administration, under the statutes of *New York*, can only deprive those coming after him of their right by taking letters himself. He cannot nominate a third party to the exclusion of the others. *In re Root*, 1 Redf. (N. Y.) 257.

Where two strangers, one nominated by the widow, applied for administration, and the ordinary granted letters to the nominee of the widow, supposing, erroneously, that he was bound by law so to do, the appellate court, not perceiving that any injury could result therefrom to the legal rights of the defeated applicant, refused to reverse the ordinary's decision. *McBeth v. Hunt*, 2 Strobb. (S. Car.) 335.

Where the next of kin reside abroad, the court will grant administration to the appointee of such next of kin. *Smith v. Munroe*, 1 Ired. (N. Car.) 345.

Where a widow has renounced her right to administer her husband's estate, and recommended another person, all the children being minors, the surrogate has jurisdiction to appoint such person, without citing the next of kin. *Sheldon v. Wright*, 5 N. Y. 497.

Letters testamentary cannot, under the law of *Maryland*, be granted to a corporation, even though the corporation be the universal legatee and executor under the will of the decedent. Nor can the corporation, in such a case, designate a person to administer on the estate *cum testamento annexo*. *Georgetown College v. Browne*, 34 Md. 450.

As a general rule the judge should be guided, to some extent, in making his appointment, by the preferences of the other heirs and creditors. *Succession of Chaler*, 39 La. Ann. 308; *Mandeville v. Mandeville*, 35 Ga. 243; *Munsey v. Webster*, 24 N. H. 126.

the courts will give great weight to the preferences of those who have the greatest interest in preserving the estate, and will appoint the person whom they request.¹

The law does not favor an agreement, the consideration for which is the relinquishment by one person to another of a right to administer on an intestate's estate.²

f. PUBLIC ADMINISTRATION.—In many of the *United States* where there is no known husband, widow, or next of kin qualified to administer, or where the persons entitled to administration fail to take out letters, administration is granted to a public official, who is usually known as the public administrator.³ A grant of

1. In *Georgia*, the appointment as administrator, of one recommended to the ordinary by a majority of the distributees, cannot be defeated by one of the distributees on the ground that the applicant is not next of kin, nor interested in the estate, nor a creditor. *Halliday v. Du Bose*, 59 Ga. 268.

Those entitled to administer upon an estate requested that the Brooklyn Trust Co. be appointed administrator. *Held*, that its right, under the circumstances, was superior to that of the public administrator, upon consideration of the apparently conflicting provisions of the statutes concerning the right of each to administer. *Godard v. Abbott*, 30 Hun (N. Y.) 401.

A's appointment as administrator of an estate was requested by the intestate's widow and by the majority of his creditors. B was the largest creditor of the estate in his capacity as C's administrator. The judge, in the exercise of his discretion, appointed B. *Held*, no error. *Ex parte Ostendorff*, 17 S. Car. 22.

On application to appoint an administrator, made by a grandmother who was next of kin, and creditors—*held*, that the probate court had discretion to order letters to issue to the grandmother's nominee in preference to that of the creditors. *Wyche's Estate*, Myr. Prob. (Cal.) 85. See also *In re Cotter's Estate*, 54 Cal. 215; *Keenan's Estate*, Myr. Prob. (Cal.) 186; *In re Stevenson*, 72 Cal. 164; *In re Keane*, 56 Cal. 407.

2. In *Bowers v. Bowers*, 26 Pa. St. 74, 67 Am. Dec. 398, Woodward, J., said: "The consideration of the contract sued on was the purchase of the office of administrator from him upon whom the law devolved the right to it, and the only question in the record is whether that is such a consideration as

the law will support. I call it an office, not because it is so strictly, but because it very much resembles one, and is frequently so called in the books. An office is a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging. An administrator is appointed by a public officer, under his seal of office, to exercise a trust and perform duties which are carefully defined by law, and which affect both public and private interests, and his compensation is measured by legal standards, though not defined in the fee bill. In *Beck v. Stitzel*, 21 Pa. St. 522, it was held that words were actionable without proof of special damage, which imputed to an administrator 'a positive and fraudulent breach of his official oath.' If public policy forbids traffic in the office of postmaster, as was decided in *Filson v. Himes*, 5 Pa. St. 456; 47 Am. Dec. 422, it will, for superior reasons, interdict barter in respect to the more sacred trust of administration. But if administration of a decedent's estate be not an office, it is strictly a trust, and as such is not to be purchased for a price which creates in the trustee an interest adverse to the *cestui que trust*."

3. A good example of a statute authorizing public administration is afforded by the *Missouri* act of 1868 (1 Wagner's Stat., ed. 1872, p. 122, § 8), which makes it "the duty of the public administrator to take into his charge and custody the estates of all deceased persons in his county, in the following instances: First, When a stranger dies intestate in the county without relatives, or dies leaving a will, and the executor named is absent or fails to qualify; second, when persons die intestate without any known heirs; third, when persons die or are found dead in the county; fourth, when money, prop-

administration to a public administrator cannot be sustained, if there are relatives within the State who are willing and competent to act;¹ but the public administrator is preferred to credi-

erty, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same; fifth, when any estate of any person who dies intestate therein or elsewhere is left in the county liable to be injured, wasted or lost when said intestate does not leave a known husband, widow or heir in this State; sixth, when from any good cause said court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost."

In *Union Mut. Ins. Co. v. Lewis*, 97 U. S. 682, this act was construed, and it was held that it did not authorize a suit by a public administrator in that State against a foreign insurance company doing business there, to enforce the payment of a policy of insurance, not made or to be executed in that State upon the life of a citizen of Wisconsin, who neither resided, died nor left any estate in Missouri.

A county court in *Missouri* may order the public administrator to take possession of any estate where administration has not been taken out under the general law. *Callahan v. Griswold*, 9 Mo. 784.

A public administrator may be ordered to take charge of the assets of a partnership, where one member is deceased, in order to prevent their being injured, wasted, purloined or lost; provided that there is no existing administrator having charge of the partnership effects. And he cannot be divested of the estate in a collateral proceeding, but only on application to the probate court. *Headlee v. Cloud*, 51 Mo. 301.

1. In *Langworthy v. Baker*, 23 Ill. 484, it was held, that the commission of an estate to the public administrator cannot be sustained unless the record shows that there is no relative within the State who will act, and that the application was made by a person interested in the estate.

Relatives of the deceased, who have an interest in his estate at the time of his death, have, in the order prescribed by law, a right to administer thereon. After such relatives, the right in the county of *New York*, belongs to the public administrator. *Public Administrator v. Peters*, 1 Bradf. (N. Y.) 100.

A public administrator, as such, is not entitled to administer under a will, as dative testamentary executor, where the testamentary executor has died, and where one or more of the heirs are present in the State. *Bougere's Succession*, 30 La. Ann. 422.

Emma Hughes, illegitimate, deceased intestate, was domiciled in England at the time of her death. Richard Hughes, the son of her mother, and the public administrator, also, applied for letters of administration on her estate. *Held*, that by the law of *England*, she had no lineal decedents nor collateral relatives, and the said Richard was not entitled to letters of administration. *Public Administrator v. Hughes*, 1 Bradf. (N. Y.) 125.

A public administrator will be preferred to the nominee of the married daughter of the intestate. *Kelly's Estate*, 57 Cal. 81; and to the nominee of the brother of a deceased Chinaman. *Yun's Estate*, Myr. Prob. (Cal.) 181.

In *Goddard v. Public Administrator*, 1 Dem. (N. Y.) 480, it was stated that, in appointing an administrator, the court, ordinarily, will prefer the public administrator to a trust company, authorized by statute to administer in the discretion of the surrogate. The duties of the office are best conducted by an individual.

Public administrators have power to take charge of, and administer on, the effects, arriving at quarantine, of any person coming from any other country or State, and dying intestate on his passage; but this power will be superseded by letters of administration granted by any court having jurisdiction. *Ex parte Commissioners of Emigration*, 1 Bradf. (N. Y.) 259.

Under *Tennessee Code*, § 468, providing that, if persons entitled to administration fail to take out letters within six months after the intestate's death, the public administrator, after applying for letters, shall administer the estate—*Held*, that where letters had been granted to the public administrator before the six months expired, the probate court might, on application of the parties interested within the time, revoke the letters. *Varnell v. Loague*, 9 Lea (Tenn.) 158.

See also the following cases on the

tors.¹ In some States there is no separate office of public administrator, but public administration is granted to some county officer such as the sheriff,² county clerk,³ or county treasurer.⁴ In

construction of various acts relating to public administrators: *In re Page*, 107 N. Y. 266; *Proctor v. Wanmaker*, 1 Barb. Ch. (N. Y.) 302; *In re Blank*, 2 Redf. (N. Y.) 443; *Douglas v. Mayor etc. of N. Y.*, 56 How. Pr. (N. Y.) 178; *Patullo's Estate*, 1 Tuck. (N. Y.) 99; *Speckles v. Public Administrator*, 1 Dem. (N. Y.) 475; *In re Brewster*, 5 Dem. (N. Y.) 259; *Taylor v. Public Administrator*, 6 Dem. (N. Y.) 158; *Tymon v. Cromwell*, 2 Dem. (N. Y.) 650; *Tuohay v. Public Administrator*, 2 Dem. (N. Y.) 412; *Burnside's Succession*, 34 La. Ann. 728; *Townsend's Succession*, 36 La. Ann. 535; *Longuefosse's Succession*, 34 La. Ann. 583; *Taylor's Succession*, 23 La. Ann. 22; *Henry's Succession*, 31 La. Ann. 555; *Duson v. Dupre*, 32 La. Ann. 806; *Supple's Succession*, 23 La. Ann. 24; *Moore v. Griffith*, 25 La. Ann. 213; *Miller's Succession*, 27 La. Ann. 574; *Bougere's Succession*, 30 La. Ann. 422; *Morgan's Estate*, 53 Cal. 243; *Nunan's Estate*, Myr. Prob. (Cal.) 238; *Murphy's Estate*, Myr. Prob. (Cal.) 185; *McCabe v. Lewis*, 76 Mo. 296; *Tittman v. Edwards*, 27 Mo. App. 492; *Donaldson v. Lewis*, 7 Mo. App. 403; *McGuire v. Buckley*, 58 Ala. 120; *State v. Anderson*, 16 Lea (Tenn.) 321; *Cleveland v. Quilty*, 128 Mass. 578.

1. **Creditor Not Preferred.**—*Estate of Doak*, 46 Cal. 573; *McKinnon's Estate*, 64 Cal. 226; *In re Page*, 107 N. Y. 266. A creditor cannot claim letters in preference to the public administrator, by reason of a non-resident heir-at-law having requested the appointment of the creditor. *Hyde's Estate*, 64 Cal. 228. But in *Illinois*, contrary to the usual rule, a creditor is preferred to a public administrator. *Rosenthal v. Prussing*, 108 Ill. 128.

2. **Sheriff.**—Under § 57 of the act of 1797, in *Kentucky*, if there be an estate of a deceased person, not administered, and of which there is no administrator, after a lapse of three months from the intestate's death, it may be committed to the sheriff, and if it be received by him or his deputy, he and his official sureties are liable for its faithful administration. *Scarce v. Page*, 12 B. Mon. (Ky.) 311.

A sheriff does not become an administrator *ex officio* of an intestate estate

until empowered by the probate court to act as such. Until then, he can do nothing to bind the estate. *Wilson v. Dibble*, 16 Fla. 782; *Davis v. Shuler*, 14 Fla. 438.

A grant of administration to a sheriff *virtute officii* attaches to the office and expires therewith. *Landford v. Dunklin*, 71 Ala. 594.

Neither the sheriff nor his securities can be heard to question the validity of a grant of letters of administration to him, after the sheriff has accepted and acted under the grant, obtaining possession of the assets and converting them. *Burnett v. Nesmith*, 62 Ala. 261.

The refusal of the court to grant letters of administration to the sheriff, on the application of a party representing himself to be a creditor, is not an interlocutory or final order, within the meaning of the *Alabama* act of 1850 (Pamph. Acts, 32 § 29) from which an appeal lies. The party's remedy is by *mandamus*. *Brennen v. Harris*, 20 Ala. 185.

Under the provisions of the *Virginia* Code, 542, § 10, it is discretionary with the court to revoke letters of administration given to the sheriff and grant them to a distributee. *Hutcheson v. Priddy*, 12 Gratt. (Va.) 85.

Before the burden of administering on an estate can be cast on a sheriff, it is incumbent on the party making the application to make it appear to the court that there are rights, property, or effects of the deceased subject to administration; and if he should claim to be a creditor, to set forth his claim free from legal objection, and that it is a valid existing debt against the deceased. *Cocke v. Finley*, 29 Miss. 127.

See also *Johnson v. Tatum*, 20 Ga. 775; *Scarce v. Page*, 12 B. Mon. (Ky.) 311; *Williamson v. Furbush*, 31 Ark. 539.

3. **Clerk.**—The ordinary, having tried in vain to get any person to apply for letters of administration on an estate, may compel the clerk of the superior court to perform the duties of administrator. *Johnston v. Tatum*, 20 Ga. 775.

4. **County Treasurer.**—*Sutton v. Public Administrator*, 4 Dem. (N. Y.) 33; *In re Ward*, 1 Redf. (N. Y.) 254.

New York, the commissioners of immigration are empowered to act in certain cases where foreigners die intestate on the passage.¹

6. Procedure.—The procedure pursued in an application for letters of administration is similar to that pursued in applying for letters testamentary. It is the usual practice for the person claiming or entitled to administration to present a petition to the probate court, setting forth the fact of the death of the intestate, the date of the death, the place of last residence, the name of the widow or husband, and the next of kin, stating the degree of kindred, and such other matters as may be suitable or necessary for the court to be informed of.² In many of the States, after the petition has been filed with the register, a citation issues to notify all persons interested of the proceedings. The citation is made returnable at a certain day, when a hearing is held and the application disposed of.³ In some of the States the form of the

1. *Ex parte* Commissioners of Emigration, 1 Bradf. (N. Y.) 259.

2. **Petition for Letters.**—In Philadelphia the form of the petition is as follows:

The petition of — respectfully sheweth that — was a resident of Philadelphia county, State of Pennsylvania, and departed this life intestate at No. — in the county of — and State of — on the — day of — A. D. 189—, at — o'clock — M. That the said — deceased, left — surviving the following-named widow or husband, heirs and next of kin, to-wit: The said intestate was possessed of goods, chattels, rights and credits to the value of \$— and of real estate (less incumbrance) to the value of \$— as near as can be ascertained.

Therefore the said — respectfully applies for letters of administration — upon the goods, chattels, rights, and credits of which said — died possessed. Dated — A. D. 189—.

In *Shipman v. Butterfield*, 47 Mich. 487, it was held that a petition, not showing on its face that it was made by a person entitled to administration, should be dismissed.

A petition for administration, stating decedent to be "late of," etc., is sufficient to confer jurisdiction on the probate court of the county named. *Abel v. Love*, 17 Cal. 234.

A petition of M S. of Monterey, for letters of administration, was addressed to the judge of the county of Santa Clara, and showed that Dr. John T., late a resident of the county aforesaid, died in said county. *Held*, that

it sufficiently appeared that the decedent was a resident of the county of Santa Clara at the time of his death. *Townsend v. Gordon*, 19 Cal. 188.

In *New York* it has been held that, although it is usual to set forth in the petition the facts essential to the grant of letters of administration, as elicited upon the preliminary examination before the surrogate, it is not necessary. *Johnston v. Smith*, 25 Hun (N. Y.) 171.

No person will be allowed to apply for letters, or to object to their grant, unless it appears that he is interested in the estate. *Augusta etc. R. Co. v. Peacock*, 58 Ga. 146; *Russell v. Hartt*, 87 N. Y. 19; *Succession of Poret*, 26 La. Ann. 157; *Ferris Estate*, 1 Tuck. (N. Y.) 15; *Burton v. Waples*, 4 Harr. (Del.) 73; *Burwell v. Shaw*, 2 Bradf. (N. Y.) 322; *Ferril v. Public Administrator*, 3 Bradf. (N. Y.) 151; *Sheldon v. Wright*, 7 Barb. (N. Y.) 39.

When a petitioner for administration withdraws his petition in the probate court, he ceases to be a party to the record. *Miller v. Keith*, 26 Miss. 166.

In a contest as to the right of administration, there are strictly no plaintiffs or defendants. All applicants are actors, and some may withdraw, and others come in, at any time during the progress of the cause, even after an appeal from the county to the superior court. *Atkins v. McCormick*, 4 Jones (N. Car.) 274.

3. In some States the citation is required to be published in a newspaper. *Montelius v. Sarpy*, 11 Mo. 237; *McGehee v. Ragan*, 9 Ga. 135.

certificate of letters of administration is prescribed by statute. In others the form of the letters is left to the discretion of the probate court. Where no specific form is prescribed by law, if the certificate of appointment is signed by the judge, although it may not be in the usual form, it must be considered as the act of the judge, and effect must be given to it.¹ The appointment of an administrator is a judicial act; while the issuing of the letters is a ministerial act.² If the court of probate appoints a person

Letters of administration issued in disregard of the rule of court on the subject of notice to those first entitled, when they have not renounced, are invalid, and this, although the statute is silent on the subject of notice. *Gans v. Dabergott*, 40 N. J. Eq. 184.

Letters of administration, granted to an applicant who has neither caused a citation to be issued, given security, nor taken the prescribed oath are void; and a subsequent compliance with the last particulars will be of no avail, giving notice being indispensable. *Torrence v. McDougald*, 12 Ga. 526.

Under *Massachusetts* Rev. Stat., ch. 64, § 4, held, that the appointment of a stranger, before the expiration of thirty days from the intestate's death, without citation or notice to the next of kin, was irregular, and should be reversed. *Cobb v. Newcomb*, 19 Pick. (Mass.) 336.

In a public notice of the granting of letters of administration, an error of two days as to the time when granted is immaterial. *Acre v. Ross*, 3 Stew. (Ala.) 288.

No notice is required by *Maine* Rev. Stat., ch. 106, prior to granting administration on an intestate's estate, where it is granted "to the widow, husband, next of kin, or husband of the daughter of the deceased, or to two or more of them." *Bean v. Bumpus*, 22 Me. 549.

An opposition to an appointment of curator, if it has not been made, is in time, although the application has been advertised ten days. *Succession of Block*, 6 La. Ann. 810.

It cannot be pleaded in defense to an action brought by an administrator, that the proper parties were not duly cited before the surrogate. The latter obtains jurisdiction, not by the citations, but by the residence of the intestate within the county. The other provisions of the statute are merely directory, a non-compliance

with which is not an objection, collaterally, to the validity of the letters. *James v. Adams*, 22 How. Pr. (N. Y.) 409.

Proof of Notice.—It is competent to prove the posting of notice of the appointment of an administrator by the affidavit of the administrator attached to a copy of the notice,¹ as provided in *Iowa* Code, § 3698. *Brownell v. Williams*, 54 Iowa 353.

Reading in Church.—A citation from the ordinary, giving notice of one's intention to apply for administration, is sufficiently published in *South Carolina* by being read by an officiating clergyman in church. *Sargent v. Fox*, 2 McCord (S. Car.) 309.

1. *Carlton's Succession*, 26 La. Ann. 329.

In *Georgia*, a certificate of letters of administration, concluding "given under my hand and seal of office, this August 7, 1854, A. B. Ordinary," is sufficient. *Witzel v. Pierce*, 22 Ga. 112.

If letters of administration purport to be granted by proper authority, and are in due form, and sealed with the office seal of the county court, they will be good without the signature of the clerk, until set aside for want of formality. *Post v. Caulk*, 3 Mo. 35.

A clerk's certificate which has his signature and official seal, is complete evidence of the appointment of a succession. *Davie v. Stevens*, 10 La. Ann. 496.

Letters of administration, not authenticated by the seal of the orphans' court which granted them, are inoperative and not admissible as evidence. *Tuck v. Boone*, 8 Gill (Md.) 187.

In *Sharp v. Dye*, 64 Cal. 9, it was held that letters of administration are not void because the seal of the court is affixed in the wrong place.

In *Texas* a grant including two estates under one administration was held not to be void. *Grande v. Herrera*, 15 Tex. 533.

2. **Letters Issued on Christmas Day.**—In

not entitled to the administration, the proper remedy is by appeal.¹

7. Effect of Decree.—In general the probate court will be presumed to have lawfully exercised its jurisdiction, and its decree cannot be attacked in collateral proceedings.² But if it appears

Glendenning v. McNutt, 1 Idaho N. S. 592, to a suit by an administrator, it was contended that his appointment was void, having been made on Christmas day. The letters appeared to have been issued on that day, but the record showed that the appointment was in fact, made on the following day. *Held*, that the appointment was the judicial act, the issue of the letters merely the ministerial act; that no injury to the defendant was shown, and that his defense was untenable.

1. *Dexter v. Brown*, 3 Mass. 32; *Wright v. Wright*, Mart. & Y. (Tenn.) 43; *Evans v. Evans*, 2 Coldw. (Tenn.) 143.

Mandamus will not lie. *State v. Mitchell*, 3 Brev. (S. Car.) 520.

2. *Burnley v. Duke*, 2 Rob. (Va.) 102; *Fisher v. Bassett*, 9 Leigh (Va.) 119; 33 Am. Dec. 227; *Landford v. Dunklin*, 71 Ala. 597; *Watson v. Glover*, 77 Ala. 323; *Bean v. Chapman*, 62 Ala. 58; *Burnett v. Nesmith*, 62 Ala. 261; *Davis v. Swearinger*, 56 Ala. 31; *Jennings v. Moses*, 38 Ala. 402; *Savage v. Benham*, 17 Ala. 119; *Leatherwood v. Sullivan*, 81 Ala. 458; *Sims v. Boynton*, 32 Ala. 353; 70 Am. Dec. 540; *Scott v. Crews*, 72 Mo. 261; *Rowden v. Brown*, 91 Mo. 429; *McNair v. Dodge*, 7 Mo. 404; *Hensley v. Dodge*, 7 Mo. 479; *Riley v. McCord*, 24 Mo. 265; *Naylor v. Moffatt*, 29 Mo. 126; *Hobson v. Ewan*, 62 Ill. 146; *Wright v. Wallbaum*, 39 Ill. 554; *Clark v. Pishon*, 31 Me. 503; *McFarland v. Stone*, 17 Vt. 165; 44 Am. Dec. 325; *Fletcher v. Fletcher*, 29 Vt. 98; *Wheeler v. St. Joseph etc. R. Co.*, 31 Kan. 640; *Robinson v. Epping*, 24 Fla. 237; *Breen v. Pangborn*, 51 Mich. 29; *Albright v. Cobb*, 30 Mich. 355; *Johnson v. Johnson*, 66 Mich. 525; *Morgan v. Locke*, 28 La. Ann. 806; *Herron's Succession*, 32 La. Ann. 835; *Lamm's Succession*, 40 La. Ann. 312; *Webb v. Keller*, 39 La. Ann. 55; *Jones v. Bittinger*, 110 Ind. 476; *Francisco v. Chicago etc. R. Co.*, 35 Fed. Rep. 647; *Davis v. Smith*, 58 N. H. 16; *Boody v. Emerson*, 17 N. H. 577; *Kittredge v. Folsom*, 8 N. H. 98; *Cleveland v. Quilty*, 128 Mass. 578; *Emery v. Hildreth*, 2 Gray (Mass.) 228;

Ramp v. McDaniel, 12 Oregon 108; *Glendenning v. McNutt*, 1 Idaho (N. S.) 592; *Holmes v. Oregon etc. R. Co.*, 7 Sawy. (U. S.) 380; *Milliken's Estate*, Myr. Prob. (Cal.) 88; *Irwin v. Scriber*, 18 Cal. 499; *Francisco v. Chicago etc. R. Co.*, 35 Fed. Rep. 647; *Gallagher v. Holland*, 20 Nev. 164; *Ragland v. Green*, 14 Smed. & M. (Miss.) 194; *Brown v. Landon*, 30 Hun (N. Y.) 57; *Kelly v. West*, 80 N. Y. 139; *O'Connor v. Huggins* (Supreme Ct.), 1 N. Y. Supp. 377; *Flinn v. Chase*, 4 Den. (N. Y.) 85; *Munro v. Merchant*, 26 Barb. (N. Y.) 383; *Beeber's Appeal*, 99 Pa. St. 596; *Sager v. Lindsey*, 108 Pa. St. 25; *Wood's Appeal*, 55 Pa. St. 332; *Rinehart v. Rinehart*, 27 N. J. Eq. 475; *Quidort v. Bergeaux*, 18 N. J. Eq. 473.

Where a probate court has jurisdiction to appoint some person administrator, and makes an appointment by issuing letters of administration to a person not a relative or creditor of the deceased, and without citing any of the relatives or creditors to appear and either take or renounce the administration, although the appointment may have been erroneous, yet the letters of administration cannot be attacked collaterally, and especially not by a person who is neither a relative nor a creditor of the deceased. *Taylor v. Hosick*, 13 Kan. 518.

A judgment granting letters of administration cannot be attacked collaterally by showing that the applicant was not a citizen of Georgia. *Maybin v. Knighton*, 67 Ga. 103.

A failure to cite the widow of the deceased is ground for revocation, but does not render the letters void. *Kelly v. West*, 80 N. Y. 139.

Under *Massachusetts* Gen. St., ch. 117, § 4, it is no defense to an action by an administrator that his appointment was procured by his false statements respecting the place of residence of his intestate, unless the want of jurisdiction in the probate court to appoint appears of record. *McFeely v. Scott*, 128 Mass. 16.

The appointment of an administrator cannot be attacked collaterally by showing non-compliance with the law

that the person on whose estate letters have been granted is not in fact dead, the grant may be attacked collaterally;¹ and where it appears that the court of probate had no jurisdiction by reason of the non-residence of the intestate, or because the intestate had no property within the jurisdiction, or for other reasons, a collateral attack on the letters may be sustained.²

as to giving bond, nor by evidence that the appointment was made at an adjourned term, and that there had been no sufficient citation at the regular term. *Barclay v. Kimsey*, 72 Ga. 725.

A grant of letters of administration to the son of an intestate was assailed collaterally for the following reasons: (1) because the son's petition did not state that he was twenty-one years of age, what his exact relationship to the deceased in the order of consanguinity, and that citation was published; (2) because the oath of the administrator was filed in the office of the judge of probate, and not in the office of the clerk of the circuit court; and (3) because the appraisement did not show the number of the intestate's family and the property they had exempted. The petition did allege that the petitioner was the son of the intestate and one of the distributees. *Held*, that the court had jurisdiction to grant the letters of administration. *Emerson v. Ross*, 17 Fla. 122.

1. Where an administration was granted on the estate of a living person, on the presumption of death arising from his absence, unheard of for seven years—*held*, that an innocent purchaser claiming under the administrator, had no title against the living owner, as the administration was wholly void. *Moore v. Smith*, 11 Rich. (S. Car.) 569; 73 Am. Dec. 122.

2. If a probate court issues letters of administration, the intestate having been a resident of another county, this may be shown by a collateral attack on the jurisdiction. *People's Sav. Bank v. Wilcox*, 15 R. I. 258.

Letters of general administration, granted during the pendency of a contest respecting the probate of a will, are null and void. Nor can they be supported as a grant of administration *pendente lite*. *Slade v. Washburn*, 3 Ired. (N. Car.) 557.

The grant of administration by a judge of probate who is interested in the estate is void. *Sigourney v. Sib-*

ley, 22 Pick. (Mass.) 507; 33 Am. Dec. 762.

A judgment of the court of ordinary, granting administration, may be impeached by extraneous evidence showing that the court had no power to grant the administration. *Griffith v. Wright*, 18 Ga. 173.

A grant of administration originally void and not merely voidable, acquires no validity from an acquiescence of twenty years or any longer period. *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; 16 Am. Dec. 372.

Under Act *Texas* 1846, requiring that letters of administration be granted in the county of the residence of the deceased, or where he owned property, or where he died, letters issued by the probate court of a county where the deceased did not die, on an application which fails to show either the *situs* of his property, or his residence, are void. *Paul v. Willis*, 69 Tex. 261.

Letters of administration, granted by a court not having jurisdiction, are merely void, and the court that has jurisdiction may grant letters, though the former letters have not been revoked. *Ex parte Barker*, 2 Leigh (Va.) 720.

An intestate died in 1836, leaving only real property. Administration was granted in 1846, on an application which did not show jurisdiction, and in 1853 administration *de bonis non* was granted on application failing to show special reasons therefor, and a debt allowed, to satisfy which said real estate was sold. *Held*, that both administrations were void, and that the order of sale, being void, might be attacked collaterally, especially where it appeared that the object of the administration was the personal benefit of the applicant. *Paul v. Willis*, 67 Tex. 261.

For other cases of collateral attack, see *Miller v. Jones*, 26 Ala. 247; *Illinois Cent. R. Co. v. Crazin*, 71 Ill. 177; *Ex parte Barker*, 2 Leigh (Va.) 720; *Henry v. Estey*, 13 Gray (Mass.) 336; *Cummings v. Hodgdon*, 147 Mass.

8. When Administration May be Dispensed With.—If all the persons entitled to distribution are of full age, they may pay the debts of the estate, and divide the property among themselves, without the appointment of an administrator.¹ Such agreements are, however, not favored by the courts, and if made unfairly, or in disregard of the rights of any one interested in the estate, they may be set aside by the subsequent appointment of an administrator.²

In some of the States it is provided by statute that administration may be dispensed with under certain circumstances. Thus in *Indiana*, estates worth less than \$300, may be inventoried, appraised, and settled without an administrator.³ In *Maine*, estates

21; *Union Pac. R. Co. v. Dunden*, 37 Kan. 1; *Harwood v. Wylie*, 70 Tex. 538; *Ex parte Barker*, 2 Leigh (Va.) 719.

1. In *Vermont* it is competent for all the heirs of a deceased person, if they are of age, to settle and pay the debts of the estate, and divide the property among themselves, without the intervention of an administrator, and neither the creditors nor debtors of the estate have a right to complain. *Taylor v. Phillips*, 30 Vt. 238; *Babbitt v. Bowen*, 32 Vt. 437.

Where a wife dies intestate, and her husband afterwards dies, leaving to her assets which belonged to him as survivor, unadministered, his representatives may, under the statute, bring suits for the recovery of such assets, without taking letters of administration upon her estate. *Roosevelt v. Ellithorp*, 10 Paige (N. Y.) 415.

Where an estate is not in debt, and the heirs, being of full age, carry out a settlement upon which they have all agreed, and by which they receive all that they could by virtue of an administrator, one cannot be appointed. *Needham v. Gillett*, 39 Mich. 574.

A court of equity will dispense with administration upon the estate of an intestate, and decree distribution direct, when the only office of administration, if granted, would be distribution. *Fretwell v. McLemore*, 52 Ala. 124.

In *Pennsylvania* an administrator was not permitted to disturb a sale of personal property made before his appointment by the widow and kindred, where he could not show debts or any good cause for reopening the transaction. *Walworth v. Abel*, 52 Pa. 370.

After an adverse possession of personality for forty-two years, a court of equity will presume a former adminis-

tration to protect the rights of *bona fide* purchasers of such property. *Woolfolk v. Beatly*, 18 Ga. 520.

2. In *Wright v. Wright*, Mart. & Y. (Tenn.) 43, it was declared that agreements between distributees, to divide the intestate's property without administering, ought not to be encouraged.

Where the heirs-at-law and next of kin of a deceased person took possession of his estate and divided it among themselves and sold some of it, —*held*, that a court of equity could not protect them by restraining an administrator, regularly appointed, from recovering the property in actions at law. *Carter v. Greenwood*, 5 Jones Eq. (N. Car.) 410.

See also in general on the necessity of administration, *Bradford v. Felder*, 2 McCord Eq. (S. Car.) 168; *Cochran v. Thompson*, 18 Tex. 652; *Alexander v. Barfield*, 6 Tex. 400; *Smiley v. Bell*, Mart. & Y. (Tenn.) 378; 17 Am. Dec. 813; *Marshall v. King*, 24 Miss. 85; *Patterson v. High*, 8 Ired. Eq. (N. Car.) 52; *Davidson v. Potts*, 7 Ired. Eq. (N. Car.) 272; *Sharp v. Farmer*, 4 Dev. & B. (N. Car.) 122; *Hibbard v. Kent*, 15 N. H. 516; *Clark v. Clay*, 31 N. H. 393; *Bartlett v. Hyde*, 3 Mo. 490; *Bowdoin v. Holland*, 10 Cush. (Mass.) 17; *Allen v. Simons*, 1 Curt. (U. S.) 124; *Walker v. Drew*, 20 Fla. 908; *Eisenbise v. Eisenbise*, 4 Watts (Pa.) 134.

3. By 2 *Indiana* Rev. Stat. 279, estates worth less than \$300 are to be inventoried and appraised and settled without an administrator; but if it turn out that it be worth more than \$300, an administrator is to be appointed; when appointed he is to proceed *de novo*, to make a new inventory and appraisement, and the former ap-

less than \$20 need not be administered upon.¹ In *Louisiana*, administration will not be granted when there is no absolute necessity for it.²

The government sometimes dispenses with the necessity for administration, where something is due to the decedent for a public service, as for a pension or prize money. In such cases the government prefers as a matter of policy to deal directly with the widow or next of kin of the decedent.³

In some States no administration is necessary upon the estate of an infant intestate.⁴

9. Secondary and Limited Administration.—Besides original administration heretofore considered, there are various kinds of secondary and limited administrations, which may be classified as follows: (1) Administration *cum testamento annexo*; (2) administration *de bonis non*; (3) administration *durante minore ætate*; (4) administration *durante absentia*; (5) administration *pendente lite*; (6) administration *ad colligendum*.

a. APPOINTMENT OF ADMINISTRATORS CUM TESTAMENTO ANNEXO.—Where a person dies testate, but without having appointed an executor in his will, or where the executor named in the will is dead, or incompetent, or refused to accept the trust, an administrator with the will annexed is appointed to carry out the provisions of the will.⁵

praisement is not conclusive. *Pace v. Oppenheim*, 12 Ind. 533.

1. *Bean v. Bumpus*, 22 Me. 549.

2. *Alleman v. Berqueron*, 16 La. Ann. 191; *Brashear v. Conner*, 29 La. Ann. 347; *Broussard v. Ditch*, 30 La. Ann. 1109; *Welch's Succession*, 36 La. Ann. 702; *Sarrazin's Succession*, 34 La. Ann. 1168; *Louaillier v. Castille*, 14 La. Ann. 777; *Lumsden's Succession*, 17 La. Ann. 38; *Dees v. Tildon*, 2 La. Ann. 412; *Soubiran v. Rivollet*, 4 La. Ann. 328; *Martin v. Dupre*, 1 La. Ann. 239; *Blake v. Kearney*, 30 La. Ann. 388.

3. "Statutes specially dispense with letters of administration in various instances; and particularly where the balance of pay due some public servant is to be settled by the government, or the bounties, prize money or pensions of soldiers and sailors remain to be adjusted. For the public interest is often thought to be subserved in such cases by dealing directly with widows, orphans, and other next of kin, through the executive; to the utter exclusion, if need be, of the intestate's creditors, and the avoidance of controversies in the probate court over the locus of assets or of the decedent's last domicile."

19 C. of L.—14

4. *Cobb v. Brown*, Spears Eq. (S. Car.) 564.

The prohibition in the *Missouri* act concerning guardians and curators, against the issuing of letters of administration upon the estate of a deceased minor, applies to those cases only where there are no debts, except those which the guardian himself has allowed to be created, and does not apply where there are demands for which the minor would have been liable to an action. *George v. Dawson*, 18 Mo. 407.

In an action by a sole surviving heir against the sureties of a deceased administrator, it appeared that plaintiff's brother, the only other heir of the decedent, had died while a minor, owing no debts, and leaving plaintiff his sole heir. *Held*, that as the only duty of administration on such brother's estate would be distribution, an administrator of his estate need not be appointed. *Glover v. Hill*, 85 Ala. 41. But see *Miller v. Eatman*, 11 Ala. 609; *Wheeler v. St. Joseph*, etc. R. Co., 31 Kan. 640; *Cobb v. Brown*, Spear's Eq. (S. Car.) 564.

5. Where a testator appointed three executors, with power to distribute his property as they thought best,

209

Administration with the will annexed is usually granted to the

and they all died indebted to the testator—*held*, that the orphans' court might appoint the son of the surviving executor, administrator of such estates with the will annexed, there being no claim by the next of kin, nor by the State, nor by creditors. *Neave's Estate*, 9 S. & R. (Pa.) 186.

Wherever a deceased person has left a will and omitted to appoint an executor, or the person appointed refused to qualify, the court may appoint any proper person administrator with the will annexed. *Suttle v. Turner*, 8 Jones (N. Car.) 403; *Smith v. Wingo*, 1 Rice (S. Car.) 287.

Where application is made to the surrogate for letters of administration with the will annexed, the executor having died, *prima facie* evidence that assets remain unadministered is sufficient, and there need be no specific enumeration of the assets remaining, nor is it an objection to the issuing of such letters that, owing to the Statute of Limitations, and the lapse of time since the original executor took his letters, such letters would confer but a barren office on the administrator *cum testamento annexo*. *Pumpelly v. Tinkham*, 23 Barb. (N. Y.) 321.

The power of the surrogate, under 3 *New York Rev. Stat.* 162, § 45, to appoint an administrator with the will annexed, in case of the death of all the executors, is not repealed nor affected by the act of 1863, which authorizes the supreme court to appoint a receiver of the estate in such an event. *Depau's Estate*, 1 Tuck. (N. Y.) 290.

The appointment of an administrator *cum testamento annexo* assumes that the court has admitted the will to probate. But this assumption may be contested by the proper parties in due time. *Lackland v. Stevenson*, 54 Mo. 108.

It is a question whether the record should show that there was cause for granting administration *cum testamento annexo*. *Peebles v. Watts*, 9 Dana (Ky.) 102; 33 Am. Dec. 531; *Giessen v. Bridgford*, 83 N. Y. 348. In *Vick v. Mayor of Vicksburg*, 2 How. (Miss.) 379, the act of appointment of an administrator with the will annexed must state a case giving the court authority to make such appointment; if it does not, the appointment will be void, al-

though the facts were sufficient to justify it.

The order of a county court appointing an administrator with the will annexed, though defective in not stating that the executors named in the will refused to qualify, is valid, if in fact the executors refused to qualify; and this fact may be proved, where the validity of the order comes collaterally in question. *Peebles v. Watts*, 9 Dana (Ky.) 102; 33 Am. Dec. 531.

A died, and letters of administration were granted on his estate to B. About a year after, C and D presented the will of A to the probate court, for the first time, by which E was constituted his executor, and a petition was filed with the will, praying that letters of administration *cum testamento annexo* might be granted them, averring that E, the executor named, was a non-resident. The court granted the petition, and appointed them such administrators accordingly; and it did not appear that E contested the petition, or claimed the right of executorship, within the sixty days permitted by the *Mississippi* statute. *Held*, on writ of error to these decrees and orders, that there was nothing in the record upon which they could be reversed, and they were therefore affirmed. *Cox v. Cox*, 3 Smed. & M. (Miss.) 292.

Dative Execution in Louisiana.—As to the appointment of a dative executor in Louisiana, see *Crocker's Succession*, 14 La. Ann. 94; *Nicholson's Succession*, 5 La. Ann. 358; *Bernard's Succession*, 3 La. Ann. 565; *King v. Lastrapes*, 13 La. Ann. 582.

Miscellaneous.—For certain miscellaneous cases illustrating the appointment of administrators *cum testamento annexo*, see *Fowler v. Walker*, 1 Dem. (N. Y.) 240; *In re Powell*, 5 Dem. (N. Y.) 281; *In re Roux*, 5 Dem. (N. Y.) 423; *Luers v. Brunges*, 56 How. Pr. (N. Y.) 282; *Van Giessen v. Bridgford*, 83 N. Y. 348; *In re Allen*, 2 Dem. (N. Y.) 293; *Blanch v. Morrison*, 4 Dem. (N. Y.) 297; *Hayward v. Place*, 4 Dem. (N. Y.) 487; *Bell v. Welch*, 38 Ark. 139; *Frisby v. Withers*, 61 Tex. 134; *Culver v. Hardenbergh*, 37 Minn. 225; *Slagle v. Entrekin*, 44 Ohio St. 637; *Wilcoxon v. Reese*, 63 Md. 542; *Meek v. Allison*, 67 Ill. 46; *Kirby v. State*, 51 Md. 383; *Ex parte Clark*, 2 Va. Cas. 230; *Creath v. Brent*, 3 Dana (Ky.) 129;

person having the greatest interest under the will.¹ The residuary legatee is preferred to the next of kin, and of several residuary legatees, one or more of them may be selected by the court at its discretion.² If the residuary legatee refuses to serve, the next of kin may be appointed, and where the will contains no specific disposition of the residue, the next of kin are properly granted administration.³ Where a wife makes a will, but fails to appoint an executor, the husband's right to administer is usually recognized by the courts;⁴ and the same rule applies under similar circumstances to the wife.⁵

Administration *cum testamento annexo*, should not be granted until the executor named in the will has had an opportunity to renounce the trust.⁶ Under certain circumstances an executor

In re Baldrige (Ariz. 1887), 15 Pac. Rep. 141; *Spinning's Estate*, 1 Tuck. (N. Y.) 78.

1. Schouler's Executors and Administrators, 166.

2. Under the statute of *New York* where letters of administration with the will annexed are granted, in a case where letters testamentary have never been issued and there is no executor to take, or where the administrator with the will annexed dies, they issue to persons in the following order of preference: 1, Residuary legatees; 2, principal or specific legatees; 3, the widow; 4, next of kin; 5, the public administrator (in the city of New York); 6, creditors; 7, any person not interested who will accept. In other counties than in New York, the county treasurer takes next after creditors. *In re* Ward, 1 Redf. (N. Y.) 254; *In re* Root, 1 Redf. (N. Y.) 257; *Quintard v. Morgan*, 4 Dem. (N. Y.) 168.

As to the preference accorded to the residuary legatee, see *Atkinson v. Barnard*, 2 Phill. 318; *Taylor v. Shore*, 2 Jones 162; *Hutchinson v. Lambert*, 3 Add. 27; *Thompson's Estate*, 33 Barb. (N. Y.) 334; *Goods of Ditchfield*, L. R., 2 P. D. 152.

3. *Wms. Exrs.* 466; *Kooystra v. Buyskes*, 3 Phill. 531; *Goods of Aston*, L. R., 6 P. & D. 203.

The next of kin has preference to a creditor. *Little v. Berry*, 94 N. Car. 488.

4. *Wms. Exrs.* 115; *Schouler's Husband and Wife*, § 457-470. *Brenchley v. Lynn*, 2 Robert. 441; *Goods of Bailey*, 2 Sw. & Tr. 135; *Salmon v. Hays*, 4 Hagg 386.

5. *Long v. Huggins*, 72 Ga. 776.

The personal representatives of a

testator had a right of action against a municipal corporation for his death. The testamentary executor refused to commence suit, closed his administration, and procured his discharge. *Held*, that under *How. St. Michigan*, § 5843, providing that if an executor dies or is removed, or his authority shall be extinguished, administration with the will annexed may be granted as to the estate not already administered, letters were properly granted to the widow to prosecute the action. *Merkle v. Bennington*, 68 Mich. 133; 55 Am. Rep. 666.

A married woman, otherwise entitled to the letters, is none the less so because the pending suit is against her husband. *Hayward v. Place*, 4 Dem. (N. Y.) 487.

Connecticut Gen. St., p. 371, § 12, providing, on refusal of an executor to accept the trust, that the court shall commit the administration with the will annexed to the widow or next of kin. *Held*, not to apply in case of a non-resident testator having property in the State. *Lawrence's Appeal*, 49 Conn. 411.

6. The order granting an administration with the will annexed, before the renunciation of the executor named in the will, is avoidable upon the application of the executor, made in due time. *Baldwin v. Buford*, 4 Yerg. (Tenn.) 16; *S. P. Thompson v. Meek*, 7 Leigh (Va.) 419.

Letters of administration cannot be legally granted and confirmed while letters granted and confirmed to an executor named in the will are in full force. *Landers v. Stone*, 45 Ind. 404.

The appointment of an administrator with the will annexed, while there is an executor under no disability and

who has renounced may be appointed administrator with the will annexed.¹

Letters of administration with the will annexed are granted by the probate court of the county in which the will is proved,² or in which a copy of a foreign will is filed.³

b. APPOINTMENT OF ADMINISTRATORS DE BONIS NON.—Where the office of an original administrator becomes vacant by

who has renounced the appointment, is void, and the renunciation must appear of record. *Springs v. Irwin*, 6 Ired. (N. Car.) 27.

Letters of administration with the will annexed, issued on the death of the executor without notice, to the next of kin, were revoked on the application of their guardian. *Maupay's Estate*, 2 Brews. (Pa.) 491.

An administration *de bonis non* with the will annexed can be appointed on the resignation of the executor without notice to the legatee. *Sivley v. Summers*, 57 Miss. 712.

An existing administrator is not removed, simply by the appointment of another person as administrator, and such second appointment is void, unless the office has first been made vacant by an accepted resignation or a removal of the first administrator, or by the occurrence of such events as by operation of law create a vacancy. *Haynes v. Meeks*, 20 Cal. 288; *Petigru v. Ferguson*, 6 Rich. Eq. (S. Car.) 378; *Grande v. Chaves*, 15 Tex. 550.

1. An executor, whose appointment is avoided by his being an attesting witness, may be appointed administrator with the will annexed. *Murphy v. Murphy*, 24 Mo. 526. See also *Goods of Blisset*, 44 L. T. 816; *Briscoe v. Wickliffe*, 6 Dana (Ky.) 157.

2. In *Pennsylvania*, letters of administration with the will annexed can be granted only by the register of the county in which the will was proved and letters testamentary granted. *Eyster's Estate*, 5 Watts (Pa.) 132. See also *Ward v. Oates*, 42 Ala. 225; *Van Giesen v. Bridgford*, 18 Hun (N. Y.) 73; *Jackson v. Jeffries*, 1 A. K. Marsh. (Ky.) 88.

A county court cannot receive and act upon a petition for letters of administration with the will annexed, pending an appeal from the order approving the will. *In re Fisher*, 15 Wis. 511.

3. Where a residuary legatee in New York wishes to obtain the benefit

of stocks in New York belonging to his testator, who was a citizen of another State at his death, in which other State the will was proved, he should cite the executors to prove the will and take out letters testamentary thereon in New York, and if they neglect to do so, to have himself, or some other person, appointed administrator with the will annexed in New York. *Brown v. Brown*, 1 Barb. Ch. (N. Y.) 189.

Where the orphans' court has issued letters of administration on the estate of one who died in another State, it should on the filing of a copy of a will, revoke the letters and issue letters *cum testamento annexo*, no executor being named in the will; and in deciding who is entitled to letters *cum testamento annexo*, the court should be governed by the rules of precedence which apply in cases of ordinary administration. *Dalrymple v. Gamble*, 66 Md. 298.

After a will, made in another State, has been recorded in the *Kentucky* court of appeals, an appointment of an administrator by a *Kentucky* county court, without the will annexed, is void. *Ewing v. Sneed*, 5 J. J. Marsh. (Ky.) 459.

Code Civil Proc. *California*, § 1350, provides that where an executor fails to qualify, letters shall be granted with will annexed, as in cases of intestacy, § 1365 provides to whom administration shall be granted in the case of an intestate estate. An executor of one dying testate in Virginia, renounced his right as an executor in California, and testator having no wife, an administrator was appointed at his request. *Held*, that as he would not have been eligible, under § 1365, if deceased had been intestate, he could not be appointed on the executor's renunciation. *In re Garber's Estate*, 74 Cal. 338.

The executor of a foreign will is not permitted to exercise his office in Louisiana by virtue of his foreign appointment, but must first obtain the authority of the court in Louisiana,

death, resignation, or removal, and the estate remains unsettled, an administrator *de bonis non* is appointed to complete the administration.¹

and give security like an administrator. Succession of Butler, 30 La. Ann. 887.

1. Taylor v. Brooks, 4 Dev. & B. (N. Car.) 139; Finn v. Hempstead, 24 Ark. 111; Green v. Byrne, 46 Ark. 453; Williams v. Cubage, 36 Ark. 307; Todd v. Willis, 66 Tex. 704; Dwyer v. Kaltayer, 68 Tex. 554; Ullman v. Verne (Tex. 1887), 4 S. W. Rep. 548; Dwyer v. Kaltayer, 68 Tex. 554; North Carolina University v. Hughes, 90 N. Car. 537; Ham v. Kornegay, 85 N. Car. 119; Minot v. Norcross, 143 Mass. 326; Neal v. Charlton, 52 Md. 495; Scott v. Fox, 14 Md. 388; Alexander v. Stewart, 8 Gill & J. (Md.) 226; Hooper v. Scarborough, 57 Ala. 570; Wright v. Phillips, 56 Ala. 69; Eubank v. Clark, 78 Ala. 73; Martin v. Ellerbe, 70 Ala. 326; Rambo v. Wyatt, 32 Ala. 363; 70 Am. Dec. 544; Jacobs v. Morrow, 21 Neb. 233; Whittaker v. Whittaker, 12 Lea (Tenn.) 393; Saffold v. Banks, 69 Ga. 289; U. S. v. Ames, 4 MacArthur (D. C.) 278; Steel v. Atkinson, 14 S. Car. 154; 37 Am. Rep. 728; Magraw v. Irwin, 87 Pa. St. 139; Moore v. Williamette Transp. etc. Co., 7 Oregon 359; Chamberlain v. McDowell, 42 N. J. Eq. 628; Perrin v. Calhoun Co. Judge, 49 Mich. 342; Balch v. Hooper, 32 Minn. 158; Read v. Howe, 13 Iowa 50; Green v. Thompson, 84 Va. 376; Hendricks v. Snodgrass, Walk. (Miss.) 86; Chapin v. Hastings, 2 Pick. (Mass.) 361; Scott v. Crews, 72 Mo. 261; Byerly v. Donlin, 72 Mo. 270; Henlon v. Bland, 81 Va. 588; Clarke v. Wells, 6 Gratt. (Va.) 475; Merkle v. Bennington, 68 Mich. 133; 55 Am. Rep. 666; Watkins v. Adams, 32 Miss. 333; *In re* Foreign Missions, 27 Conn. 344.

An administrator *de bonis non* may be appointed even where the original administrator has reduced all the assets of the estate to money. Donaldson v. Raborg, 26 Md. 312.

Letters of administration *de bonis non* must be granted in every case where, upon the death of the administrator, there are unadministered assets; and *prima facie* evidence of such assets is all that is required. Scott v. Fox, 14 Md. 388; Hendricks v. Snodgrass, Walk. (Miss.) 86.

Under *Massachusetts* Stat. 1817, ch. 190, § 17, authorizing the grant of ad-

ministration *de bonis non*, "where there are debts due from the person unpaid," held, that a legacy was not a debt due from the deceased, within the meaning of the statute. Chapin v. Hastings, 2 Pick. (Mass.) 361.

The appointment of an administrator generally, without adding the words *de bonis non*, is not void because made in respect to an estate already administered. Moseley v. Mastin, Ala. Sel. Cas. 171.

Administration *de bonis non*, is to be granted where there are debts unsatisfied, notwithstanding the estate is all distributed. Brattle v. Converse, 1 Root (Conn.) 174. After an administrator appointed by a Virginia county court had qualified by giving bond without security, the court in term, made an order permitting him to resign, and on the following day appointed a new administrator, who qualified by giving bond with security. *Held*, that the second appointment was regular. Goff v. Norfolk etc. R. Co., 36 Fed. Rep. 299.

An administrator *de bonis non* may be appointed, and may maintain a suit against his predecessor, although there are no debts, and only the rights of heirs and distributees are to be protected. Scott v. Crews, 72 Mo. 261.

When the final settlement of a deceased administrator is set aside by the circuit court, an administrator *de bonis non* must be appointed by the probate court to settle the estate. Byerly v. Donlin, 72 Mo. 270.

An administrator *de bonis non* is a necessary party where money is to be paid to the intestate's estate. Hinton v. Bland, 81 Va. 588.

In an action by a sole surviving heir against the sureties of the deceased administrator for settlement, an administrator *de bonis non* need not be appointed where it appears that all the decedent's debts are paid or barred by limitation, and therefore that no administrative duties remain except settlement and distribution of the estate. Glover v. Hill, 85 Ala. 41.

The goods of an intestate do not go to the legal representative of a deceased administrator, nor has such representative any preferred right to

As a general rule administration *de bonis non* is granted in accordance with the rules governing the original grant of letters.¹ In *Massachusetts*, however, no preference is given to the next of kin in the grant of administration *de bonis non*, but the probate court may grant it to any suitable person.² Where a husband dies pending the settlement of his wife's estate, administration is granted to the husband's representatives.³ The probate court

the successorship. *Schouler's Exrs. & Admrs.* 171; *Taylor v. Brooks*, 4 Dev. & B. (N. Car.) 139; *Donaldson v. Raborg*, 26 Md. 312.

There must be an actual vacancy. *Munroe v. People*, 102 Ill. 406; *Pollard v. Mohler*, 55 Md. 284; *Ullman v. Verne* (Tex. 1887), 4 S. W. Rep. 548; *Rambo v. Wyatt*, 32 Ala. 363; 70 Am. Dec. 544; *Matthews v. Douthitt*, 27 Ala. 273; 62 Am. Dec. 765; *Watkins v. Adams*, 32 Miss. 333; *Ramey v. Green*, 18 Ala. 771; *Steen v. Bennett*, 24 Vt. 303; *Trumble v. Williams*, 18 Neb. 144; *Croxton v. Renner*, 103 Ind. 223; *Pate v. Moore*, 79 Ind. 20; *Ex parte Crafts*, 28 S. Car. 281.

Upon a petition for the appointment of an administrator *de bonis non*, the order of appointment recited that "whereas J. P. W. (an administrator previously appointed) is a non-resident, and has not for more than ten years past made any report of his doings to the court, and has left the estate unsettled in full, by means whereof the granting of administration on goods not administered upon doth belong to us." Held, that the order implied the removal of the first administrator, and that the appointment of the second one was valid. *Bailey v. Scott*, 13 Wis. 618.

Where a court granted letters of administration *de bonis non*, knowing that an administrator had been appointed in another county and had resigned it was held that, on a collateral attack, the jurisdiction of the court would be conclusively presumed. *Brockenborough v. Melton*, 55 Tex. 493.

When letters of administration *de bonis non* are attacked collaterally on the ground that there was no vacancy, the fact that there was no vacancy must be affirmatively shown. *Bean v. Chapman*, 73 Ala. 140.

1. *Williams on Executors* (7th ed.) 472; *Long v. Eaely*, 13 Ala. 239; *Kearney v. Turner*, 28 Md. 408; *Cutlar v. Quince*, 2 Hayw. (N. Car.) 60; *Bradley v. Bradley*, 3 Redf. (N. Y.)

512; *Cobb v. Beardsley*, 37 Barb. (N. Y.) 192; *Pendleton v. Pendleton*, 6 Smed. & M. (Miss.) 448; *Goods of Grundy*, L. R., 1 P. & D. 459.

2. *Russell v. Hoar*, 3 Met. (Mass.) 187.

3. *Schouler's Husband and Wife*, § 415. The rule seems to have been first definitely established in *England*, in *Fielder v. Hanger*, 3 Hagg. 769. That was a cause of granting administration to the executors of Leader, of certain effects of his late wife unadministered by him, an appearance having been given for, and administration prayed for, the niece and one of his wife's next of kin, the executors alleged in a petition, that in June, 1812 in contemplation of marriage, Leader and Mrs. Dawson signed an agreement, that her property should on the marriage pass to Leader, save as to "her moneys in the funds which shall be for her separate use to all intents and purposes as if she were sole and unmarried, and that the same shall be conveyed to trustees, and a proper settlement executed; "that no settlement was made, but the marriage took place, and on her death in June, 1828, she was possessed of personal estate consisting of £2,475 in the four per cents, and some long annuities standing in her name of "Dawson."

The proctor for the niece having returned the act unanswered, Lushington moved that the grant should pass to the husband's executors, citing all the cases collected in vol. 1, Hagg. Ecc. Reports 341-8, and vol. 2, Appendix 158-170.

The court said: "Those cases show that there have been contradictory decisions on the point. On the principle, however, that the grant ought to follow the interest, and that the whole interest is vested in the husband's representatives, I shall decree this grant. I should have done the same if the husband had not taken out administration, unless it could be shown that he had not the interest, but the property belonged to the wife's

which granted the original letters of administration is the proper court to which to apply for letters *de bonis non*.¹

After a great length of time a presumption arises that the estate has been duly administered. In such a case letters of administration *de bonis non* will not be granted.² But there are special circumstances which will rebut this presumption, and justify the grant of letters *de bonis non*.³

c. ADMINISTRATION DURING MINORITY. — Administration during minority is granted where a person who has the right to administration, or is named sole executor in a will, is under age, and therefore incapable of executing the trust.⁴ In the *United*

next of kin; and it will be understood in the registry that this is to be the rule for the future, unless special cause to the contrary be shown."

As to the rule in *America*, see *Whitaker v. Whitaker*, 6 Johns. (N. Y.) 112; *Hendrin v. Colgin*, 4 Munf. (Va.) 231; *Bryan v. Rooks*, 25 Ga. 622; 71 Am. Dec. 194; *In re Harvey*, 3 Redf. (N. Y.) 214; *Patterson v. High*, 8 Ired. Eq. (N. Car.) 52; *Lockwood v. Stockholm*, 11 Paige (N. Y.) 87; *Cutchin v. Wilkinson*, 1 Call (Va.) 1.

1. An administrator *de bonis non*, granted by the probate court of a different district from that in which the first administration was granted, but to which the town in which the deceased resided has been annexed by statute is not void, but only voidable upon appeal. *Clapp v. Beardsley*, 1 Vt. 151.

The county court which granted administration has alone the right to grant administration *de bonis non*, and a grant by another court is void. *Pawling v. Speed*, 5 T. B. Mon. (Ky.) 582.

When administration is duly granted by any court having jurisdiction, the same court, and no other, can grant administration *de bonis non*, upon the death of the first administrator. *Ex parte Lyons*, 2 Leigh (Va.) 761.

A grant including two estates under one administration will not be void, either in whole or in part, if the court has jurisdiction over both estates. *Grande v. Herrera*, 15 Tex. 533.

2. Lapse of time and other circumstances raise a presumption that all debts against an estate are barred or paid, and that the remaining assets belonged to the heirs; and therefore the estate cannot be reopened by the appointment of an administrator *de bonis non*. *Murphy v. Menard*, 14 Tex. 62.

An application for letters *de bonis non* made sixteen years after probate,

by one neither showing an interest in the estate, nor that any debt remained unpaid, will be refused. *San Roman v. Watson*, 54 Tex. 254.

3. Administration *de bonis non* may be granted after the expiration of twenty years from the death of the former administrator. *Bancroft v. Andrews*, 6 Cush. (Mass.) 493; *S. P. Holmes*, Petitioner, 33 Me. 577.

An executor having died without distributing a parcel of leasehold property inventoried by him, administration *de bonis non* is properly granted twenty-four years after his death, and the allegation of the testator's widow that she purchased of the executor the property in question, and paid him for it, affords no ground for refusing the letters. *Neal v. Charlton*, 52 Md. 495.

A person appointed administrator *de bonis non* in Alabama in 1862, on the ground that the chief was absent in the confederate army, and who continued to act in that capacity until 1867, when his appointment was declared void. *Held* to be an administrator *de facto*, and his deed as such to a purchaser, valid. *Green v. Scarborough*, 49 Ala. 137. *Compare Sugg v. Winston*, 49 Ala. 586.

4. *Cope v. Cope*, L. R., 16 Ch. D. 49; *Taylor v. Barron*, 35 N. H. 484; *Pitcher v. Armat*, 6 Miss. 288; *Lamb v. Helm*, 56 Mo. 420. In *Wallis v. Wallis*, 1 Winst. No. 1 (N. Car.) 78, it was held that a widow under twenty-one years of age cannot be appointed an administratrix. The court may appoint an administrator *durante minoritate*, and on the widow's attaining full age, give the administration to her, or the office may be filled by such person as she shall appoint.

If two persons are appointed executors and one is of full age while the other is a minor, administration during minority

States, it is usually customary to pass over minors, and select a suitable person for administrator without special reference to or regard for the minor's precedence.¹ An administrator during minority has the usual powers of a general administrator as long as his office continues.²

d. ADMINISTRATION DURING ABSENCE.—In certain cases administration during absence has been granted where, prior to the grant of original letters, the person or persons entitled had been absent from the jurisdiction of the court.³

e. ADMINISTRATION PENDENTE LITE.—Administrations *pendente lite* are appointed to take charge of an estate pending a contest over a will, or over the right to administration.⁴ The

need not be granted, the person of full age being vested with full power to administer. *Cartwright's Case*, 1 Freem. 258; *Williams on Executors* 479.

1. *Schouler's Executors and Administrators* 176, n.

2. In *Cope v. Cope*, L. R., 16 Ch. D. 52, Jessel, M. R., in speaking of the duties of an administrator *durante minore etate*, said: "The limit to his administration is no doubt the minority of the person, but there is no other limit. He is an ordinary administrator; he is appointed for the very purpose of getting in the estate, paying the debts, and selling the estate in the usual way; and the property vests in him. I am of opinion that he clearly can sell for the purpose of paying the debts."

3. In *Slater v. May*, 2 Ld. Raym. 1071, Chief Justice Holt said that it was reasonable that there should be such an administrator, and that this administration stood upon the same reason as an administration *durante minore etate* of an executor, viz: That there should be a person to manage the estate of the testator, till the person appointed by him is able.

In *Willing v. Perot*, 5 Rawle (Pa.) 264, a resident of Calcutta died possessed of American funds, which he bequeathed specifically to his sons upon various trusts. The court held that a local administrator *cum testamento annexo, durante absentia*, was entitled to the fund, in preference to those claiming under the foreign executor.

In *Wilkinson v. Winne*, 15 Minn. 123, the power of the probate court to appoint a second administrator when the first has absented himself from the State is considered. See also *Lamb v. Helm*, 56 Mo. 420; *Webb v. Kirby*, 3 Sm. & G. 333; *Goods of Ruddy*, L. R., 2 P. & D. 330; *Goods of Jenkins*, 28 W. R.

431; *Goods of Richardson*, 35 L. T. 767.

In *South Carolina* administration *durante absentia* cannot be granted after probate of the will and letters testamentary are granted. *Griffith v. Frazier*, 8 Cranch (U. S.) 9.

By the Statute 38 Geo. III, ch. 87, administration *durante absentia* may be granted where the ordinary executor or administrator goes and remains abroad.

4. The orphans' court has power to appoint an administrator *pendente lite* only where the validity of the will is contested. *Munnikhuysen v. Magraw*, 57 Md. 172.

New York, Code, § 2668, restricts the right of the surrogate, in the matter of the appointment of a temporary administrator, to cases where delay necessarily occurs in granting letters under the Code; the surrogate is without power to appoint a receiver pending a contest concerning a will devising real estate. *Tooker v. Bell*, 1 Dem. (N. Y.) 52.

As an appeal from an order revoking the probate of a will does not revive the powers of the executor, the court can appoint a special administrator. *In re Crozier*, 65 Cal. 332.

The powers and functions of an administrator *pendente lite*, which are suspended by the admission of the will to probate and the qualification of the executors, revive on appeal from the decree of probate, and continue until the determination of the appeal. *Brown v. Ryder*, 42 N. J. Eq. 356.

A probate court has a right to appoint a custodian of the personal property of the deceased, pending the appeal of the executrix from a decree of said court requiring a bond for the faithful administration of said property, she having a life estate

person who should be appointed is largely within the discretion of the court, and no one should be appointed who is interested on the one side or the other of the contest.¹

therein. *Sarle v. Court of Probate*, 7 R. I. 270.

In *Mortimer v. Paull*, L. R., 2 P. & D. 85, the deceased executed a will and two codicils, and by the will he appointed executors. A suit was instituted to test the validity of the second codicil only; such codicil in no way affecting the appointment of executors. The court refused to appoint an administrator *pendente lite*.

An administrator appointed by the chancery court under the *Tennessee Code*, § 2213, is not a mere administrator *pendente lite*, but a general administrator liable to suit, and whose appointment sets in motion the Statute of Limitations in favor of the estate. *Todd v. Wright*, 12 Heisk. (Tenn.) 442.

The authority, under *Wagn. Missouri Stat.* 72, § 12, to suspend the functions of an executor during a contest of the will in the circuit court, and appoint a temporary administrator *pendente lite*—*held*, to include an administrator *cum testamento annexo*. *Lamb v. Helm*, 56 Mo. 420.

Under the act *Wagn. Stat.* 1368, § 29, which provides that if the validity of a will be contested, letters of administration shall be granted during the time of such contest to some other person, in case of proceedings in the circuit court to contest the validity of the will, the probate court may suspend the functions of the executor named in the will, and appoint an administrator *pendente lite*. *Rogers v. Dively*, 51 Mo. 193.

See also *Benson v. Wolf*, 43 N. J. L. 78; *Kaminer v. Hope*, 18 S. Car. 561; *Walker v. Dougherty*, 14 Ga. 653; *Wade v. Bridges*, 24 Ark. 569; *Dean v. Biggers*, 27 Ga. 73; *Crandall v. Shaw*, 2 Redf. (N. Y.) 100; *Moore v. Alexander*, 81 Ala. 509; *Elwell v. Universalist Church*, 63 Tex. 220; *Fisk v. Norvel*, 9 Tex. 13; *Ex parte Worthington*, 54 Md. 359; *Fisk v. Norvel*, 9 Tex. 13.

1. Whether the surrogate should appoint as temporary administrator one named as executor in a disputed will, depends on the circumstances of the case. All things being equal, his appointment is rather desirable than otherwise. *Jones v. Hamersley*, 2 Dem. (N. Y.) 286.

One named as executor may, although charged with having unduly

influenced the testator, be appointed temporary administrator pending a controversy over the will, where the allegations of undue influence are vague and uncertain, the objector's share small, where the others in interest consent to the appointment, and where economy prompts it. *Haas v. Childs*, 4 Dem. (N. Y.) 137.

Pending a contest concerning a will, one named therein as executor, and charged by the testaments with having influenced the testator, should not be appointed temporary administrator. *Cornwell v. Cornwell*, 1 Dem. (N. Y.) 1.

An attorney-at-law who represents an heir in the settlement of a succession may legally be appointed *curator ad hoc* to represent the interests of another heir absent from the State. *Fly v. Noble*, 37 La. Ann. 667.

A will executed by the testator in 1882 was, after his death in 1885, offered for probate, and, on contest of its validity, a daughter of the testator appointed administratrix *pendente lite*, who had, with her devisees, petitioned for admission of the will to probate, and for the appointment of the executors therein named. Under *Code Maryland*, art. 93, § 68, which provides for the appointment, pending the contest of a will, of either the person named in the will, or to whom the largest portion of personal estate has been bequeathed, or who would be entitled to letters testamentary in case of intestacy, it was held that the administratrix was one of the classes of persons entitled to letters, and had not, by signing and filing the petition consenting to the probate of the will, renounced her right. *McIntire v. Worthington*, 68 Md. 203; *McIntire v. Wilson* (Md. 1887), 12 Atl. Rep. 253.

A caveat was filed to a will, and upon application of the party who was admitted to be the executor named in the will, and the largest legatee of the personalty, he was appointed by the orphans' court administrator *pendente lite*. *Held*, that the orphans' court had full power to make this appointment, and, the eligibility of the party being admitted, that the exercise of its discretion by

The duties of an administrator *pendente lite* end with the suit.¹

f. SPECIAL ADMINISTRATION.—In certain cases administration is granted for special or limited purposes. Thus, where a person appoints an executor, the appointment to take effect only after the expiration of a certain specified time, administration for the intermediate time may be granted.² In some jurisdictions, administration limited to certain specific effects of the deceased, or for the performance of a single act, may be granted.³ In *Massachusetts*, where there is delay from any cause in granting letters of administration, the probate court may appoint a special administrator to collect the effects of the deceased;⁴ and in *New York* a "special collector" is appointed in cases of delay.⁵

PROCEDENDO.—A writ of *procedendo ad iudicium* issues out of the court of chancery in *England* and out of a superior court in *United States* where judges of any subordinate court delay the parties, as by not giving judgment on either side.⁶ A *procedendo* may also be awarded out of the superior court where an action has been removed to it from an inferior court, and it appears to

said court must determine the matter. *Cain v. Warford*, 3 Md. 454.

A special collector of the estate of a deceased person will be appointed whenever, by reason of a contest or other cause, there is likely to be delay in the grant of letters testamentary or of administration. But an indifferent person, and not a party litigant, should be appointed. *Mootrie v. Hunt*, 4 Bradf. (N. Y.) 173; *Lawrence v. Parsons*, 27 How. Pr. (N. Y.) 26.

1. Letters of administration *pendente lite* will not be revoked and an administrator appointed pending the determination of the litigation. *Robinson's Estate*, 12 Phila. (Pa.) 170.

When the contest as to the will is over and the executor qualifies, the functions of the administrator *pendente lite* are at an end. And notice of his settlement with the executor is not necessary. *Robards v. Lamb*, 89 Mo. 308.

Under the amendment of the constitution creating the office of ordinary, a temporary administrator is entitled to exercise his authority until an appeal from the grant of permanent letters is tried and determined and such letters are granted. *Gresham v. Pyron*, 17 Ga. 268.

2. *Williams on Executors* 513.

3. *Jordan v. Polk*, 1 Sneed (Tenn.) 430; *M'Nairy v. Bell*, 6 Yerg. (Tenn.) 302; *Smith v. Pistole*, 10 Humph. (Tenn.) 205; *Harris v. Milburn*, 2

Hagg. 62; *Goods of Summerset*, L. R., 1 P. & D. 350; *Succession of De Flechier*, 1 La. Ann. 20; *Ex parte Lyon*, 60 Ala. 650; *Jones v. Ritter*, 56 Ala. 270; *Codman v. Richards*, 13 Neb. 383; *Pickering v. Werting*, 47 Iowa 242; *Ellmaker's Estate*, 4 Watts (Pa.) 36; *Sarle v. Court of Probate*, 7 R. I. 270.

4. *Massachusetts* Pub. Stat., ch. 130, § 10-17.

5. *Berdell v. Schell*, 2 Dem. (N. Y.) 292; *In re Haskett*, 3 Redf. (N. Y.) 165; *Mootrie v. Hunt*, 4 Bradf. (N. Y.) 173; *Lawrence v. Parsons*, 27 How. Pr. (N. Y.) 26; *Crandall v. Shaw*, 2 Redf. (N. Y.) 100; *Howard v. Dougherty*, 3 Redf. (N. Y.) 535.

In *Alabama*, an administrator *ad colligendum* is the mere agent or officer of the court, and may be removed at any time, and an administrator in chief appointed. *Flora v. Mennice*, 12 Ala. 836.

Authorities.—*Woerner's American Law of Administration*, 1889; *Schouler's Executors and Administrators*, 1889.

6. "In this case a writ of *procedendo* shall be awarded, commanding them in the king's name to proceed to judgment; but without specifying any particular judgment, for that (if erroneous) may be set aside in the course of appeal or by writ of error or false judgment; and upon further neglect or refusal, the judges of the inferior

have been removed on insufficient grounds. And by 21 Jac. 1, ch. 23, a suit once so remanded shall not be again removed before judgment into any court whatsoever.¹ The office of justice of the peace is determinable by superseding the commission by writ of *supersedeas*, which supersedes the power of all the justices, but does not totally destroy it; seeing it may be revived again by another writ called a *procedendo*.² If one pray in aid of the crown in a real action and aid be granted, it shall be awarded that he sue to sovereign in chancery, and the justices in the common pleas shall stay until this writ of *procedendo de loquela* come to them. So also on a personal action.³

PROCEDURE—(See also PROCEEDING).—The word procedure as a law term is not well understood. The term is so broad in its

court may be punished for their contempt by writ of attachment returnable in the king's bench or common pleas." 3 Bl. Com. 109. The Supreme court of the *United States* has power to award in proper cases the writs of *certiorari* and *procedendo*, and a *United States* circuit court may be required upon *mandamus* or *procedendo* to review a decision of the district court denying relief or unreasonably postponing it. 4 Min. Inst. 301, 276.

"It is remarkable that this writ is not unfrequently styled a *mandamus*, notwithstanding the functions and nature of a *mandamus* differ, as we shall see, so essentially from those of a *procedendo*. Such a confusion of terms we have in *Webb v. Barbour*, 4 Hen. & M. (Va.) 462, and also in *Richardson's Case*, 3 Leigh (Va.) 343; and more conspicuously still in several cases in the Supreme Court of the *United States*, e. g. *N. Y. Life etc. Ins. Co. v. Adams*, 8 Pet. (U. S.) 306; *Ex parte Many*, 14 How. (U. S.) 25," 4 Min. Inst. 310.

1. 3 Steph. Com. (11th ed.) 633-4.

For cases where the writ was granted in action removed by *habeas corpus*, see *Pope v. Vaux*, 2 W. Bl. 1060; *Dixon v. Heslop*, 6 T. R. 365; *Blanchard v. De La Crounee*, 9 Q. B. 869; *Fry v. Carey*, 1 Stra. 527.

Plaintiff in an inferior court from which a cause is removed by *habeas corpus* and a rule for better bail given, is not entitled to a *procedendo*, after render of defendant and notice of such render, although the render be made after the day on which the rule for better bail expires. *Farquharson v. Fanchecour*, 16 East 387; *Johnson v. Walker*, 4 B. & Ald. 535; 6 E. C. L. 591.

"If the *certiorari* has been improperly issued, by a fraud upon the court, a false allegation and the like, the court above will issue a *procedendo* to the court, commissioners or others below, to proceed in the cause or business. By this writ of *procedendo* the cause is remitted to the court whence the record came, and it commands the inferior court to proceed to the final hearing and determination of the same. It issues not only in the cases above mentioned, but also when it does not appear to the superior court that the suggestion upon which the cause has been removed is sufficiently proved." 3 Bouv. Inst. § 3367.

A single judge of one of the three superior common-law courts has the power to order a *procedendo*. Reg. v. Scaife, 18 Q. B. 773.

In *Pennsylvania*, and perhaps in some of the other States, where on a writ of error the proper judgment cannot be pronounced by the supreme court, or where anything remains for the court below to do, and a *venire de novo* is not the proper order, the supreme court will award a *procedendo*. See *Troub. & Haly's Prac.*, § 871. On a reversal for a defect in pleading a *procedendo* will be awarded to give an opportunity to amend. *Garland v. Davis*, 4 How. (U. S.) 131. See also *Harper v. Keely*, 17 Pa. St. 234; *Klett v. Claridge*, 31 Pa. St. 106; *Leach v. Ansbacher*, 28 Leg. Int. (Pa.) 277.

2. 1 Bl. Com. 353; 2 Steph. Com. (11th ed.) 659; 1 Br. & Had. Com. 424.

3. Whart. L. Dict. 661; N. N. B. 154. See also Jac. Dict., tit. "*Procedendo*."

signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, pleading, evidence, and practice. In this sense the word practice means those legal rules which direct the course of proceeding, to bring parties into the court, and the course of the court after they are brought in. And evidence, as a part of procedure, signifies those rules of law whereby we determine what testimony is to be admitted, and what rejected in each case, and what is the weight to be given to the testimony admitted.¹

PROCEEDING—(See also EXECUTIONS, vol. 7, p. 160).—Proceeding (as used in reference to actions) is any step taken by a party in the progress of an action.²

1. Bishop's Crim. Proc., § 2, followed in *Kring v. Missouri*, 107 U. S. 221.

2. *Wilson v. Allen*, 3 How. Pr. (N. Y.) 369; *Williamson v. Champlin*, Clarke Ch. (N. Y.) 9. A proceeding in court is an act done by the authority or direction of the court, express or implied. *Bulkeley v. Keteltas*, 3 Sandf. (N. Y.) 741.

"Proceeding" means, in all cases, the performance of an act, and is wholly distinct from any consideration of an abstract right. It is an act necessary to be done in order to attain a given end; it is a prescribed mode of action for carrying into effect a legal right, and so far from involving any consideration or determination of the right, pre-supposes its existence. *Rich v. Husson*, 1 Duer (N. Y.) 620. See also *Fargo v. Helmer*, 43 Hun (N. Y.) 19.

"The term 'proceedings,' in its more general sense in law, means all the steps or measures adopted in the prosecution or defense of an action. (Webster's Dict., *Gordon v. State*, 4 Kan. 504.) It may mean more than the record history of the case. It is, undoubtedly, sometimes used in this restrictive sense. In its ordinary acceptation the word, when unqualified, except by the subject to which it is applied, includes the whole of the subject. Thus, the proceedings of a suit embrace all matters that occur in its progress judicially; proceedings upon a trial, all that occurs in that part of the litigation." *Morewood v. Hollister*, 6 N. Y. 320.

Proceedings in Court.—The statutory proceedings to foreclose a mortgage are not "proceedings" in court, so as to authorize the court to remedy defects in them. *Dwight v. Phillips*, 48 Barb. (N. Y.) 116.

"Proceeding" in the Sense of "Action."

—The word "proceeding" may be used in the sense of "action," as "any proceeding" equivalent to "any action." *Pryor v. City Offices Co.*, 10 Q. B. D. (Eng.) 504.

"A suit is certainly a 'proceeding.'" *Dodd v. Middleton*, 63 Ga. 638.

"Proceeding" May or May Not Include the Pleadings.—Proceeding is used in the *Nebraska Co. Civ. Proc.*, to distinguish all other steps taken in an action from those embraced in the word pleading. Filing an affidavit in an action of replevin is a "proceeding." *Wilson v. Macklin*, 7 Neb. 50.

It was provided by the *Kansas Code* that "an action may be dismissed, without prejudice to a future action . . . by the court for disobedience by the plaintiff of an order concerning the proceedings in the action." It was held that the word proceedings in this connection meant any proceedings in the case including the pleadings. *Jackson v. Hoagland*, 5 Kan. 559.

Proceeding More Comprehensive than Judgment.—"The word 'proceeding' in a judicial sense is much more comprehensive than that of 'judgment'; the former very frequently including the latter," and accordingly it was held that the certificate of a justice of the peace to a transcript that it contained "a correct statement of the proceedings" sufficiently complied with the provision of an *Indiana* statute, requiring copies of proceedings before a justice of the peace to be certified by him as "true and complete copies of such proceedings and judgments." *Yeager v. Davis*, 112 Ind. 230.

Under a Wisconsin statute, which provided that unless "proceedings shall be had" within one year from the entry of a certain order in court, the cause

PROCEED.—See note 1.

PROCEEDS.—A word of great generality, but not necessarily money.²

PROCESS.—See SERVICE OF PROCESS; WRITS.

I. Definition, 222.

shall be dismissed, etc., it was held that the notice of an attorney to the adverse party that the cause had been remitted, and that on a day named he would move the court to vacate its judgment, was such a "proceeding." *Bonesteel v. Orvis*, 31 Wis. 117.

Gaol Liberties.—A *United States* statute provided that "writs of execution and other final process issued on judgments and decrees rendered in any courts of the *United States*, and the proceedings thereupon shall be the same, except their style, in each State, respectively, as are now used in the courts of such State," etc. It was held that the allowance of gaol liberties was a part of the "proceeding" upon such writs of execution, within the meaning of the act. *United States v. Knight*, 3 Sumn. (U. S.) 371.

Proceedings in the Cause.—This phrase includes the sheriff's doings under the execution. *Ward v. Cohen*, 3 S. Car. 338.

Criminal Proceeding.—A "criminal proceeding" is a far larger term than "criminal prosecution." *Yates v. Reg.* 14 Q. B. D. 648.

1. The word "issue," as used in a *Georgia* statute giving a remedy where execution has issued illegally, was treated as having the sense of "proceed." *Robison v. Banks*, 17 Ga. 211.

A stipulation not to proceed against a party is an agreement not to sue. To sue a man: is to proceed against him. *Planters' Bank v. Houser*, 57 Ga. 140.

2. *Phelps v. Harris*, 101 U. S. 380, in which case, it was held, that the power to dispose of land and to take in return such proceeds as one thinks best, includes power to exchange for other lands.

The word "proceeds" is a word of equivocal import. Its construction depends very much upon the context and the subject-matter to which it is applied. If a testator should direct

II. Necessity of Process, 224.

his property to be sold, and the proceeds to be disposed of or distributed in a certain manner, no one could doubt that the whole *corpus* or principal was intended. But should he order it to be rented or invested, then proceeds would necessarily be limited to the net income, especially if the interest given was for life only. *Thomson's Appeal*, 89 Pa. St. 46; and in the case under consideration it was held that by "proceeds" were meant the income of the estate in question. See also *Robert's Appeal*, 92 Pa. St. 407.

In *Belmont v. Dowvert*, 35 N. Y. Super. Ct. 208, "proceeds" was held to mean the amount of money that in future would be obtained for the property upon a disposition of it by sale.

And in *Knox v. Knox*, 59 Wis. 172, the court held in construing a will, that the words "all the proceeds of my said property," meant the entire body of the estate and were not restricted to the income. See also *Allen v. Barnes*, 5 Utah 100.

Proceeds of a cargo in general includes the return or substituted cargo or property acquired by the sale or exchange of the goods originally shipped. *Dow v. Hope Ins. Co.*, 1 Hall (N. Y.) 166. So in *Haven v. Gray*, 12 Mass. 71, it was held that insurance upon the proceeds of the outward cargo effected by a valued policy on a voyage out and home, covered the value of that cargo in the return cargo, if the return cargo was procured on the credit of the outward; but where the insurance was effected on the goods "out" and the "proceeds thereof home," it was held that if the identical goods comprising the outward cargo were brought home as the return cargo, the policy did not cover them. *Doe v. Whetten*, 8 Wend. (N. Y.) 160. See also *Dow v. Hope Ins. Co.*, 1 Hall (N. Y.) 166. See also *Hancock v. Fishing Ins. Co.*, 3 Sumn. (U. S.) 134; **MARINE INSURANCE**, vol. 14, p. 332.

I. DEFINITION.—Process is the mandate of a court to its officer commanding him to perform certain services within his official cognizance. It is the means whereby the defendant in a suit is compelled to appear in court and whereby the effect of the suit is secured to the successful party.¹ In its broader sense it com-

1. Bouvier's Law Dict., Abbot's Law Dict., Anderson's Law Dict.

The meaning of the word "process" is defined in the codes of most of the States; *e. g.* in the *Kentucky* code "process" is defined as "a writ or summons issued in the course of judicial proceedings." The term is therefore held to embrace a writ of execution. *Gourdy v. Sanders* (Ky. 1889), 11 S. W. Rep. 82.

In *New York*, "process," in its application to insurance companies, is defined to be "any writ, summons or order whereby any suit, action or proceeding shall be commenced" L. 1884 (N. Y.), ch. 346, § 5.

In *Wisconsin*, a constitutional requirement that all writs of "process" should run in the name of the State, includes only process emanating from the courts of justice of the State. *Sprague v. Birchard*, 1 Wis. 457.

In *Louisiana* it is held to signify the judicial means, or the writ which issues forth to bring the defendant into court to answer. It does not include furnishing copies of indictments, recording and indexing court papers and the like. *Fitzpatrick v. New Orleans*, 27 La. Ann. 457.

In *Minnesota* the term as used in the constitution is held to include "all such writs, original, mesne, or final, by which the authority of the State is exercised in obtaining jurisdiction over the person or property of its citizens, and which require the exercise of the sovereign power for their enforcement." *Hinkley v. St. Anthony Falls etc. Co.*, 9 Minn. 55.

Is Summons Process?—The question as to whether a mere writ of summons is "process" has often arisen. It has been held in *Minnesota* that the term "process" did not include a mere summons, process being considered as merely synonymous with proceedings. *Hana v. Russell*, 12 Minn. 80, and cases cited.

So also in *Colorado*, *Florida*, *Oregon* and *Wisconsin* a summons has been held not process. *Comet Consolidated Min. Co. v. Frost* (Colo. 1890), 25 Pac. Rep. 506; *Gilmer v. Bird*, 15

Fla. 410; *Bailey v. Williams*, 6 Oregon 71; *Porter v. Vandercook*, 11 Wis. 70. In all these cases the summons was merely a writing directed to the defendant requiring him to appear and answer the complaint, and was signed only by the plaintiff's attorney. It was not a mandate of the court to its officer commanding him to summon, nor did it bear the signature of the clerk or the seal of the court.

This idea is well set forth in *Whitney v. Blackburn*, 17 Oregon 564; 11 Am. St. Rep. 857, where it is said: "Properly speaking, a summons is only a process when issued from the office of a court of justice requiring the person to whom it is addressed to attend the court for the purpose therein stated. Under our code, the summons is a process to commence a civil action. But technically, such a summons is not a 'process,' but is more in the nature of a mere notice informing the defendant that an action has been commenced against him, and that he is required to answer the complaint therein within a specified time. In view of this distinction, such notice cannot be considered process in the sense in which that word is used in the books." See also *Bailey v. Williams*, 6 Oregon 71.

A summons is nevertheless a *quasi* process; "it is deemed a mandate of the court," and is signed by the plaintiff's attorney as an officer of the court. The expression "summons or other process" is often used. See *New York Co. Civ. Proc.*, §§ 218, 802.

A suit at common law in the *United States* circuit court was sought to be commenced by serving on defendant a paper purporting to be a summons, in the form prescribed by the statute of *New York* for commencing a civil action, signed by the plaintiff's attorney, but not under the seal of the court nor signed by the clerk of the court. Defendant before appearing generally in the suit, moved to set aside the summons and the plaintiff asked to be allowed to amend the summons *nunc pro tunc*, by having the seal and signature added. The court held that the summons required by U. S. Rev. Sts., §

911 to bring a defendant into court was "process," and hence must be under the signature of the clerk and the seal of the court. It was also held that the summons by which this suit was sought to be commenced was not sufficient and could not be amended, since it was not process, and therefore could not be made so by amendment. *Dwight v. Merritt*, 18 Blatchf. (U. S.) 305.

A Rule to Show Cause.—A rule to show cause is held not to be such a writ of "process" as is required by *Massachusetts* Stat. to have a *teste*, and be under the seal of the court. *Taylor v. Henry*, 2 Pick. (Mass.) 397.

But a rule upon an incumbent to show cause why he refuses to surrender his office, is process. *Kennard v. Louisiana*, 92 U. S. 480.

A rule *nisi* is also held to be judicial "process." *Falvey v. Jones*, 80 Ga. 130.

Memorial.—In *Ex parte Davis*, 41 Me. 38, a justice of the supreme court who had been removed by the governor in a manner alleged to be unconstitutional, filed a memorial to the court asking the judgment of the court thereon, and claiming the right to sit as a justice of the court. It was held, however, that the memorial so filed was no process known to the common law, since no party adversely interested or otherwise had been summoned or claimed to be heard, and therefore it did not bring the proceedings of the removal before the court in such a manner as to give it jurisdiction.

Other Cases.—A guardian's notice of an application to sell his ward's land has been held to stand in the place and to perform the office of "process." *Nichols v. Mitchell*, 70 Ill. 258.

Garnishment is not a suit or process. *Tunstall v. Worthington*, 1 Hempst. (U. S.) 662.

But notice to a garnishee whereby he is informed of the attachment of defendant's property or credits in his hands, and commanded to appear in court and submit to an examination in relation thereto, is "process" within the meaning of the statutes and constitutional provisions prescribing the manner and style in which process shall issue. *Middletown Paper Co. v. Rock River Paper Co.*, 19 Fed. Rep. 252; *Boyd v. Chesapeake etc. Canal Co.*, 17 Md. 195; *Hinkley v. St. Anthony Falls etc. Co.*, 9 Minn. 55. See also GARNISHMENT, vol. 8, p. 1116.

A distraint warrant is no legal "pro-

cess." *U. S. v. Myers*, 12 Int. Rev. Rec. 14.

A *scire facias* upon a mortgage is "process" within the meaning of the Act of April 18, 1861, staying civil process against any person in the service of the State or of the *United States* for the term of such service and thirty days thereafter. *Drexel v. Miller*, 49 Pa. St. 246.

So also a *scire facias* to hear error is "process." *Weiskoph v. Dibble*, 18 Fla. 22. Likewise a fee-bill is "process" and must run in the name of the "people of Illinois." *Reddick v. Cloud*, 7 Ill. 670.

None of the appeal papers in an appeal from the judgment of a justice is a "writ or process" requiring a stamp under the law of Congress. *Dorman v. Bayley*, 10 Minn. 383.

"Process" usually signifies a writ or warrant, but it also means all the proceedings in a case after the first step. (Tomlin's Dict.), and comprehends rule or order to commit. *People v. Nevins*, 1 Hill (N. Y.) 169.

In England.—Several English cases have held as follows: "Process" is the doing of something in a proceeding in a civil or criminal court; and that which may be done without the aid of the court is not process. Therefore a distraint, whether for rent or any other payment, and whether the right of distress be given by the common law or by statute (or, as it would seem, by any other authority), is not process nor is it "an execution or other required process" within § 13 Bankry. Act, 1869, or within the substituted section (10) of the Bankry. Act, 1883." *Blackmore's Cas.*, 8 Rep. 157; *Rex v. Crisp*, 1 B. & Ald. 287; 3 Blacks. Com. 3; *Ex parte Birmingham etc. Co. (In re Fanshaw)*, 4 L. J. Bank. 52; L. R., 11 Ex. 615; *Ex parte Harrison*, 53 L. J. Ch. 917; 13 Q. B. D. 753.

But a writ of sequestration is such process. *In re Browne*, 40 L. J. Bank. 46; *Ex parte Hughes*, L. R., 12 Ex. 137.

All the steps taken in an execution, with seizure and sale, are in the natural meaning of the word, comprehended in the term "process." *In re Delahoyd*, 11 Ir. Ch. Rep. 407.

A trader-debtor's summons is not a "process." *In re Dobson*, 8 Ir. Ch. Rep. 391; nor an adjudication in bankruptcy thereon. *In re Kerr*, 1 L. R. Ir. 67; *In re McVeigh*, 5 L. R. Ir. 177; nor is a petition in Bankruptcy.

prehends the whole proceeding after the original writ and therefore embraces all mandates of the court which may be necessary to institute or to carry on an action or suit, and to execute the judgment of the court.¹

The phrase "due process of law," as used in the various constitutions, means the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights. It is not necessarily judicial process only.²

II. NECESSITY OF PROCESS.—"It would be a violation of one of the first principles of justice to try or to decide upon the rights of an individual, either civilly or criminally, without notice." However summary the proceedings, a party must always be given notice and an opportunity of being heard. So important a principle is this that it has been incorporated into the Constitution of the *United States* and of every State, that no person shall "be deprived of life, liberty or property without due process of law."³

Ex parte Walker, *In re Haywood*, 6 De G. M. & G. 752; *Ex parte Therene*, *In re Saunders*, 2 De G. F. & J. 661; *Ex parte Hills*, 3 De G. & J. 476, n.

A mere notice, though headed with the name of a county court, is not a "process" within § 57, 9 & 10 Vict., ch. 95; *R. V. Castle*, 30 L. T. 188; but such a notice, especially if it also has the royal arms and (without authority) professes to bear the signature of the register, is a "false color or pretence" of such "process." *Rex v. Evans*, 26 L. J. M. C. 92; *Dears & B.* 236; *R. v. Richmond*, 28 L. J. M. C. 188.

1. *Gilmer v. Bird*, 15 Fla. 410.

The original division of process was into original, mesne, and final; original process being the original writ commanding the party to appear and defend; mesne process embracing all writs and orders of the court necessary for the carrying on of the suit; while final process comprehended those writs which were necessary to secure to the successful party the benefit of the suit. It is now generally understood, however, that all writs preceding execution are embraced within the term "mesne process," which is therefore used to describe any except final process. *State v. Ferguson*, 31 N. J. L. 231; *Arnold v. Chapinan*, 13 R. I. 586.

See also various titles which treat of different process, *e. g.*, ATTACHMENT, vol. 1, p. 894; EXECUTION, vol. 7, p. 118, *et seq.*; FOREIGN ATTACHMENT, vol. 8, p. 316; GARNISHMENT, vol. 8, p. 1116; SUBPENA; WRIT.

2. *Westervelt v. Gregg*, 12 N. Y. 209; *Weimer v. Bunbury*, 30 Mich. 201 and

cases cited; *Rees v. Watertown*, 19 Wall. (U. S.) 107; *Pennoyer v. Neff*, 95 U. S. 715.

This subject has already been fully treated. See DUE PROCESS OF LAW, vol. 6, p. 43, *et seq.*

3. *Holliday v. Swailes*, 2 Ill. 515; *Bissel v. Briggs*, 9 Mass. 464; *Ex parte Bradley*, 7 Wall. (U. S.) 364; *Bradley v. Fisher*, 13 Wall. (U. S.) 335; *Ex parte Robinson*, 19 Wall. (U. S.) 512; U. S. Const. Amendments, arts. 5, 14. See also SERVICE OF PROCESS.

Where it does not appear of record that the defendant has been served with process or that notice has been given him of the suit, or that he has appeared, the court has no jurisdiction. *Easterly v. Goodwin*, 35 Conn. 273; *Karr v. Karr*, 19 N. J. Eq. 427; *Newton v. Preston*, 15 Me. 14; *McGahan v. Carr*, 6 Iowa 331; *Marshall v. Marshall*, 2 Greene (Iowa) 241; *Com'rs of Pilotage v. Low*, R. M. Charl't. (Ga.) 298; *Weeks v. Merritt*, 5 Robt. (N. Y.) 610.

There need not always be an actual summons—a constructive one being often sufficient. *Anderson v. Sutton*, 2 Duv. (Ky.) 480; SERVICE OF PROCESS.

The mere fact of a person's being in the presence of the court does not authorize a judgment to be entered against him; he must be brought there by legal means or must have appeared voluntarily by pleading. *Jones v. Kenney*, Hard. (Ky.) 103.

Attempts to evade service do not dispense with the necessity for personal service. *Van Rensselaer v. Palmatier*, 2 How. Pr. (N. Y.) 24.

Thus in a well considered case¹ it has been said, "To decide upon the rights of parties who have received no notice, is always full of hazard. Indeed, so far does the common law carry its dread of *ex parte* proceedings, it is one of its maxims that he who decides, one party being unheard, does wrong though he may decide right."

PROCESSIONING.—See note 2.

PROCESS VERBAL.—"Process verbal" is a true relation in writing, in due form of law, of what has been done and said verbally in the presence of a public officer, and what he himself does upon the occasion; it is a species of inquisition of office.³

PROCLAMATION.—See note 4.

In criminal cases a person in custody may be examined on the charge contained in the indictment without the issue of a formal warrant of arrest. *Waller v. Com.*, 84 Va. 492.

If a defendant die before service of citation upon him, his administrator must be served with citation and copy of the petition. It is error to render judgment upon service of *scire facias* only, in such case. *Lyendecker v. Martin*, 38 Tex. 287.

Where defendants who have not answered an original bill are called upon by an amended bill simultaneously to answer both, it is not necessary to issue new subpoenas. *Fitzhugh v. McPherson*, 9 Gill & J. (Md.) 51.

When some of the proper parties to a cause have not been served with process, the cause should be remanded to the rules until service has been perfected. *Hunt v. Walker*, 40 Miss. 590.

Residents of one State cited as warrantors in a suit in another State, at the request of the defendant in such suit, but with no notice to them except the appointment of a *curator ad hoc* to represent them in the suit, are not bound by a judgment rendered therein. *Flowers v. Foreman*, 23 How. (U. S.) 132.

1. *Eskridge v. Jones*, 1 Smed. & M. (Miss.) 595; 4 Minor's Insts. (2nd ed.) 517, and cases cited.

2. Processioning was designed to prevent controversies concerning the boundaries of land between adjacent owners, and originally they were required, once in every ten years, to have their lands "processioned or gone around and the land marks renewed." It is, however, now confined to cases where the owner of any particular land desires the lines around his entire

tract surveyed and marked anew. And an examination of the law of processioning will show that there is no provision for any other manner of tracing and marking the lines of adjacent owners, so as to make the said lines *prima facie* correct and admissible in evidence without further proof. *Watson v. Bishop*, 69 Ga. 53.

3. *Bouvier's L. Dict.* followed in *Hall v. Hall*, 11 Tex. 539.

4. In *Lapeyre v. United States*, 17 Wall. (U. S.) 191, the case turned upon the point whether a proclamation of the President took effect from the time that it was dated or whether some publication in the newspapers or otherwise was necessary. It was held that the same rule of presumption should be applied to proclamations of the President that is applied to statutes; that is, that they have a valid existence on the day of their date, and that no inquiry should be permitted upon the subject. Conceding publication to be necessary, it is to be conclusively presumed that an officer whose duty it is to make such publication has promptly done so. But the dissenting opinion by Justice Hunt concurred in by Justices Miller, Field and Bradley, defines a proclamation as follows: "What is a proclamation? It is to cry aloud publicly; to make known. One may proclaim as of old by the sound of trumpet, or by voice, or by print, or by posting; but not by silence. A proclamation may be published in the newspapers, or scattered by writing, or in any demonstrative manner, but it cannot be published by a deposit in a place to which the public have no access."

"A proclamation by the President reserving lands from sale is his official

PROCURE.—Contrive, effect, or bring about; to effect; to cause.¹

PRODUCE; PRODUCTS.—See note 2.

public announcement of an order to that effect. No particular form of such an announcement is necessary; it is sufficient if it has such publicity as accomplishes the end to be attained." *Wolsey v. Chapman*, 101 U. S. 770.

1. *Long v. State*, 23 Neb. 45.

Procure, as used in the *California* statute, making it an offense to "procure a female to have illicit carnal connection with any man," does not cover the offense of seduction. The natural meaning of the word "procure" is that the illicit intercourse is with a person other than the one who commits the offense of procuring, etc. *People v. Roderigas*, 49 Cal. 9.

There is a clearly recognized legal distinction between procuring an act to be done and suffering it to be done. *Matter of Black*, 2 Ben. (U. S.) 196.

2. In *District of Columbia v. Oyster*, 4 Mackey (D. C.) 285, the court defines produce as follows: "The argument of the bar was, as against the information, that produce meant only those things which were the product directly of the soil, such as cereals and fruits, as distinguished from those things which were the product of human industry, and not derived from, but directly connected with the product of the soil. But the common parlance of the country, and the common practice of the country, have been to consider all those things as farming products or agricultural products which had the *situs* of their production upon the farm, and which were brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, as contradistinguished from manufacturing or other industrial pursuits." And accordingly, within the meaning of a statute, which provided that every person engaged in buying and selling "produce, fish, meats, and fruits" should be regarded as a produce dealer and that no additional license shall be required from produce dealers for selling meat, it was held, that butter and eggs are produce, but that one who sells meat alone is not a produce dealer.

In *Mayor v. Davis*, 6 W. & S. (Pa.) 269, it was held that the words, "produce of the farm" did not include beef raised and killed upon it.

But in *Ladd v. Abel*, 18 Conn. 513, in construing a covenant in which A agreed to furnish B with "one-half of all the produce" of a farm, and further, if "one-half the yearly rent and produce" should be insufficient for B's support, agreed to increase the supplies, it was held that "yearly produce" did not comprehend the wood and timber of the farm, but must be confined to crops annually gathered.

In *Exemption Law*.—Under an exemption law which provided that all "products, rents or profits" arising from a homestead should be exempt from levy, it was held, that the earnings of a physician could not be called products of the homestead, although he used the several items of the exemption in rendering the services for which the earnings were the return. *Staples v. Keister*, 81 Ga. 772.

In a *License Law*.—An exception to a license law permitted persons to sell wines or liquors, the "products" of their farms. Held, that spirits manufactured from the grain received by a miller as tolls are not from the "products of his farm." *State v. Kennerly*, 98 N. Car. 657.

"The produce of capital employed in trade is all that the capital produces; *i. e.*, whether in the shape of interest or profits allowed." *Johnston v. Moore*, 27 L. J. Ch. 455, 456; and accordingly a direction to pay to A for life "the rents, dividends and produce" of an estate consisting partly of capital in a partnership, will give to A the profits on that capital, so long as the capital is properly employed in the business of partnership. *Johnston v. Moore*, 27 L. J. Ch. 455, 456; *Howe v. Dartmouth*, 7 Ves. 137.

In a *charter-party* containing an agreement to ship at A "a full cargo of produce," "produce" means "anything produced by the country in the neighborhood of the port of lading, and being an ordinary subject of importation." *Per Maule, J.*, in *Warren v. Peabody*, 8 C. B. 800.

In a *will* a bequest of the produce of a fund, directly, or in trust without any limitation as to continuance, will carry the principal. *Craft v. Snook*, 13 N. J. Eq. 121. See also *Peale v.*

PRODUCTION.—In defining the word "production" Webster says it has reference to "that which is produced or made; product; fruit of labor; as, the productions of the earth, comprehending all vegetables and fruits; the productions of intellect, or genius, as poems and prose compositions; the products of art, as manufactures of every kind."¹

PRODUCTION OF DOCUMENTS.—(See also BILL OF DISCOVERY, vol. 2, p. 199; BOOKS AS EVIDENCE, vol. 2, p. 467 *j*; EVIDENCE, vol. 7, p. 42; NOTICE TO PRODUCE PAPERS, vol. 16, p. 843; PRIVILEGED COMMUNICATIONS; SUBPENA DUCES TECUM; TRIAL.

I. Production of Documents for Inspection Before Trial, 227.

1. *Public Documents*, 227.
 - (a) *Judicial Writings*, 228.
 - (b) *Non-judicial Writings*, 229.
2. *Semi-public Documents*, 231.
 - (a) *Books of Corporations and Incorporated Banking Companies*, 231.
 - (b) *Other Semi-public Documents*, 241.
3. *Private Documents*, 242.
 - (a) *Doctrine at Common Law*, 242.
 - (b) *Doctrine Under Statutes*, 248.

(c) *Power of Congress to Compel the Production of Private Papers*, 249.

II. Production of Documents at Trial, 251.

1. *Public Documents*, 251.
 - (a) *Judicial Writings*, 251.
 - (b) *Non-judicial Writings*, 253.
2. *Semi-public Documents*, 253.
3. *Private Documents*, 253.
 - (a) *Documents in the Hands of the Party*, 253.
 - (b) *Documents in the Hands of the Adverse Party*, 254.
 - (c) *Documents in the Hands of Third Parties*, 257.

I. PRODUCTION OF DOCUMENTS FOR INSPECTION BEFORE TRIAL.—1. Public Documents.—These are defined as consisting of the acts of public functionaries, in the executive, legislative, and judicial departments of government, including the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation.² Public documents may be conveniently divided into those which are judicial, and those which are not. In respect to the former class there is a more extensive right of inspection than in regard to the latter. But it may be stated as a general rule, applicable to all writings of a public nature, that if the disclosure of their contents would, in the opinion of the court, or of the chief executive magistrate, or of the head of the department under whose control

White, 7 La. Ann. 449; Arnauld v. Delachaise, 4 La. Ann. 109.

Produce Broker.—Produce broker, as used in an internal revenue law, was held to include a person who sold produce in the public market, although such produce was raised by him upon his own farm. *United States v. Simons*, 1 Abb. (U. S.) 470.

Produce of Mines.—"The expression 'produce' of mines or minerals does not necessarily mean produce in its native

state. Coke may be such produce, although by combustion its chemical nature is changed." *MacSwinnney on Mines, Q. & Min.* 19, citing *Bowes v. Ravensworth*, 15 C. B. 518, 523.

Forest Products.—Standing, growing trees are not forest "products." *Fletcher v. Alcona Township*, 72 Mich. 18.

1. *Dano v. M. O. etc. R. Co.*, 27 Ark. 567.

2. 1 Greenl. Ev. (14th ed.) § 470.

the documents are kept, be detrimental to the public interests, an inspection will not be granted.¹

a. JUDICIAL WRITINGS.—From a very early period, it has been admitted that every one has a right, upon paying the proper fees, to have the records of the public courts produced for him to inspect and copy;² and while in *England*, in the reign of Charles II, this right was, in consequence of frequent applications for a copy of the record on which to base actions for malicious prosecution, restricted³ by refusing to grant a copy of an indictment

1. 1 Greenl. Ev. (14th ed.), §§ 251, 476;

2 Taylor Ev. (8th ed.) § 1483.

The President of the United States, and the governors of the several states, are not bound to produce papers or to disclose information in their possession, when, in their judgment, the disclosure would, on public considerations, be inexpedient. 1 Greenl. Ev. (14th ed.), § 251; 1 Burr's Trial, 186-7; Gray v. Pentland, 2 S. & R. (Pa.) 23. Nor will a court compel a disclosure of documents which state policy requires to be kept secret. 1 Whart. Ev. (3d ed.), §§ 604-5, 745.

2. 1 Greenl. Ev. (14th ed.), § 470. In *England*, this right seems to apply only to the superior courts of law and equity. 2 Taylor Ev. (8th ed.), § 1483, where the author says: "Although at the present day, the question whether the public have a strict legal right to inspect these records, is not likely to be mooted, it would be difficult to establish the right, except as to such of the documents as are the records of the superior courts of law and equity; and even with respect to these, it may be doubtful whether the Queen's Bench Division of the High Court would interfere by mandamus unless the applicant was prepared to show that he was interested in the document which he sought to inspect." See Rex v. Justices of Staffordshire, 6 A. & E. 99, 100; 33 E. C. L. 17; 1 Greenl. Ev. (14th ed.), § 473. As regards the records of the inferior tribunals in *England*, although it is doubtful whether they are open to the inspection of all persons without distinction, it is clear that every one has a right to inspect and take copies of the parts of the proceedings in which he is individually interested. The party who wishes to examine any particular record of one of those courts, should first apply to that court, showing that he has some interest in the document in question, and that he requires it for a proper pur-

pose. If his application be refused, the Chancery, or the Queen's Bench Division of the High Court, upon affidavit of the fact, may send for either the record itself or an exemplification; or a mandamus will be granted by the Queen's Bench Division to obtain for the applicant the inspection or copy required. 1 Greenl. Ev. (14th ed.), § 473; 2 Taylor Ev. (8th ed.), § 1492; Rex v. Sheriff of Chester, 1 Chit. 477; 18 E. C. L. 139; Rex v. Wilts and Berks Canal Nav. Co., 3 A. & E. 477; 30 E. C. L. 132; Rex v. Leicester Justices, 4 B. & C. 892; 10 E. C. L. 466; Rex v. Midlam, 3 Burr. 1720-2.

In practice, however, the public records in *England* are open to all without restriction. 2 Taylor Ev. (8th ed.), §§ 1480-2.

In the *United States*, the judicial records, as well as the registries of deeds and wills, are by statute or usage settled in default of statute, required to be produced by the officers in charge of them for the inspection of all applicants; to whom also copies are to be given upon payment of the proper fees. 1 Whart. Ev. (3rd ed.), § 745. And any limitation upon the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of our institutions. 1 Greenl. Ev. (14th ed.), § 471.

3. Orders and Directions, 16 Car. II., prefixed to Sir J. Kelyng's Reports, Order VII; 1 Greenl. Ev. (14th ed.), § 471, note 1. But the legality of this order was doubted in Browne v. Cumming, 10 B. & C. 70; 21 E. C. L. 27; and was impliedly denied in Rex v. Brangan, 1 Leach 32, in which case it was declared that by the laws of *England* every prisoner, upon his acquittal, has an undoubted right to a copy of the record of such acquittal, for any use he may think fit to make of it, and that, after a demand

for felony,¹ save upon motion in open court,—in the *United States* the right seems never to have been restrained.² This right of inspection applies also to writs and other papers in a cause; and if the officer having custody of them, refuse to produce them for inspection, he may be compelled, by rule of court, to do so, even where the object is to procure evidence to be used in a civil action against himself.³

b. NON-JUDICIAL WRITINGS.—This class includes, among many other public documents, acts of State,⁴ legislative acts and journals, laws of other States, and official registers⁵ (comprising books of public officers).⁶ But the same universal right to an inspection does not exist here as in the case of public judicial documents.⁷ The right to inspect non-judicial public docu-

of it has been made, the proper officer may be punished for refusing to supply it. See also *Doe v. Date*, 3 Q. B. 619; 43 E. C. L. 889; 2 Taylor Ev. (8th ed.), § 1489.

1. In cases of misdemeanor, the right to a copy of the record was never questioned. *Morrison v. Kelly*, 1 W. Bl. 385; *Evans v. Phillips*, 2 Selw. N. P. 1072.

2. In *Stone v. Crocker*, 24 Pick. (Mass.) 87, the court by Morton, J., said: "Another indispensable, though generally easy step [in actions for malicious prosecution], is the proof of the institution of the prosecution, and of the acquittal of the plaintiff. This necessarily being a matter which exists on record, if at all, must be proved by an authenticated copy of the record. One of the means to which the English courts sometimes resort, to check the improper use of the action for malicious prosecution, is the refusal to the plaintiff, of a copy of the record of his acquittal. This, however, is only done when, in their opinion, there was a probable cause for the prosecution. *Groenvelt v. Burrell*, 1 Ld. Raym. 253; *Carth. 421*; *Jordan v. Lewis*, 2 Str. 1122. It is not probable that our courts would undertake to exercise the same control over the records, but would leave this action, like any other, to be settled upon its merits and according to correct principles of law, when it was regularly before them for trial."

3. 1 Greenl. Ev. (14th ed.), § 472; 2 Taylor Ev. (8th ed.), § 1501; *Fox v. Jones*, 7 B. & C. 732; 14 E. C. L. 112. But see *Davies v. Brown*, 9 Moo. C. P. 778; 17 E. C. L. 130; *Rex v. Sheriff of Chester*, 1 Chit. 477; 18 E. C. L. 139.

4. Under this head Mr. Taylor includes treaties, charters, letters patent, letters close, grants from the crown,

pardons, commissions, royal proclamations, government orders and regulations, etc. 2 Taylor Ev. (8th ed.), §§ 1526, *et seq.*

5. Under this head are comprised registers of births and of marriages, made pursuant to the statutes of any of the United States; books which contain the official proceedings of corporations, and matters respecting their property, if the entries are of a public nature; books of assessment of public rates and taxes; bishops' registers, and chapter house registers; books, registers, and other official papers kept at the post-office, the custom-house, and other public offices; prison registers; enrolment of deeds; books of record of the transactions of towns, city councils, and other municipal bodies; and many other public documents. 1 Greenl. Ev. (14th ed.), § 484; 2 Taylor Ev. (8th ed.), § 1595, *et seq.*

6. 4 Min. Inst. (2d ed.) *721-2.

7. **Right to Inspect Record of Coroner's Inquest in Clerk's Office.**—In *Daly v. Dimock*, 55 Conn. 579, it was held that under the *Connecticut Rev. Sts.* §§ 2009, 2011, 2016, providing that the coroner at an inquest shall reduce to writing the testimony of all the witnesses examined before him, and shall make a return to the clerk of the superior court of his county of all the testimony so taken, and of his findings, or of the verdict of the jury, a defendant indicted for the murder of a person over whom an inquest has been held, has a right to inspect all the papers composing the coroner's return, after it has been filed with the clerk. "We do not deem it important," said the court by Carpenter, J., "to consider whether the testimony, when reduced to writing as required by law, and lodged with the clerk of the Superior

ments is limited to cases where they constitute the common evidence of transactions between public offices and private individuals, and where the inspection is necessary to establish some disputed claim.¹ Thus, no inspection will be granted of books of public officers in favor of persons who either have no interest in them, or seek to inspect them for some private object unconnected with the purposes for which the books are kept.² But if access be denied without sufficient reason, upon affidavit of that fact, with a statement of the circumstances under which the inspection is claimed, the court will, where an action is pending, award a rule at any stage of the cause for the production of the documents for inspection.³ Where no action is pending, the proper course is an application for a mandamus, commanding the officer in custody of the documents to allow the applicant to inspect and copy them. The application should state some specific reason for the inspection, and should be supported by affidavit, as in the preceding case.⁴

Court, is or is not, in a strict technical sense, a public record. For the purposes of this case, we may concede that the duties of a coroner are of a judicial nature, and that the verdicts of juries and the findings of coroners are, in a general sense, matters of record. They are results and conclusions of judicial proceedings, and are clearly analogous to verdicts and judgments in ordinary courts of justice. In either case the testimony and other oral proceedings are not matters of record, unless made so by statute. In behalf of the plaintiff, it is contended that the statute does make the evidence before a coroner, when reduced to writing, a part of the record. We do not regard that as strictly true. The Legislature required that such testimony should be reduced to writing by a sworn officer, and preserved for future reference. It is enough for our present purpose to say that it is a public document, relating to matters of public interest, and required by law to be kept by a public officer who is the custodian of the records of judicial proceedings, and other public documents. The statute is silent in respect to the purpose for which such writings are preserved, and the use to be made of them, and by whom. In the absence of any limitation or restriction, we must assume that it was intended that they might be examined by any and all persons interested in the subject-matter. We do not consider that we are justified in saying that they may be inspected by one person,

and not by another. In the absence of legislation to that effect, we cannot say that they are for the exclusive use of one person or officer, or that any one person or class of persons may not inspect or use them.⁵

1. See *Rex v. Hostmen of Newcastle*, 2 Str. 1223, note, in which all the older authorities are collected and classified. See also *Rex v. King*, 2 T. R. 235, *per* Ashhurst, J., as to the assessments of the land tax.

The custom house books may be inspected by merchants interested in certain entries in the books relating to their goods. *Crew v. Saunders*, 2 Str. 1005.

2. 1 Greenl. Ev. (14th ed.), § 475; 2 Taylor Ev. (8th ed.), § 1499. Thus where a *qui tam* action was brought against a post-office clerk for interfering in the election of a member of Parliament, an inspection of the post-office books was refused to the plaintiff, because the action did not relate to any transaction in the post-office, for which alone the books were kept. *Crew v. Blackburn*, cited in *Benson v. Post*, 1 Wils. 240; *Crew v. Saunders*, 2 Str. 1005. And see *Atherfold v. Beard*, 2 T. R. 610.

3. 1 Tidd Pract. 595-6; 1 Greenl. Ev. (14th ed.), § 477; *Isaigi v. Brown*, 1 Curt. (U. S.) 401; *People v. Vail*, 2 Cow. (N. Y.) 623.

4. 1 Greenl. Ev. (14th ed.), § 478; 2 Taylor Ev. (8th ed.), § 1493, where the author says: "It may be laid down as a general rule, that the Queen's Bench

2. Semi-public Documents.—These partake both of a public and of a private character, and are treated as the one or the other according to the relation in which the applicant stands to them.¹ Under this head fall books of corporations and incorporated banking companies, deposit and transfer books of the Bank of England and of the East India Company, rolls of copyhold courts and of courts baron, parish registers, vestry books, terriers, books of commissioners of sewers, public lottery books, a bishop's register of presentations, and some others of the like kind.²

a. BOOKS OF CORPORATIONS AND INCORPORATED BANKING COMPANIES.—The books of both public and private corporations, including those of incorporated banking companies, are considered private with respect to strangers,³ but public as regards the directors, corporators, and stockholders of the corporation or banking company, and as regards the depositors also of a banking corporation.⁴ Although even by these parties an inspection is

Division will enforce by mandamus the production of every document of a public nature, in which any one of her majesty's subjects can prove himself to be interested. Every officer, therefore, appointed by law to keep records, ought to deem himself a trustee for all interested parties, and allow them to inspect such documents as concern themselves, without putting them to the expense and trouble of making a formal application for a mandamus. *Rex v. Justices of Staffordshire*, 6 A. & E. 99, 100; 33 E. C. L. 17. But the applicant must show that he has some direct and tangible interest in the documents sought to be inspected, and that the inspection is *bona fide* required on some special and public ground, or the court will not interfere in his favor; and therefore if his object be merely to gratify a rational curiosity, or to obtain information on some general subject, or to ascertain facts which may be directly useful in some ulterior proceedings, he cannot claim inspection as a right capable of being enforced. *Ex parte Briggs*, 28 L. J., Q. B. 272; 1 E. & E. 881; 102 E. C. L. 879; *Rex v. Justices of Staffordshire*, 6 A. & E. 101; 33 E. C. L. 17. Thus, the rate payers of a county are not entitled to inspect and copy the bills and charges of county officers, which, having been paid by the treasurer under orders of justices, have become items in his accounts, and which have been allowed by the sessions, and deposited by the clerk of the peace among the county records. For in such case the individual rate-payers would have no power to interfere, even though they might prove to demonstration that the bills had been

improperly paid and allowed." *Rex v. Justices of Staffordshire*, 6 A. & E. 84; 33 E. C. L. 17. See also *Rex v. Vestrymen of St. Marylebone*, 5 A. & E. 268; 31 E. C. L. 333.

For a discussion of the right to inspect the records of deeds in the office of the county clerk or of the public register of deeds, see **RECORD**.

1. 1 Greenl. Ev. (14th ed.), § 474; 2 Taylor Ev. (8th ed.), § 1474.

2. 1 Greenl. Ev. (14th ed.), § 474; 2 Taylor Ev. (8th ed.), §§ 1494-9.

3. 2 Stark. Ev. 734; 1 Greenl. Ev. (14th ed.), § 474; 2 Taylor Ev. (8th ed.), § 1495; Ang. & Ames Corp. (11th ed.), § 681; *Rex v. Justices of Buckingham*, 8 B. & C. 375, *per* Bayley, J.; 15 E. C. L. 240; *Bolton v. Liverpool*, 3 Sim. 467; 1 Myl. & K. 88; *Hodges v. Atkins*, 3 Wils. 308; *Mayor of Southampton v. Graves*, 8 T. R. 590, which holds this doctrine, notwithstanding some authority to the contrary, *viz.*, *Lynn v. Denton*, 1 T. R. 689; *Barnstaple v. Lathey*, 3 T. R. 303; *London v. Lynn*, 1 H. Bl. 511. And see *Davies v. Humphreys*, 3 M. & S. 223; *Opdyke v. Marble*, 44 Barb. (N. Y.) 64; *Morgan v. Morgan*, 16 Abb. Pr. N. S. (N. Y.) 291.

A corporation will not be compelled to disclose its records for the purposes of a litigation to which it is not a party. *Henry v. Travelers' Ins. Co.*, 35 Fed. Rep. 15.

4. 2 Stark. Ev. 734; Ang. & Ames Corp. (11th ed.), §§ 681-2; 1 Morawetz Private Corp. (2d ed.), § 473; 1 Dill. Mun. Corp. (4th ed.), § 303; *Union Bank v. Knapp*, 3 Pick. (Mass.) 108; *In re Sage*, 70 N. Y. 220; *Hatch v.*

not exercisable at pleasure,¹ they may, at all reasonable and

City Bank, 1 Rob. (La.) 470; Cockburn v. Union Bank, 13 La. Ann. 289; Martin v. Bienville Oil Works, 28 La. Ann. 204; Huyler v. Cragin Cattle Co., 40 N. J. Eq. 392; Deaderick v. Wilson, 8 Baxt. (Tenn.) 108, 137; Lewis v. Brainerd, 53 Vt. 519; Com. v. Phoenix Iron Co., 105 Pa. St. 111. In this last case the court by Trunkey, J., said: "Unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect its books and papers and to take minutes from them, for a definite and proper purpose, at reasonable times. The doctrine of the law is, that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders."

In Lewis v. Brainerd, 53 Vt. 519, the court by Redfield, J., said: "The shareholders in a corporation hold the franchise, and are the owners of the corporate property; and as such owners, they have the right at common law to examine and inspect all the books and records of the corporation, at all reasonable times; and to be thereby informed of the condition of the corporation and its property."

1. 1 Morawetz Private Corp. (2d ed.), § 473, where the author says: "The members of a simple co-partnership are entitled to examine the partnership books and accounts whenever they desire; but this rule is inapplicable to large joint-stock companies and corporations. The control over the affairs of associations of this description is, by common consent, delegated to directors and managing agents, elected by the majority, and the individual shareholders have no authority or control except by their votes at shareholders' meetings. If every shareholder in a large joint stock association were allowed to examine its books and accounts at pleasure, it would become impossible, in practice, to keep the books in a proper manner; moreover, it is evident that the result would be to lay open the affairs of the company to the public, and render any privacy of its dealings impossible."

In Reg. v. Mariquita, etc., Min. Co., 1 E. & E. 289, 102 E. C. L. 289, the court by Campbell, C. J., said: "It is highly proper that an inspection of the books containing the proceedings of the directors

should be obtained on special occasions and for special purposes; but the business of such companies could hardly be conducted, if any one, by buying a share, might entitle himself at all times to gain a knowledge of every commercial transaction in which the directors engage, the moment that an entry of it is made in their books; and we cannot find that any such right of inspection is given. . . . We entirely concur in the observations of Mr. Richardson's counsel on the importance of narrowly watching the proceedings of the directors of joint stock companies, and of affording the means of detecting any misconduct of which they may be guilty. But the proposed daily and hourly inspection and publication of all their proceedings would be tantamount to admitting the presence of strangers at all their meetings, and would probably, ere long, be found very prejudicial to the shareholders."

In Com. v. Phoenix Iron Co., 105 Pa. St. 111, the court by Trunkey, J., said: "Text-books and *dicta* of courts seem to have treated the right of shareholders in joint stock corporations, to inspect the accounts and papers, as similar to that of members in large partnerships where managers are appointed to transact the business. The necessary limitations practically prevent exercise of the right for speculative purposes, or gratification of curiosity; if every shareholder could inspect for such purposes, at his own will, the business of most corporations would be greatly impeded. . . . Were it established that every stockholder may have a mandamus to enforce his right of inspection for the mere purpose of enabling him to vote understandingly, where the stockholders are numerous, there would likely result great inconvenience and hindrance in the conduct of the business of the corporation. The interests of all the corporators require that the writ shall not go at the caprice of the curious or suspicious. It would seem from the weight of authority, and in reason, that a shareholder is entitled to mandamus to compel the *custos* of corporate documents to allow him an inspection, and copies of them, at reasonable times, for a specific and proper purpose, upon showing a refusal on the part of the *custos* to allow it; and not otherwise."

proper times, inspect and copy the documents in question, provided they are interested in some special object, or have in view some proper purpose, in respect of which an examination is requisite; as, if an inspection be necessary in view either of an action already instituted, or at least of some specific dispute or question depending; or in order to protect the interests of the applicant or prevent him from suffering injury; or to enable him to perform his duties.¹ The right of inspection extends no further, and to no other documents, than these objects require.²

A stockholder in an incorporated company cannot be deprived of the right to inspect the books of the company, because they are kept in a particular way, or because they contain along with the information to which he is entitled, other information which he has no right to demand. *People v. Pacific Mail Steamship Company*, 50 Barb. (N. Y.) 280; 3 Abb. Pr. N. S. (N. Y.) 364; 34 How. Pr. (N. Y.) 193. Nor can a director of a bank be excluded by the board of directors from an inspection of its books, although they believe him to be hostile to the interests of the institution. *People v. Throop*, 12 Wend. (N. Y.) 183; *Hatch v. City Bank*, 1 Rob. (La.) 470. But *contra*, *State v. Einstein*, 46 N. J. L. 479, where it was held that if there is fair reason to believe that a director asking for an inspection of corporate books, intends to make an improper use of them, and on that ground his request is denied, the court will not aid him by mandamus.

The fact that a shareholder is employed as the solicitor of litigants opposed to the corporation, does not affect his right of inspection. *Reg. v. Wilts Co.*, 29 L. T. N. S. 922. But see *Hutt's Case*, 7 Dowl. Pr. 690; *Herschfield v. Clark*, 11 Ex. 712.

1. 1 Greenl. Ev. (14th ed.), § 474; *Rex v. Newcastle*, 2 Str. 1123; *Reg. v. Beverly*, 8 Dowl. 140; *Rex v. Merchant Tailors' Co.*, 2 B. & Ad. 115; 22 E. C. L. 40; *In re Burton and Saddlers' Co.*, 31 L. J. Q. B. 62; *Rex v. Babb*, 3 T. R. 579; *Williams v. Prince of Wales Ins. Co.*, 23 Beav. 338; *Brouwer v. Cotheal*, 10 Barb. (N. Y.) 216; 5 N. Y. 562; *People v. Mott*, 1 How. Pr. (N. Y.) 247; *People v. Cornell*, 47 Barb. (N. Y.) 329; 35 How. Pr. (N. Y.) 31; *Central Nat. Bank v. White*, 37 N. Y. Sup. Ct. 297; *People v. Lake Shore, etc., R. Co.*, 11 Hun (N. Y.) 1; 70 N. Y. 220; *Ferry v. Williams*, 41 N. J. L. 332; *Foster v. White*, 86 Ala. 467; *Huyler v. Cragin*

Cattle Co., 40 N. J. Eq. 392; 42 N. J. Eq. 139; *Phoenix Iron Co. v. Com.*, 113 Pa. St. 513.

2. *Rex v. Merchant Tailors' Co.*, 2 B. & Ad. 115; 22 E. C. L. 40; *In re Burton and Saddlers' Co.*, 31 L. J. Q. B. 62; *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111, 120.

See 2 Taylor Ev. (8th ed.), § 1495, where the author says: "The rule appears to have been sometimes laid down more broadly, and the language ascribed to the court in one or two cases would almost lead to the inference, that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. *Rex v. Hostmen of Newcastle*, 2 Str. 1223; *Rex v. Babb*, 3 T. R. 581, *per* Ashhurst, J. But this doctrine is now properly exploded; the privilege of inspection being confined to those cases in which the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object." *Rex v. Merchant Tailors' Co.*, 2 B. & Ad. 115; 22 E. C. L. 40.

Thus, where certain members of a corporation applied for a mandamus to allow them to inspect all the documents of the corporation, alleging their belief that its affairs were improperly conducted, and complaining of misgovernment in some particulars not affecting themselves, nor then in dispute, the court held that the applicants had no right on these speculative grounds to the inspection desired, and discharged the rule. *Rex v. Merchant Tailors' Co.*, 2 B. & Ad. 115; 22 E. C. L. 40. So, where parties were sued by an incorporated company for alleged misconduct in making false entries in the books of the corporation while acting in the capacity of directors, the court held that they were not entitled to a general inspection of the company's books, at least without an affidavit that such inspec-

The inspection may be made through an agent; and the assistance of a solicitor, attorney, expert, or interpreter may be called in.¹ If access be denied, an action lies, at common law, against the officers having custody of the corporation books and records, for refusing to allow an inspection, and damages therefor, either actual or nominal, may be recovered.² But as an action for damages would generally be an inadequate remedy,³ a writ of mandamus⁴ will be granted to the applicant, or, where a suit is

tion was necessary for their defense. *Imperial Gas Co. v. Clarke*, 7 Bing. 95; 20 E. C. L. 59. Nor will an inspection be granted in order to fish out a defense. *Birmingham, etc., R. Co. v. White*, 1 Q. B. 282; 41 E. C. L. 541; *Imperial Gas Co. v. Clarke*, 7 Bing. 95; 20 E. C. L. 59; *Hoyt v. American Exchange Bank*, 1 Duer (N. Y.) 652; 8 How. Pr. (N. Y.) 89; *Shoe & Leather Assoc. v. Bailey*, 49 N. Y. Super. Ct. 385. See also *Credit Co. v. Webster*, 53 L. T. Rep. 419. Nor for speculative purposes or to gratify curiosity. *Phenix Iron Co. v. Com.*, 113 Pa. St. 563, 572; *People v. Walker*, 9 Mich. 328; *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392; 42 N. J. Eq. 139; and authorities in note 1, p. 233. Nor to ascertain whether it would be better for the petitioner to accept with the other shareholders what was offered her for her holding in an old company which was being wound up, instead of proceeding with an arbitration. *In re Glamorganshire Co.*, 28 Ch. D. 620. Nor to establish a justification in an action against the petitioner for a libel imputing insolvency to the company. *Metropolitan Co. v. Hawkins*, 4 H. & N. 146; *Collin v. Yates*, 27 L. J. Ex. 150; *Finlay v. Lindsay*, 7 Ir. C. L. 1; *Opdyke v. Marble*, 44 Barb. (N. Y.) 64. Nor to examine all the books of the company for fifty years back, the petitioner alleging that he is dissatisfied with the management of the company, and with the accounts, besides other grounds. *Reg. v. Grand Canal*, 1 Ir. L. R. 337. Nor where the petition does not specify the particular books asked for, nor the object of the petitioner in making the application to the officers and to the court. *Reg. v. London, etc., Co.*, 44 L. J. Q. B. 4; *Hunt v. Hewitt*, 7 Ex. 236; *Pepper v. Chambers*, 7 Ex. 226; *New England Iron Co. v. New York Loan Co.*, 55 How. Pr. (N. Y.) 351; *Central Cross-Town R. Co. v. Twenty-Third St. R. Co.*, 53 How. Pr. (N. Y.) 45; *Commissioners v. Lem-*

ley, 85 N. Car. 341; *Walker v. Granite Bank*, 44 Barb. (N. Y.) 39.

1. Cook on Stock and Stockholders and Corporation Law (2d ed.), § 516; *Williams v. Prince of Wales Ins. Co.*, 23 Beav. 338; *Bonnardet v. Taylor*, 1 J. & H. 386; *Draper v. Manchester, etc., R. Co.*, 7 Jur. N. S. (pt. 1) 86; *Hide v. Holmes*, 2 Moll. 372; *Blair v. Massey, L. R.*, 5 Ir. Eq. 623; *In re Joint Stock Discount Co.*, 36 L. J. Eq. 150; *Atty. Gen. v. Whitwood*, 40 L. J. Ch. 592; *Lindsay v. Gladstone, L. R.*, 9 Eq. 132; *State v. Bienville Oil Works Co.*, 28 La. Ann. 304; *Foster v. White*, 86 Ala. 467; *Ballin v. Ferst*, 55 Ga. 546. But see *Bartley v. Bartley*, 1 Drew. 233; *Summerfield v. Pritchard*, 17 Beav. 9; *Draper v. Manchester R. Co.*, 3 DeG. F. & J. 23; *In re West Devon, etc., Mine*, 27 Ch. D. 106; *Bank of Utica v. Hilliard*, 6 Cow. (N. Y.) 62.

2. *Lewis v. Brainerd*, 53 Vt. 510. In this case the court by Dunton, J., said: "Neither is it necessary to allege or prove a reason or purpose for inspecting such records. A lawful reason or purpose for examining the records of the corporation will be presumed in the absence of proof to the contrary. The stockholders in a corporation are severally interested in all the corporate property and corporate action in proportion to the amount of their respective stock. The officers are, to a certain extent, their servants and agents. Such stockholders, therefore, have the right to examine the books and records of the corporation, at reasonable and proper times, without making known to the recording officer their purpose or reasons therefor." But this case appears to lay down the doctrine as to the right of inspection too broadly.

3. See *Cockburn v. Union Bank*, 13 La. Ann. 289.

4. See, in regard to municipal corporations, *MANDAMUS*, vol. 14, p. 171.

pending, a rule of court.¹ But the mandamus does not issue as a matter of course;² the reasons for granting the writ must be

1. The *English* authorities, which are conflicting, are as follows: *Rex v. Babb*, 3 T. R. 580, 581; *Rex v. Lucas*, 10 East 235; *Edwards v. Vesey*, Lee t. Hard. 128; *Rex v. Trevannion*, 2 Chit. 366, note; 18 E. C. L. 369; *Rex v. Sheriff of Chester*, 1 Chit. 467, 477, 479, note; 18 E. C. L. 139; *Rex v. Shelley*, 3 T. R. 145; *Mayor of Southampton v. Graves*, 8 T. R. 592; *Barterman v. Phillips*, 4 Taun. 162; *Harrison v. Williams*, 3 B. & C. 162; 10 E. C. L. 43; *Reg. v. Saddlers' Co.*, 10 W. R. 77; *Herbert v. Ashburner*, 1 Wils. 297; *Rex v. Allgood*, 7 T. R. 746; *Rex v. Purnell*, 1 Wils. 242; *Rex v. Bridgman*, 2 Str. 1203; *Rex v. Newcastle*, 2 Str. 1223; *Walburn v. Ingleby*, 1 Myl. & K. 61; *Swansea Vale R. Co. v. Budd*, L. R., 2 Eq. 274.

Hatch v. City Bank, 1 Rob. (La.) 470; *Cockburn v. Union Bank*, 13 La. Ann. 289; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *People v. Lake Shore, etc.*, R. Co., 11 Hun (N. Y.) 1; *People v. Throop*, 12 Wend. (N. Y.) 183; *People v. Mott*, 1 How. Pr. (N. Y.) 247; *People v. Pacific Mail Steamship Co.*, 50 Barb. (N. Y.) 280; 3 Abb. Pr. N. S. (N. Y.) 364; 34 How. Pr. (N. Y.) 193; *In re Sage*, 70 N. Y. 290; *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111; *Foster v. White*, 86 Ala. 467; *Swift v. State* (Del. 1886), 6 Atl. Rep. 856.

The order of court may be made at any stage of the action, and the court may, in making the order, direct the manner of the examination. *Cook on Stock and Stockholders and Corporation Law* (2d ed.), § 519; *Williams v. Prince of Wales Ins. Co.*, 23 Beav. 338.

Stockholders obtaining an inspection may be ordered not to disclose the information received. *In re Birmingham, etc., Co.*, 36 L. J. Ch. 150; *Williams v. Prince, etc., Co.*, 23 Beav. 340.

An appeal may be taken from an order granting a party leave to inspect and examine the books of the adverse party or corporation. *Lancashire Co. v. Greatorox*, 14 L. T. N. S. 290; *Thompson v. Erie R. Co.*, 9 Abb. Pr. N. S. (N. Y.) 212; *Cummer v. Kent*, 38 Mich. 351; *Commissioners v. Lemley*, 85 N. Car. 241; *Woods v. De Figanieri*, 1 Robt. (N. Y.) 681. And

see *Saxby v. Easterbrook*, L. R., 7 Ex. 207; *Bustros v. White*, 1 Q. B. D. 423; *McCargo v. Crutcher*, 27 Ala. 171; *Clyde v. Rogers*, 24 Hun (N. Y.) 145; *In re Sage*, 70 N. Y. 221. But see *White v. Monroe*, 33 Barb. (N. Y.) 650.

An article of a company taking away the right of inspection does not prevent a rule issuing requiring its allowance in pending litigation. *Hall v. Connell*, 3 Y. & C. Ex. 707.

In *New York* the right of inspection by order is regulated by statute. See Code Civ. Proc., §§ 803-9; and see also §§ 868-9.

Where a motion is made in an action for an order to secure the inspection of books, papers, and documents, if the moving papers establish the existence of the evidence, its materiality, the necessity of a discovery, and the good faith of the application, and these facts are not contradicted, it is not necessary that the papers should also show, in addition to these facts, that the evidence sought to be discovered is indispensably necessary, and that the party seeking the discovery has not the means of establishing the same facts by other available proof. The cases that seemingly hold such a doctrine, are cases where the propriety and necessity of a discovery were drawn in question by opposing affidavits. *Whitworth v. Erie R. Co.*, 37 N. Y. Super. Ct. 437.

2. "The writ of mandamus, however, does not issue herein as a matter of course. It is an extraordinary remedy to be invoked only upon special occasions. The courts do not grant the mandamus until it has [they have] taken into careful consideration all the facts and circumstances of the case. The condition and character of the books, the reasons for refusal by the corporation, the specific purpose of the stockholder in demanding inspection, the general reasonableness of the request, and the effect on the orderly transaction of the corporate business in case it is granted, are all considered in granting or refusing the writ. It is granted only in furtherance of essential justice." *Cook on Stock and Stockholders and Corporation Law* (2d ed.), § 514.

clear and cogent ;¹ and, as in all other cases where the interference of a court is sought for the purpose of obtaining the inspection of a document, the applicant must by affidavit show affirmatively all the facts that entitle him to such remedy ;² as, that he has a manifest right to the inspection,³ that he has made an express demand⁴ of a proper person, at a proper time and place, and for a proper reason,⁵ and that his demand was distinctly refused.⁶

1. *People v. Lake Shore, etc., R. Co.*, 11 Hun (N. Y.) 1; *aff'd* under the name *In re Sage*, 70 N. Y. 220; *In re West Devon, etc., Mine*, L. R., 27 Ch. D. 106.

Mere suspicion or conjecture that an inspection is necessary for the maintenance of the applicant's rights, is not sufficient, even though the application is made with a view to bringing suit against the directors. *Central Cross-Town R. Co. v. Twenty-Third Street R. Co.*, 53 How. Pr. (N. Y.) 45.

On petition for a mandamus to compel a corporation to allow a stockholder to inspect the stock ledger (a book containing the list of stockholders), the reasons alleged were, that the stock had recently paid little or no dividends, and had depreciated in market value; that the officers of the corporation did not distribute to the stockholders reports as to its business and condition; and that the petitioners desired to inform themselves, and to inspect the list with a view to a conference with their fellow stockholders. No mismanagement of the company was alleged as a cause of the lack of dividends, or of the depreciation of the stock. The proof showed that the treasurer's reports had been distributed to the stockholders. The by-laws provided for annual and special meetings, which would give opportunity for conference; and the petitioners were not deprived of conference at the annual meetings, nor had they tried to call a special meeting. It was not alleged that there was any considerable dissatisfaction among the stockholders, and it appeared that one of the petitioners had advertised for nearly a year without success, for the stockholders to send their names for a conference. *Held*, that sufficient cause for a mandamus was not shown. *Lyon v. American Screw Company*, 16 R. I. 472.

2. *People v. Northern Pacific R. Co.*, 50 N. Y. Super. Ct. 456; 18 Fed. Rep. 471.

3. *Ang. & Ames Corp.* (11th ed.), § 707.

4. It seems that this demand must come either directly from the applicant or indirectly from his agent, and that it will not suffice if it be made by a person whom the agent has employed for that purpose. *Ex parte Hutt*, 7 Dowl. 690.

5. *People v. Walker*, 9 Mich. 328. In this case, the court by Martin, C. J., said: "While, in the absence of any statutory provision to that effect, a corporator may at the common law, have a mandamus to compel the *custos* of corporate records and documents to allow him an inspection of them, yet, to entitle himself to the aid of the court, he must show that he has made a proper demand upon the *custos*, at a proper time and place, and for a proper reason, and has been refused. I have examined all the cases to which we have been referred, and can find none where the writ was granted to enable a corporator to gratify idle curiosity. The principle seems to be, and very properly, too, that the party asking the right must have some interest at stake which renders the inspection necessary."

6. 2 *Taylor Ev.* (8th ed.), § 1502; *Cook on Stock and Stockholders and Corporation Law* (2d ed.), § 516; *Ang. & Ames Corp.* (11th ed.), § 707; *Rex v. Wilts & Berks Canal Nav. Co.*, 3 A. & E. 477; 5 N. & M. 344; 30 E. C. L. 132; *Reg. v. Bristol, etc., R. Co.*, 4 Q. B. 162; 45 E. C. L. 161; *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111, 118; *People v. Walker*, 9 Mich. 329.

The objection that the affidavit discloses no sufficient demand and refusal, must be taken before the merits are discussed. *Reg. v. Bristol, etc., R. Co.*,

In stating that there must be a distinct refusal, it is not meant that the word "refuse" or any equivalent expression should be employed: it will be enough if the party applied to shows clearly by his conduct that he is determined not to do what is required; but nothing short of this will suffice.¹ The application should also state what information the applicant needs, and what books of the corporation he wishes to inspect.² The writ is properly directed to the person or officer having the possession and control of the books: the corporation is not a necessary party, and whether it be domestic or foreign is immaterial.³

The right of inspection of corporation books, being thus limited in the case of members, is, as regards strangers, still more restricted; and unless the documents sought to be inspected contain the common evidence of some transaction between the corporation and a stranger, or at least furnish the rule by which the stranger is sought to be bound, he has no right to inspect them, even though he be a defendant in a suit brought by the corporation; and he can here, as in cases between private persons, merely give notice to the corporation to produce its books and papers, with the right, if it fails to do so, of introducing secondary evidence.⁴

¹ Q. B. 162, 171, *per* Lord Denman; 45 E. C. L. 161; *Reg. v. Eastern Counties R. Co.*, 10 A. & E. 531, 545, note b; 37 E. C. L. 174.

It seems that the applicant must also show that when he demanded the inspection, he stated the object for which he wanted it. *Rex v. Wilts & Berks Canal Nav. Co.*, 3 A. & E. 477; 30 E. C. L. 132. See *Rex v. Trustees of Northleach and Witney Roads*, 5 B. & Ad. 978; 27 E. C. L. 250; *Rex v. Clear*, 4 B. & C. 899; 10 E. C. L. 466.

² *R. v. Brecknock, etc., Co.*, 3 A. & E. 217, 222-223, *per* Lord Denman, and Littledale, J.; 30 E. C. L. 81.

Thus, where a stockholder in a company applied to the committee for leave to inspect the books of the company, and was told by the chairman that the committee would take time to consider the request; whereupon, ten days afterward, he again applied to the clerk, who refused inspection, though it did not appear that the refusal was authorized by the committee, the Court of Queen's Bench held that no sufficient refusal by the committee had been proved to warrant the making absolute a rule for a mandamus. *Rex v. Wilts & Berks*

Canal Nav. Co., 3 A. & E. 477; 5 N. & M. 344; 30 E. C. L. 132.

If, on the application of a party, the liberty to inspect the books be offered as a favor, and not as a right, and be consequently declined by the applicant, it may be questionable whether the court will interfere. *Rex v. Trustees of Northleach and Witney Roads*, 5 B. & Ad. 978, 982, *per* Lord Denman; 27 E. C. L. 250.

Where a party applied to a judge on summons for leave to inspect certain books, but the judge, after hearing both parties, referred the question to the court, it seems to have been considered that the proceedings at chambers were equivalent to a demand and refusal. *Birmingham, etc., R. Co. v. White*, 1 Q. B. 282, 286; 4 P. & D. 649; 41 E. C. L. 541, 543.

³ Cook on Stock and Stockholders and Corporation Law (2d ed.), § 516.

⁴ Cook on Stock and Stockholders and Corporation Law (2d ed.), § 516; *Reg. v. Kendall*, 1 Q. B. 366; 41 E. C. L. 580; *Swift v. State* (Del. 1886), 6 Atl. Rep. 303; *Bailey v. Stohecker*, 38 Ga. 259; *St. Luke's Church v. Slack*, 7 Cush. (Mass.) 226; *Bergenthal v. Bergenthal*, 72 Wis. 318.

⁵ 2 Taylor Ev. (8th ed.), § 1496;

When an actual inspection is necessary, a stranger can obtain it only by a bill of discovery, or under the statutory equivalents therefor.¹ And it should be added that in accordance with the invariable rule which protects a witness or party from being compelled to furnish evidence that may expose him to a criminal charge,² a person will never be obliged to allow an inspection of either public or private documents in his custody, where the inspection is sought for the purpose of supporting a prosecution against himself.³ But at present in the various States of the Union the inspection of corporation books is very generally regulated by statutes, references to which are given in the note below.⁴

Mayor of Southampton v. Graves, 8 T. R. 590; *Burrell v. Nicholson*, 3 B. & Ad. 649; *Rex v. Justices of Buckingham*, 8 B. & C., 375; 15 E. C. L. 240; *Imperial Gas Co. v. Clarke*, 7 Bing. 95; 20 E. C. L. 59; *Harrison v. Williams*, 3 B. & C. 162; 10 E. C. L. 43; *Hill v. Great Western R. Co.*, 10 C. B. N. S. 148; 100 E. C. L. 148; *In re Burton and Sadlers' Co.*, 31 L. J. Q. B. 62; *Bank of Utica v. Hilliard*, 5 Cow. (N. Y.) 419; 6 Cow. (N. Y.) 62.

1. 1 Greenl. Ev. (14th ed.), § 474; BILL OF DISCOVERY, vol. 2, p. 206. And see *Johnson v. Consolidated Silver Mining Co.*, 2 Abb. Pr. N. S. (N. Y.) 413.

2. 1 Greenl. Ev. (14th ed.), § 451; 2 Taylor Ev. (8th ed.), § 1453; 1 Wharton Ev. (3d ed.), §§ 533, *et seq.*

3. 1 Greenl. Ev. (14th ed.), § 474; 2 Taylor Ev. (8th ed.), § 1500; 1 Whart. Ev. (3d ed.), § 751; *Ld. Montague v. Dudman*, 2 Ves. Sen. 397; *Glynn v. Houston*, 1 Keen 329; *Rex v. Purnell*, 1 W. Bl. 37; 1 Wils. 239; *Rex v. Heydon*, 1 W. Bl. 351; *Rex v. Justices of Buckingham*, 8 B. & C. 375, *per Tenterden*, C. J.; 15 E. C. L. 240; *Rex v. Cornelius*, 2 Str. 1210; 1 Wils. 142; *Boyd v. U. S.*, 116 U. S. 616; *Byass v. Sullivan*, 21 How. Pr. (N. Y.) 50. But see *Bradshaw v. Murphy*, 7 C. & P. 712; 32 E. C. L. 654.

An information in the nature of a *quo warranto* is not considered as a criminal proceeding within the meaning of this rule. *Rex v. Shelley*, 3 T. R. 141; *Rex v. Babb*, 3 T. R. 582; *Rex v. Purnell*, 1 W. Bl. 45. Nor is a mandamus, at least if the object be to enforce

a civil right. *Reg. v. Ambergate, etc.*, R. Co., 17 Q. B. 957; 79 E. C. L. 957. But where the lord of a manor was indicted for a nuisance in not repairing the bank of a river *ratione tenuræ*, it was in vain urged in support of a rule to inspect the court rolls, that the indictment, though in form a criminal proceeding, was really to try the right of repair, which was a civil right. *Rex v. Earl of Cadogan*, 5 B. & Al. 902; 7 E. C. L. 295; 1 D. & R. 550.

4. See generally Cook on Corporations as Affected by Statutes and Constitutions, in which a summary of all the State laws in reference to corporations is given.

Alabama.—Code of 1886, § 4677, enacts that "the stockholders of all private corporations have the right of access to, of inspection and examination of, the books, records, and papers of the corporation at reasonable and proper times." Under this statute, which was considered not to be declaratory of the common law, it was held that it was not necessary for a stockholder, in order to exercise the right, to show any reason for such examination. *Foster v. White*, 86 Ala. 467.

Arizona.—Rev. Sts. of 1887, § 305.

Arkansas.—Const., art. 17, § 2; Rev. Sts. of 1884, §§ 974, 5506.

California.—Const., art. 12, § 14; Civ. Code, §§ 321, 377-8; Penal Code, § 565.

Colorado.—Gen. Sts. of 1883, No. 249.

Connecticut.—Gen. Sts. of 1888, §§ 1296, 1939, 1953. And see *Pratt v. Meriden Cutlery Co.*, 35 Conn. 36.

Delaware.—Laws of 1883, ch. 147.
Florida.—Laws of 1881, pp. 233, 235-6.
Georgia.—Code of 1882, § 1689 q.
Idaho.—Code Civ. Proc., §§ 2639-40.
Maryland.—Gen. Laws of 1888, pp. 286, 304.
Michigan.—Acts of 1885, p. 348.
Minnesota.—Gen. Sts. of 1888, p. 395, § 115; and see pp. 369, 398.
Missouri.—Const., art. 15, § 15; Rev. Sts. of 1879, §§ 720-1, 932.
Nebraska.—Const., art. 11, § 1.
Nevada.—Gen. Sts. of 1885, ch. 8, § 817.
New Hampshire.—Gen. Laws of 1878, p. 351.
New Jersey.—See revision of 1887, p. 183, § 36; p. 186; and Act of March 25, 1881. And see *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392; 42 N. J. Eq. 139.
New Mexico.—Comp. Laws of 1884, §§ 224, 2650.
Illinois.—Const., art. 11, § 9; Rev. Sts., ch. 32, § 13, and ch. 114, §§ 7, 10.
Indiana.—Rev. Sts. of 1887, §§ 2688, 2693, 3010. And see *Williams v. College etc. Co.*, 45 Ind. 170.
Iowa.—Rev. Sts. of 1888, §§ 1076-7, 1279.
Kansas.—Comp. Laws of 1885, p. 214.
Kentucky.—Gen. Sts. of 1887, pp. 765-6.
Louisiana.—Const. of 1879, art. 245.
Maine.—Rev. Sts. of 1884, p. 402; Laws of 1889, ch. 263.

New York.—As the New York statutes on this subject are more minute than those of the other States, and have been extensively copied, they are given in full.

For general provisions, applying to all corporations, see 1 R. S. (1st ed.), p. 601, § 1; R. S. (8th ed.), p. 1728, § 1; 1 Birdseye's R. S., p. 678, § 30; where it is enacted that "the book or books of any incorporated company in this State, in which the transfer of stock in any such company shall be registered, and the books containing the

names of the stockholders in any such company shall, at all reasonable times during the usual hours of transacting business, be open to the examination of every stockholder of such company, for thirty days previous to any election of directors; and if any officer having charge of such books, shall upon demand of any stockholder as aforesaid, refuse or neglect to exhibit such books, or submit them to examination as aforesaid, he shall for every such offense, forfeit the sum of \$250, the one moiety thereof to the use of the people of this State, and the other moiety to him who will sue for the same, to be recovered by action of debt in any court of record, together with costs of such suit." And see *Brouwer v. Cotheal*, 10 Barb. (N. Y.) 216; aff'd, *Cotheal v. Brouwer*, 5 N. Y. 562; *People v. Pacific Mail Steamship Co.*, 50 Barb. (N. Y.) 280; *People v. Mott*, 1 How. Pr. (N. Y.) 247; *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37, 45.

For manufacturing corporations, see Laws of 1848, ch. 40, § 25; R. S. (8th ed.), p. 1960, § 25; 2 Birdseye's R. S., p. 1897, § 104, where it is enacted: "It shall be the duty of the trustees of every such corporation or company, to cause a book to be kept by the treasurer or clerk thereof, containing the names of all persons alphabetically arranged, who are or shall, within six years, have been stockholders of such company, and showing their places of residence, the number of shares of stock held by them respectively, and the time when they respectively became the owners of such shares; and the amount of stock actually paid in; which book shall, during the usual business hours of the day, on every day except Sunday and the fourth day of July, be open for the inspection of stockholders and creditors of the company, and their personal representatives, at the office or principal place of business of such company, in the county where its business operations shall be located; and any and every such stockholder, creditor, or representative, shall have a right to make extracts from such book; and no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company, according to the provisions of this act, until it shall have been entered therein as required by this section, by an entry showing to and from whom transferred.

Such book shall be presumptive evidence of the facts therein stated, in favor of the plaintiff, in any suit or proceeding against such company, or against any one or more stockholders. Every officer or agent of any such company, who shall neglect to make any proper entry in such book, or shall refuse or neglect to exhibit the same, or allow the same to be inspected, and extracts to be taken therefrom, as provided by this section, shall be deemed guilty of a misdemeanor, and the company shall forfeit and pay to the party injured, a penalty of \$50 for every such neglect or refusal, and all the damages resulting therefrom. And every company that shall neglect to keep such book open for inspection as aforesaid, shall forfeit to the people the sum of \$50 for every day it shall so neglect, to be sued for and recovered in the name of the people, by the district attorney of the county in which the business of such corporation shall be located; and when so recovered, the amount shall be paid into the treasury of such county for the use thereof." See *Tracy v. Yates*, 18 Barb. (N. Y.) 152; *Burr v. Wilcox*, 22 N. Y. 551; *Johnson v. Underhill*, 52 N. Y. 203; *Veeder v. Mudget*, 95 N. Y. 295; *Herries v. Wesley*, 13 Hun (N. Y.) 492; *Kelsey v. Pfau* etc. Co., 41 Hun (N. Y.) 20; 51 Hun (N. Y.) 636; *French v. McMillan*, 43 Hun (N. Y.) 188.

For banking (moneyed) corporations, see *Laws of 1882*, ch. 409, §§ 214, 208-9; *R. S. (8th ed.)*, p. 1514, *et seq.*, §§ 214, 208-9; 1 *Birdseye's R. S.*, pp. 210-11, §§ 214, 208-9; where it is declared that "every such corporation shall keep a book, in which the transfer of shares of its stock shall be registered; and another book, containing the names of its stockholders, which books shall, at all times during the usual hours of transacting business, for thirty days previous to an election of directors, be open to the examination of the stockholders. If any officer having charge of such books shall, upon the demand of a stockholder, refuse or neglect to exhibit and submit them to examination, he shall for each offense forfeit the sum of \$250." And see *Brouwer v. Cotheal*, 10 Barb. (N. Y.) 216; *aff'd*, *Cotheal v. Brouwer*, 5 N. Y. 562.

For business corporations, see *Laws of 1875*, ch. 611, §§ 16, 17; *R. S. (8th ed.)*, p. 1982, §§ 16, 17; 1 *Birdseye's R.*

S., p. 371, §§ 16, 17; where it is enacted: "It shall be the duty of the directors of every such corporation to cause to be kept at its principal office or place of business, correct books of account of all its business and transactions, and every stockholder in such corporation shall have the right at all reasonable times by himself or his attorney to examine the records and books of account of such corporation. It shall be the duty of the directors of every such corporation to cause a book to be kept by the treasurer or clerk thereof, containing the names of all persons, alphabetically arranged, who are or shall within six years have been stockholders of such corporation, and showing their places of residence, the number of shares of stock held by them, respectively, and the time when they, respectively, became the owners of such shares, and the amount actually paid thereon; which book shall, during the usual business hours of the day, on every day, except Sundays and legal holidays, be open for the inspection of stockholders and creditors of the corporation and their personal representatives, at the principal business office of such corporation; and any and every such stockholder, creditor or representative shall have a right to make extracts from such book; and no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the corporation according to the provisions of this act, until it shall have been entered therein as required by this section, by an entry showing from and to whom transferred. Such book shall be presumptive evidence of the facts therein stated, in favor of the plaintiff in any suit or proceeding against such corporation, or against any one or more stockholders. Every officer or agent of any such corporation, who shall neglect to make any proper entry in such book, or shall refuse or neglect to exhibit the same, or allow the same to be inspected, and extracts to be taken therefrom, as provided by this section, shall be deemed guilty of a misdemeanor; and the corporation shall forfeit and pay to the party injured a penalty of fifty dollars for every such neglect or refusal and all the damages resulting therefrom. And every corporation that shall neglect to keep such book open for inspection as aforesaid, shall forfeit

*b. OTHER SEMI-PUBLIC DOCUMENTS.*¹

to the people the sum of fifty dollars for every day it shall so neglect, to be sued for and recovered in the name of the people of the State, by the district attorney of the county in which the principal business office of such corporation is located, and the amount so recovered shall be paid to the proper authorities for the support of the poor of such county."

For transfer agents of foreign corporations, see Laws of 1842, ch. 165, §§ 1, 2; 1 Birdseye's R. S., p. 684, §§ 55-6; where it is declared that "the transfer agent in this State of any moneyed or other corporation existing beyond the jurisdiction of this State (whether such agent shall be a corporation or natural person), shall, at all reasonable times during the usual hours of transacting business, exhibit to any stockholder of such foreign corporation, when required by him, the transfer book of such foreign corporation, and also a list of the stockholders thereof (if in their power so to do). In case such transfer agent or any clerk or officer of such agent should refuse to exhibit such transfer book, or a list of the stockholders of such foreign corporation as aforesaid, he shall for every such offense forfeit the sum of \$250, to be recovered by the person to whom such refusal was made."

North Dakota.—Const., art. 8, § 140; and see the Territorial statutes of Dakota (which continue in force in North Dakota until changed by the new State) in Comp. Laws of 1887, 2937, 3110.

Ohio.—Rev. Sts. of 1886, §§ 3268, 3312.

Oregon.—Gen. Sts. of 1887, § 3228.

Pennsylvania.—Const., art. 17, § 2; Brightly's Purdon's Dig. of 1883, p. 164.

Rhode Island.—Pub. Sts. of 1882, pp. 373, 408.

South Carolina.—Laws of 1885, Act No. 114, § 6; Laws of 1886, Act No. 288, § 17.

South Dakota.—Const., art. 17, § 12. And see also Comp. Laws of 1887 of the Territory of Dakota, §§ 2937, 3110, which, until changed, continue in force in the new State of South Dakota.

Tennessee.—Code of 1884, § 1706.

Texas.—Const., art. 10, § 3; Rev. Sts. of 1887, §§ 586, 4115 a, 4121, 4141.

Utah.—Comp. Laws of 1888, §§ 2327-8.

Vermont.—Rev. Laws of 1880, §§ 3294-5. And see *Lewis v. Brainerd*, 53 Vt. 519.

Virginia.—Code of 1887, §§ 1121-3, 1142.

Washington.—Code of 1881, § 2436.

West Virginia.—Code, ch. 53, § 47; Laws of 1881, ch. 17, § 38; Laws of 1882, ch. 98.

Wisconsin.—Rev. Sts. of 1878, pp. 512, 532, 539.

England.—In England the Companies' Act (25 & 26 Vict., ch. 89) regulates specifically the inspection of corporate books by stockholders. See *Mutter v. Eastern etc. R. Co.*, 59 L. T. R. 117; 36 W. R. 401; *Gourand v. Edison etc. Co.*, 59 L. T. R. 812; *Holland v. Dickson*, 58 L. T. R. 845; *In re West Devon etc. Mine*, 27 Ch. D. 106; *In re Joint Stock Discount Co.*, 36 L. J. Eq. 150; *In re Emma Silver Min. Co.*, L. R., 10 Ch. 194; *Ex parte Buchan*, 36 L. J. Ch. 150.

1. Deposit and Transfer Books of the Bank of England, and of the East India Company.—On the same principle as in the preceding paragraph above, fundholders are entitled to inspect and copy such entries in the deposit and transfer books of the Bank of England, or of the East India Company, as relate to stock in which they claim to be interested. *Foster v. Bank of England*, 8 Q. B. 689; 55 E. C. L. 689; *Geery v. Hopkins*, 2 Ld. Raym. 851; 7 Mod. 129; *Shelling v. Farmer*, 1 Str. 646.

Rolls of Copyhold Courts and of Courts-Baron.—2 Taylor Ev. (8th ed.), § 1494; *Crew v. Saunders*, 2 Str. 1005; *Rex v. Shelley*, 3 T. R. 142; *Rex v. Merchant Tailors' Co.*, 2 B. & Ad. 115, 128-9; 22 E. C. L. 40, 45; *Rex v. Tower*, 4 M. & S. 162; *Rex v. Lucas*, 10 East 235; *Ex parte Hutt*, 7 Dowl. 690; *Ex parte Barnes*, 7 Dowl. N. S. 20; *Addington v. Clode*, 2 W. Bl. 1030; *Hobson v. Parker*, Barnes 237, cited in 3 T. R.

3. Private Documents—*a.* DOCTRINE AT COMMON LAW.—Originally, at common law, the production of documents by one party for the inspection of his opponent before the trial, can scarcely be said to have existed, save to a limited extent in the case of personal representatives and of parties claiming or justifying under a deed.¹ These were bound, where the deed or the letters testamentary or of administration were within their power, to make *profert* of them, the effect of which was to tender the document for the inspection of the opponent, who by craving *oyer* of the instrument, could have it produced either formally or constructively in court.² With this imperfect exception, the common law, adhering to the maxim, "*Nemo tenetur armare adversarium suum contra se*,"³ refused to compel either party to supply the other with any evidence, parol or otherwise, to assist

142; *Warwick v. Queen's College, L. R.*, 3 Eq. 683; 36 L. J. Ch. 505; *Owen v. Wynn*, 9 Ch. D. 29; *Rex v. Allgood*, 7 T. R. 746.

Parish Books, Etc.—These are open to the inspection of parishoners for ordinary parochial purposes. 2 Taylor Ev. (8th ed.), § 1497; *Newell v. Simpkins*, 6 Bing. 565; 19 E. C. L. 167; but not, it seems, for purposes unconnected with the affairs of the parish. *May v. Gwynne*, 4 B. & Al. 301; 6 E. C. L. 493; and see *Reg. v. Harrison*, 9 Q. B. 794; 58 E. C. L. 793; *Rex v. Smallpiece*, 2 Chit. 288; 18 E. C. L. 338; *Ex parte Briggs*, 1 E. & E. 881; 102 E. C. L. 879; *Burrell v. Nicholson*, 3 B. & Ad. 649; 1 Myl. & K. 680; *Rex v. Justices of Buckingham*, 8 B. & C. 375; 15 E. C. L. 240. In the same class with parish books may be mentioned vestry books, 2 Taylor Ev. (8th ed.), § 1595; *Rex v. Martin*, 2 Camp. 100; terriers, 1 Greenl. Ev. (14th ed.), § 484; 2 Taylor Ev. (8th ed.) § 1595; books of commissioners of sewers, 2 Taylor Ev. (8th ed.), § 1498; *Reg. v. Com'r of Sewers for Tower Hamlets*, 3 Q. B. 760; 43 E. C. L. 917; public lottery books, 1 Greenl. Ev. (14th ed.), § 474; *Schinotti v. Bumstead*, 1 Tidd Pract. 594; a bishop's register of presentations and institutions, 1 Greenl. Ev. (14th ed.), § 474; 2 Taylor Ev. (8th ed.), § 1498; *Rex v. Bishop of Ely*, 8 B. & C. 112; 2 M. & R. 127; 15 E. C. L. 158; 17 E. C. L. 296; and other similar books; thus, for instance, it has been held that a person who is not a member of the College of Physicians can-

not obtain a rule to inspect the books of the college. *Rex v. West*, cited 2 Wils. 240; 5 Mod. 395-6. And so a prebendary is entitled at all times to inspect the documents of the chapter. *Young v. Lynch*, 1 W. Bl. 27.

1. Whart. Ev. (3d ed.), § 753.

2. Whart. Ev. (3d ed.), § 753; *Steph. Plead.* (3d Am. ed.) 100, *et seq.*; 380, *et seq.*; 1 Chit. Plead. (16th Am. ed.) 378, *et seq.*; 1 Sell. Pract. 261; 1 Tidd. Pract. (8th ed.) 635; *Com. Dig.*, "Pleader," O; *Bac. Abr.*, "Pleas and Pleadings," I, 12; 4 Min. Inst. (2d ed.) *1061, *et seq.*; *Layfield's Case*, 10 Co. 92, *et seq.*; *Master v. Miller*, 4 T. R. 338; *Hutchins v. Scott*, 2 M. & W. 816; *Archbishop of Canterbury v. Tubb*, 3 Bing. N. C. 789; *Kellogg v. Riggs*, 2 Root (Conn.) 126; *Paddock v. Higgins*, 2 Root (Conn.) 482; *Hilyard v. Township of Harrison*, 37 N. J. L. 170; *Respublica v. Coates*, 1 Yeates (Pa.) 2; *Moore v. Fenwick*, 1 Gilm. (Va.) 214. See also PLEADING.

When any deed is showed in court, the deed, by judgment of law, doth remain in court all the term at which it is showed, for the whole term is as one day, and the party may demand *oyer* during the time it is so in court. *Wimark's Case*, 5 Rep. 74; *Simpson v. Garside*, 2 Lutw. 705; *Hilyard v. Township of Harrison*, 37 N. J. L. 170, 174.

3. Co. Litt. 36 a; *Wingate's Max.* 665. This maxim seems to have been derived from the Roman Law. *Cod. Jur. Civ.*, lib. 2, tit. 1, l. 4. So in the

him in the conduct of his cause.¹ The only recourse was a bill in equity for a discovery. But this being expensive and dilatory, the common law courts gradually relaxed the strictness of the ancient rule; and the practice arose, where one party was in possession or control of a document material to his opponent's case,² the circumstances being such that he might fairly be deemed the trustee or agent of the other, of ordering him to produce it for the adverse party to inspect and copy.³ But in later times the au-

Scotch Law, "*Nemo tenetur edere instrumenta contra se.*" Halk. Max. 100; Ersk. Inst., bk. 4, tit. 1, § 52.

1. Best Ev. (Am. ed.), § 624; 1 Thomp Tr., § 730.

2. This applies only to parties to the cause. A third person no way interested in the suit will not, on motion, be compelled by the court to produce a private paper of his own for the inspection of a party. Such paper may, however, be produced at the trial by a *subpoena duces tecum*. Davenport v. McKinnie, 5 Cow. (N. Y.) 27.

3. Best Ev. (Am. ed.), § 624; Whart. Ev. (3d ed.), § 742; Smith v. Winter, 3 M. & W. 307; Goodliff v. Fuller, 14 M. & W. 4; Steadman v. Arden, 15 M. & W. 587; 4 Dow. & L. 16; Charnock v. Lumley, 5 Scott 438; Rex v. Colucci, 3 F. & F. 103; Goldsmidt v. Marryat, 1 Camp. 562; Ley v. Barlow, 1 Exch. 800; Arundel v. Holmes, 8 Dowl. 119; Rayner v. Ritson, 6 B. & S. 888; 118 E. C. L. 887; King v. King, 4 Taun. 666; Browning v. Aylwin, 7 B. & C. 204; 14 E. C. L. 27; Woolmer v. Devereux, 2 M. & Gr. 758; 40 E. C. L. 612; Morrow v. Saunders, 1 B. & B. 318; 5 E. C. L. 94; Metropolitan Saloon Omnibus Co. v. Hawkins, 4 H. & N. 146; Powell v. Bradbury, 4 C. B. 541; 56 E. C. L. 541; Shadwell v. Shadwell, 6 C. B. N. S. 679; 95 E. C. L. 679; Price v. Harrison, 8 C. B. N. S. 617; 98 E. C. L. 615; Blakey v. Porter, 1 Taun. 384; Bateman v. Philip, 4 Taun. 157; Blogg v. Kent, 6 Bing. 614; 19 E. C. L. 179; Owen v. Nickson, 3 E. & E. 602; 107 E. C. L. 601. And see Street v. Brown, 6 Taun. 302; Portmore v. Goring, 4 Bing. 152; 13 E. C. L. 384; 12 Moo. C. P. 363; Cocks v. Nash, 9 Bing. 723; 23 E. C. L. 439; Pritchett v. Smart, 7 C. B. 625; 62 E. C. L. 625; Pickering v. Noyes, 1 B. & C. 262; 8 E. C. L. 112; Parkhurst

v. Gosden, 2 C. B. 894; 52 E. C. L. 893.

And see several *New York* cases prior to the Revised Statutes: Jackson v. Jones, 3 Cow. (N. Y.) 17; Lawrence v. Ocean Ins. Co., 11 Johns. (N. Y.) 241, 245, note a; People v. Vall, 2 Cow. (N. Y.) 623 (case of a public document); Wallis v. Murray, 4 Cow. (N. Y.) 399; Bank of Utica v. Hillard, 6 Cow. (N. Y.) 62; Willis v. Bailey, 19 Johns. (N. Y.) 268. But *contra*, Den-slow v. Fowler, 2 Cow. (N. Y.) 592.

Sealed Instruments.—Whether the document be under seal or not, makes no difference as regards the privilege of inspection. The practice is for the party desiring an inspection to apply either to the court, or to a judge at chambers for an order for the production of the writing. 1 Whart. Ev. (3d ed.) § 753; Woolmer v. Devereux, 2 M. & Gr. 758; Thomas v. Dunn, 6 M. & Gr. 274; Penarth, etc., R. Co. v. Cardiff Waterworks Co., 7 C. B. N. S. 816; Hardman v. Ellames, 2 Myl. & K. 732; Mackintosh v. Great Western R. Co., 14 M. & W. 548; 1 Hall & Tw. 41.

In the case of a plaintiff who claimed damages of a railway company for dismissing him from the office of superintendent, it was held that he was entitled to have an inspection of all entries or minutes in the company's books having reference to his employment. Hill v. Great Western R. Co., 10 C. B. N. S. 148; 100 E. C. L. 148.

But in Beale v. Bird, 2 D. & R. 419; 16 E. C. L. 99; the court refused to require the plaintiff to deliver to the defendant a copy of an agreement in order to enable the latter to plead in abatement that the agreement was signed jointly by himself and others. Perhaps this decision may be reconciled, by considering the lack of favor in which all dilatory pleas are held by the

thorities have not been agreed as to either the extent of the power at common law, or the means of enforcing it,—whether by a peremptory order,¹ or, where the writing is not produced, by enlarging the time to plead.² It may be laid down, however, that the right of inspection is not limited to documents which may be made evidence in the action, but extends to all that may throw light upon the case.³ And an inspection may be granted,

courts. See Steph. Pl. (3d Am. ed.) 351; 1 Chit. Pl. (16th Am. ed.) *473; 4 Min. Inst. (2d ed.) *1057; Com. Dig., "Abatement," I, 11; Bac. Abr., "Abatement," O; Rex v. Shakespeare, 10 East 83; Attwood v. Davis, 1 B. & Al. 172; Hixon v. Binns, 3 T. R. 186; Alexander v. Mawman, Willes 42; Grant v. Ld. Soudes, 2 W. Bl. 1096; 2 Saund. 209 a, note 1; Hall v. Brazleton, 46 Ala. 359; Clark v. Latham, 25 Ark. 16; Wadsworth v. Woodford, 1 Day (Conn.) 28; Clark v. Warner, 6 Conn. 355; Gill v. Mirzell, 43 Ga. 589; Nixon v. Southwestern Ins. Co., 47 Ill. 444; Haywood v. Chestney, 13 Wend. (N. Y.) 495.

And in Pratt v. Goswell, 9 C. B. N. S. 706; 99 E. C. L. 704; it was held that the court would not grant a rule for the inspection of documents which were produced in evidence at the trial, for the mere purpose of furnishing materials to the other side for moving for a new trial.

1. See as to the requisites for such an order, *ante*, p. 236.

To grant the order, it is not necessary that the document be in the hands of the party himself, against whom the order is asked: it is enough if it be in the hands of his agent, or in some way subject to his authority. 1 Whart. Ev. (3d ed.), § 742, citing Morrow v. Sanders, 3 Moo. C. P. 671; Gigner v. Bayly, 5 Moo. C. P. 71; 16 E. C. L. 389; Steadman v. Arden, 4 Dowl. & L. 16; 15 M. & W. 587; Ley v. Barlow, 1 Ex. 800.

2. 1 Greenl. Ev. (14th ed.), § 559. In this section Mr. Greenleaf states the rule thus: "It seems, however, to be agreed, that where the action is *ex contractu*, and there is but one instrument between the parties, which is in the possession or power of the defendant, to which the plaintiff is either an actual party or a party in interest, and of which he has been refused an inspec-

tion, upon request, and the production of which is necessary to enable him to declare against the defendant, the court, or a judge at chambers, may grant him a rule on the defendant to produce the document, or give him a copy for that purpose."

The following conditions are enumerated by Mr. Wharton as necessary in order to obtain a rule of court for the inspection of documents in the hands of the adverse party: "*First*, the party applying must make an affidavit to the effect that he has no copy in his hands or attainable by himself, though under peculiar circumstances the court may, at its discretion, dispense with such affidavit; *secondly*, the applicant must have a legal or equitable interest in the document; *thirdly*, it must appear that the paper is in the hands of the holder as in some sense the trustee of the applicant." 1 Whart. Ev. (3d ed.), § 743, citing Woolmer v. Devereux, 2 M. & G. 758; 40 E. C. L. 612; 9 Dowl. 672; Birmingham R. Co. v. White, 1 Q. B. 286; 41 E. C. L. 541; Beale v. Bird, 2 D. & R. 419; 16 E. C. L. 99; Goldsmidt v. Marryat, 1 Camp. 562; Rayner v. Ritson, 6 B. & S. 888; 118 E. C. L. 887; Price v. Harrison, 8 C. B. N. S. 617; 98 E. C. L. 615; Portmore v. Goring, 4 Bing. 152; 13 E. C. L. 384; 12 Moo. C. P. 363; Morrow v. Saunders, 1 B. & B. 318; 5 E. C. L. 94; Bluck v. Gompertz, 7 Ex. 67; Lawrence v. Hooker, 5 Bing. 6; 15 E. C. L. 345; Cocks v. Nash, 9 Bing. 723; 23 E. C. L. 439; Smith v. Winter, 3 M. & W. 309; Goodliff v. Fuller, 14 M. & W. 4; Powell v. Bradbury, 4 C. B. 541; 56 E. C. L. 541; Pritchett v. Smart, 7 C. B. 625; 62 E. C. L. 625; *Ex parte* Partridge, 1 H. & W. 350; Pickering v. Noyes, 1 B. & C. 262; 8 E. C. L. 112; Blagg v. Kent, 6 Bing. 614; 19 E. C. L. 179; Parkhurst v. Gosden, 2 C. B. 894; 52 E. C. L. 893.

3. 2 Taylor Ev. (8th ed.), § 1797;

not only where it is asked with a view to establish the original case of the applicant, but also where the object is to obtain material evidence to answer the opponent's case.¹ But a party cannot be subjected to a fishing investigation, to ascertain whether he has books which may contain evidence relating to the merits; nor to a general inquisitorial examination of his books on the chance of something being found which may aid the moving

Hutchinson v. Glover, 45 L. J. Q. B. 120-1; 1 Q. B. D. 138; *Bustros v. White*, 1 Ch. D. 425, *per* Jessel, M. R.; *English v. Tottie*, 45 L. J. Q. B. 138; 1 Q. B. D. 141. But see *Hewitt v. Pigott*, 7 Bing. 400; 20 E. C. L. 179; where, on a new trial, the court allowed the plaintiff an inspection of a deed read in evidence by the defendant at the first trial, but denied it as to another deed, which, at the former trial, was admitted to have been duly executed, but was not offered in evidence.

It is no objection to granting the inspection that a party desires to see and copy a document in his opponent's hands for the purpose of bringing suit upon the same. 1 Whart. Ev. (3d ed.), § 742; *citing* *Blakey v. Porter*, 1 Taunt. 386; *Reid v. Coleman*, 2 Car. & M. 456; *Rowe v. Howden*, 4 Bing. 539, note; *Arundel v. Holmes*, 8 Dowl. 119; *Morrow v. Saunders*, 1 B. & B. 318; 5 E. C. L. 94; *Powers v. Elmendorf*, 4 How. Pr. (N. Y.) 60; *Miller v. Mather*, 5 How. Pr. (N. Y.) 160.

1. 2 Taylor Ev. (8th ed.), § 1795; *Goodman v. Harvey*, 3 New Rep. 512.

In the following cases an inspection was granted or favored: *Scott v. Walker*, 2 E. & B. 555; 75 E. C. L. 555; *Rayner v. Allhusen*, 2 L. M. & P. 95, *per* Erle, J.; *Galsworthy v. Norman*, 21 L. J. Q. B. 70, *per* Erle, J.; *London Gas Light Co. v. Vestry of Chelsea*, 28 L. J. C. P. 275; 6 C. B., N. S. 411; 95 E. C. L. 411; *Hunt v. Hewitt*, 7 Exch. 236; *Riccard v. Inclosure Com'rs*, 4 E. & B. 329; 82 E. C. L. 328; *Daniel v. Bond*, 9 C. B. N. S. 716; 99 E. C. L. 716; *Baker v. London, etc., R. Co.*, 37 L. J. Q. B. 53; L. R., 3 Q. B. 91; 8 B. & S. 645; *Fraser v. Burrows*, 46 L. J. Ex. 501; *Doe v. Langford*, 1 Bail. Ct. Cas. 37; 21 L. J. Q. B. 217; *Hill v. Philip*, 7 Ex. 232.

In an action against a railway company for injuries sustained on their railway, the plaintiff has been allowed to inspect a variety of reports, descrip-

tive of the accident, made in the ordinary discharge of duty by different servants of the company to their general manager; but in the same case, the court would not sanction the inspection of reports made to the defendants by scientific persons, whom they had consulted in confidence for the purpose of ascertaining how the accident had occurred. *Woolley v. N. London R. Co.*, L. R., 4 C. P. 602; 38 L. J. C. P. 317; *Cossey v. London, etc., R. Co.*, L. R., 5 C. P. 146; 39 L. J. C. P. 174. See also the following cases, which Mr. Taylor (2 Taylor Ev. (8th ed.), § 1795) regards as irreconcilable. *Mahoney v. Widows' L. Assoc. Fund*, L. R., 6 C. P. 252; 40 L. J. C. P. 203; *Richards v. Gellatly*, L. R., 7 C. P. 127; *Fenner v. London, etc., R. Co.*, 41 L. J. Q. B. 313; L. R., 7 Q. B. 767; *Malden v. Gt. North. R. Co.*, L. R., 9 Ex. 300; *Skinner v. Gt. North. R. Co.*, 43 L. J. Ex. 150; L. R. 9 Ex. 298; and *M'Corquodale v. Bell*, 45 L. J. C. P. 329; 1 C. P. D. 471.

Forgery, etc.—In several cases an inspection has been granted to parties claiming that the documents in question are forgeries. *Jackson v. Jones*, 3 Cow. (N. Y.) 17, and note (a), containing a memorandum of the case *Brush v. Gibbon*; *King v. King*, 4 Taunt. 666. And compare *Woolmer v. Devereux*, 2 M. & G. 758; 40 E. C. L. 612. But see *Frank v. Frank*, 1 Houst. (Del.) 245. And it seems that the rule allowing a person to refuse to furnish evidence that may expose him to a criminal charge, does not apply here, but that the document must be produced, and, in a proper case, may be impounded by the court for the purposes of a criminal prosecution. 1 Whart. Ev. (3rd ed.), § 751, *citing* *Woolmer v. Devereux*, 2 M. & G. 758; 40 E. C. L. 612; 3 Scott N. R. 324; *Thomas v. Dunn*, 6 M. & G. 274; 46 E. C. L. 274; *Richey v. Ellis*, Al. & Nap. 111; *Rogers v. Turner*, 21 L. J. Ex. 9; *Boyd v. Petrie*, L. R., 3

party.¹ Moreover, communications made to a party by skilled advisers, such as scientific or medical men, are privileged from inspection.² The mere fact that letters are written to the plaintiff's solicitor "in confidence," and under a pledge not to disclose their contents to any one but the plaintiff and his legal advisers, does not exempt them from inspection; but if they are not merely confidential communications, but are written in answer to inquiries by the plaintiff's solicitor in contemplation of anticipated litigation, they are privileged.³

Whenever an inspection of private documents is desired, the application of the party should be supported by affidavit, stating that he has no copy in his hands or attainable by himself, and describing definitely the other cir-

Ch. 818; *overruling* L. R., 5 Eq. 290.

A partner gave his executors power to continue his interest in the business for two years after his death. In an action by his infant son against them, an order for an inspection of the partnership books, to prepare his complaint, was granted, on an affidavit that the executors had conspired with the decedent's surviving partner, and had sold him the decedent's interest for less money than its value. *Martine v. Albro*, 26 Hun (N. Y.) 559. And see *Hue v. Richards*, 2 Beav. 305.

In an action by a principal against his agent for an accounting, an inspection, with copy, of the books and vouchers of the agent may be ordered, to enable the plaintiff to frame his complaint. *Manley v. Bonnel*, 11 Abb. N. Cas. (N. Y.) 123. And see *Turner v. Bayley*, 34 Beav. 105.

Breach of Promise.—In an action for breach of promise of marriage, the defendant, before pleading, was allowed an inspection of all the letters written by him to the plaintiff during the previous two years. *Stone v. Strange*, 3 H. & C. 541. And see *Pope v. Lister*, L. R., 6 Q. B. 242; *Chute v. Blennerhasset*, 16 Ir. C. L. 9; *Glyn v. Caulfield*, 3 Macn. & G. 463; *Kerr v. Gillespie*, 7 Beav. 572. But in *Hamer v. Sowerby*, 3 L. T. N. S. 734, it was held that the defendant in an action for breach of promise of marriage was not entitled to inspect his own letters to the plaintiff, upon an affidavit that the promise, if any, was contained in the letters. 1 Greenl. Ev. (14th ed.) 648, note a, citing the above case.

1. *People v. Rector*, etc., of Trinity Church, 6 Abb. Pr. (N. Y.) 177; *Walker v. Granite Bank*, 19 Abb. Pr. (N. Y.) 114. And see *ante*, p. 233, note 2.

2. See generally **PRIVILEGED COMMUNICATIONS**; *Woolley v. N. London R. Co.*, L. R., 4 C. P. 602; 38 L. J. C. P. 317; *Cossey v. London, etc.*, R. Co., L. R., 5 C. P. 146; 39 L. J. C. P. 174; *Friend v. London, etc.*, R. Co., L. R., 2 Ex. 437; 46 L. J. Ex. 696; *Pacey v. London Tramways Co.*, L. R., 2 Ex. 440, note; 46 L. J. Ex. 698.

3. See generally **PRIVILEGED COMMUNICATIONS**; 1 Whart. Ev. (3d ed.), § 742; citing *McCorquodale v. Bell*, 1 C. P. D. 471; *Cossey v. London, etc.*, R. Co., L. R., 5 C. P. 146; *Skinner v. Great Northern Railway Co.*, L. R., 9 Ex. 298; *Fenner v. London, etc.*, R. Co., L. R., 7 Q. B. 767.

It has even been held that documents drawn up by the agent of a party for the purpose of being submitted to a solicitor for advice, were privileged from inspection, although they had not been submitted to the solicitor. *Southwark Water Co. v. Quick*, 47 L. J. Q. B. 258; 3 Q. B. D. 315; *The Theodore Korner*, 47 L. J. Adm. 85; L. R., 3 P. D. 162.

And shorthand notes of evidence taken in a former trial have also been held exempt from inspection. *Nordon v. Defries*, 8 Q. B. D. 508; 51 L. J. Q. B. 415. And see the *Palermo*, 9 P. D. 6; 53 L. J. P. D. & A. 6.

For the rule as to criminating documents, see *Pritchett v. Smart*,

cumstances of the case.¹ The affidavit must show that the information sought is essential.² It may be made by any person cognizant of the facts.³

A party, to excuse himself from the discovery of a paper sought by the adverse party, must, by affidavit, swear positively that it is not in his possession or control, or state facts which, with his denial on information and belief, are equivalent to a positive denial.⁴

The rule of practice in equity, allowing a party who produces documents for inspection, upon making affidavit that certain portions do not relate to the matter in question, to seal up such irrelevant parts,⁵ applies also in all other cases of the inspection

7 C. B. 625; 62 E. C. L. 625; and *ante*, p. 238, note 3.

1. 1 Greenl. Ev. (14th ed.), § 559; 1 Whart. Ev. (3d ed.), § 743; Morrow v. Saunders, 1 B. & B. 318; 5 E. C. L. 94; McAllister v. Pond, 15 How. Pr. (N. Y.) 299; People v. Rector, etc., of Trinity Church, 6 Abb. Pr. (N. Y.) 177.

In *New York*, although the proper statutory proceeding is by petition, the application may be made also by motion supported by affidavit. Johnson v. Consolidated Silver Mining Co., 2 Abb. Pr. N. S. (N. Y.) 413; Pindar v. Seaman, 33 Barb. (N. Y.) 140; Exchange Bank v. Monteath, 4 How. Pr. (N. Y.) 280. But see Dole v. Fellows, 5 How. Pr. (N. Y.) 451; Follett v. Weeds, 3 How. Pr. (N. Y.) 303.

2. Imperial Gas Co. v. Clarke, 7 Bing. 95; 20 E. C. L. 59; Kaupe v. Isdell, 3 Robt. (N. Y.) 699; Stanton v. Delaware Mut. Ins. Co., 2 Sandf. (N. Y.) 662. And see Davis v. Dunham, 13 How. Pr. (N. Y.) 425; Morrison v. Sturges, 26 How. Pr. (N. Y.) 177.

An affidavit on which a motion for a discovery of books and papers is made, which merely alleges that there are in the possession of the defendants various letters, receipts, and accounts, in the handwriting of the moving party, "containing evidence in relation to the subject of the action," and "to the merits of the action," is not sufficient to enable the court to pass upon the question whether the contents of such books and documents are at all material as evidence in regard to any issue in the action. The plaintiff is not entitled to the inspection of all such books, merely to obtain informa-

tion how, or in reference to what matters, to get other evidence. Merguelle v. Continental Bank Note Co., 7 Robt. (N. Y.) 77.

A motion for an order compelling defendant to deliver to plaintiff a copy of a printed book, in an action for a libel contained in the book, was denied because the affidavit did not show what was stated in the book, nor specify any particular information desired, so that the court could order a sworn copy to be delivered, and because the plaintiff was not entitled to the whole book, but only to the particular article on which his action was founded. Lynch v. Henderson, 10 Abb. Pr. (N. Y.) 345, note.

3. 1 Whart. Ev. (3d ed.), § 750; Exchange Bank v. Monteath, 4 How. Pr. (N. Y.) 280.

But in *England* it was held under the Common Law Procedure Act (1854), 17 and 18 Vict., c. 125, that a discovery of documents could not be granted except upon the affidavit of the party to the suit; the affidavit of the attorney not being sufficient, although the party himself were abroad. Herschfield v. Clark, 11 Ex. 712; Christopherson v. Lotinga, 15 C. B. N. S. 809; 109 E. C. L. 808.

4. Southart v. Dwight, 2 Sandf. (N. Y.) 672.

5. 3 Greenl. Ev. (14th ed.), § 301; 2 Dan. Ch. Pl. & Pract. (5th Am. ed.) *1824; Gerard v. Penswick, 1 Swanst. 533; Curd v. Curd, 1 Hare 274; Mansell v. Feeny, 2 J. & H. 320; Talbot v. Marshfield, L. R. 1 Eq. 6; 11 Jur. N. S. 901; Napier v. Staples, 2 Moll. (Irish) 270; Dias v. Merle, 2 Paige (N. Y.) 494; Titus v. Cortelyou, 1 Barb. (N. Y.) 444; Elder v. Bogardus, 1 Edm. Sel. Cas. (N. Y.) 110.

of books and papers, whether they belong to individuals or to corporations.¹ But if such irrelevant matter cannot be separated, the party must produce the whole.²

When private writings are produced for inspection under an order of court, the court will not, except in the case of forged documents,³ compel the impounding of the papers, or their deposit with an officer of the court or any third party. The owner of the document is allowed to keep it in his possession. The order simply permits its inspection, while in the hands of the owner or his attorney.⁴ But the inspection is not confined to the opposing party or his attorney. Since it may be necessary in order to determine as to the genuineness or meaning of a writing that it should be examined by others, the court will, on due cause shown, authorize an inspection by other persons, as, for example, by experts.⁵

As to the costs of an inspection, see the authorities below.⁶

b. DOCTRINE UNDER STATUTES.—As even the above relaxation at common law proved insufficient for the ends of justice, statutes have been passed both in *England*,⁷ and very generally in the *United States*, providing for compelling a party to a pending action or other legal proceeding, to allow his opponent an inspection, with the right to make copies, of all documents in his

1. Cook on Stock and Stockholders and Corporation Law (2d ed.), § 516, note 5; Clifford v. Taylor, 1 Taunt. 167; Hill v. Great Western R. Co., 10 C. B. N. S. 148; 100 E. C. L. 148; Bull v. Clarke, 15 C. B. N. S. 851; 109 E. C. L. 851; Earp v. Lloyd, 3 K. & J. 549; Jones v. Andrews, 58 L. T. R. 601; Pyncheon v. Day, 118 Ill. 9.

2. Carew v. White, 5 Beav. 172. But in Pyncheon v. Day, 118 Ill. 9, where the entries in a journal containing the accounts between the parties, were so intermingled with other transactions that an inspection would disclose such outside matters, it was ordered that the defendant present in court a *verbatim* copy of all the journal entries of matters between the parties, giving the page where entered, such copy to be verified by affidavit, and, if the plaintiff should so request, by the certificate of the clerk of the court after actual examination and comparison.

3. See note 1, p. 245.

4. 1 Whart. Ev. (3d ed.), § 749; Thomas v. Dunn, 6 M. & G. 274; 46 E. C. L. 274; Rogers v. Turner, 21 L. J. Ex. 9; Hilyard v. Harrison, 37 N. J. L. 170, 173.

In the last case, the court by Depue, J., said: "At common law and inde-

pendently of recent statutes, courts of law had the power to order inspection of papers which, by the pleadings or by being used in evidence, came within the control of the court. When any deed is showed in court, the deed, by judgment of law, doth remain in court all the term at which it is showed, for the whole term is as one day, and the party may demand oyer during the time it is so in court But the court in exercising this control over papers and documents offered in evidence, will merely grant inspection and examination by the party and his witnesses, either in open court or before an officer of the court, or in the presence of the party producing them, or his attorney, and will not take them from the latter and deliver them into the possession of the other side."

5. 1 Whart. Ev. (3rd ed.), § 752; citing Atty. General v. Whitwood Local Board, 40 L. J. Ch. 590; Swansea Vale R. v. Budd, L. R., 2 Eq. 274; Boyd v. Petrie, L. R., 3 Ch. 818, *qualifying* L. R., 5 Eq. 290.

6. *Costs of Inspection.*—Hill v. Philp, 7 Ex. 232; Davey v. Pendleton, 11 C. B. N. S. 628; 103 E. C. L. 626; Gardner v. Dangerfield, 5 Beav. 389.

7. 14 & 15 Vict., c. 99, § 6; 17 & 18 Vict., c. 125, § 50; Rules of the

possession relating to the pending cause.¹ In the Federal courts, since the rules of the common law (including the common law doctrine as to the inspection of documents) do not form a part of the law of the *United States*,² and since no statute has been enacted covering the case,³ there is at present no means of securing, prior to the trial, an inspection of documents in the hands of an opponent, save by a bill of discovery.⁴

c. POWER OF CONGRESS TO COMPEL PRODUCTION OF PRIVATE PAPERS.—Congress has no power to compel the production of the private books and papers of a citizen for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, and in both cases only upon averments that its rights are in some way dependent for enforcement upon the evidence those books and papers contain.⁵

Supreme Court, 1883, Order XXXI, R. 1.

1. See BILL OF DISCOVERY, vol. 2, p. 206, for a summary of the statutory provisions on this subject in *England* and in the *United States*.

2. Cooley Prin. Const. L. 131; Cooley Const. Lim. (6th ed.) 30-1; *Wheaton v. Peters*, 8 Pet. (U. S.) 591, 658. And see *Ex parte Bollman*, 4 Cranch (U. S.) 75, 93; *United States v. Hudson*, 7 Cranch (U. S.) 32; *United States v. Coolidge*, 1 Wheat. (U. S.) 415; *United States v. Barney*, 5 Blatchf. (U. S.) 294; *United States v. New Bedford Bridge*, 1 Woodb. & M. (U. S.) 401; *United States v. Lancaster*, 2 McLean (U. S.) 431, 433; *Lorman v. Clarke*, 2 McLean (U. S.) 568, 572.

3. Rev. Sta. U. S., § 724, applies, according to the better opinion, to the production of documents at the trial, and not to their production for inspection before trial. See authorities in the next note; and compare pp. 255-6.

4. *Foster* Fed. Pract. 552; *Guyot v. Hilton*, 32 Fed. Rep. 743; *Colgate v. Compagnie Française*, 23 Blatchf. (U. S.) 86; 23 Fed. Rep. 82; *Triplett v. Bank*, 3 Cranch (C. C.) 646; *Merchants' Bank v. State Bank*, 3 Cliff. (U. S.) 201, 204; *Iasigi v. Brown*, 1 Curt. (U. S.) 401. But see *Coit v. North Carolina Gold Amalgamating Co.*, 9 Fed. Rep. 577; *U. S. v. Youngs*, 10 Ben. (U. S.) 264; *Central Bank v. Tayloe*, 2 Cranch (C. C.) 424; *Jacques v. Collins*, 2 Blatchf. (U. S.) 23; *Finch v. Rikeman*, 2 Blatchf. (U. S.) 301.

5. *Kilbourn v. Thompson*, 103 U. S. 168; *In re Pacific Railway Commission*, 32 Fed. Rep. 241; *In re McLean*, 37 Fed. Rep. 648. In the second of the

above cases the court by Field, J., said: "Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value. The law provides for the compulsory production, in the progress of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others, and also, in certain cases, for the seizure of criminal papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained, and their contents made known, against the will of the owners. In the recent case of *Boyd v. U. S.*, 116 U. S. 616, the Supreme Court held that a provision of a law of Congress which authorized a court of the United States in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or that the allegations of the attorney respecting them should be taken as confessed, was unconstitutional and void as applied to suits for penalties or to establish a forfeiture of the party's goods. The court, speaking by Mr. Justice Bradley said: 'Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is

abhorrent to the instincts of an American. It may suit the purpose of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.' The language then used had reference, it is true, to the compulsory production of papers as a foundation for criminal proceedings, but it is applicable to any such production of the private books and papers of a party otherwise than in the course of judicial proceedings, or a direct suit for that purpose. It is forcible intrusion into, and compulsory exposure of, one's private affairs and papers, without judicial process, or in the course of judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans. In his opinion in the celebrated case of *Entick v. Carrington*, reported at length in 19 How. St. Tr. 1029, Lord Camden said: 'Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot, by the laws of *England*, be guilty of a trespass, yet, where papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.' Compulsory process to produce such papers, not in a judicial proceeding, but before a commissioner of inquiry is as subversive of 'all the comforts of society' as their seizure under the general warrant condemned in that case. The principles laid down in the opinion of Lord Camden, said the Supreme Court of the United States, 'affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court with its adventitious circumstances; they apply to all invasions on the part of the government, and its employes, of the sanctity of man's home and the privacies of life.'

The case of *Kilbourn v. Thompson*, 103 U. S. 168, was as follows: The firm of Jay Cooke & Co. were debtors of the United States, and it was alleged that they were interested in a "real-estate pool" in Washington, and that the

trustee of their estate had made a settlement with the associates in the "pool" to the disadvantage of numerous creditors, including the United States. The House of Representatives, by a resolution reciting these facts, authorized the speaker to appoint a committee of five to inquire into the matter and history of the said partnership, and the character of the settlement, with the amount of the property involved, in which Jay Cooke & Co. were interested, and the amount paid, or to be paid, in said settlement, with power to send for persons and papers, and report to the House. The committee being appointed and organized, a subpoena was issued to one Kilbourn, commanding him to appear before the committee to testify touching the matters to be inquired into, and to bring with him certain designated records, papers, and maps. Kilbourn, being asked on his appearance before the committee, to state the names of the five members of the partnership, and where each resided, refused to answer the question, or to produce the books. The committee reported the matter to the House, and it ordered the Speaker to issue his warrant, directed to the Sergeant-at-Arms, to arrest Kilbourn and bring him before the bar of the House to answer for contempt. On being brought before the House, Kilbourn persisted in his refusal to answer the question, and to produce the books and papers required. He was thereupon held to be in contempt, and committed to the custody of the Sergeant-at-Arms until he should signify his willingness to comply with the requirements of the committee. And it was ordered that in the meantime he should be confined in the common jail of the District of Columbia. He was accordingly confined in jail for 45 days, when he was released on *habeas corpus* by the chief justice of the Supreme Court of the District of Columbia. Upon his release he sued the Speaker of the House, the members of the committee, and the Sergeant-at-Arms, for his forcible arrest and confinement. The defendants pleaded the facts recited, to which the plaintiff demurred. The demurrer was overruled, and judgment ordered for the defendants. On a writ of error to the Supreme Court, the judgment was affirmed as to all the defendants except the Sergeant-at-Arms. They, being members of the House, were held to be protected from prosecution for their action. But, as to

II. PRODUCTION OF DOCUMENTS AT TRIAL.—1. Public Documents.—a.

JUDICIAL WRITINGS.—Judicial writings may be divided into records and *quasi* records, the latter class embracing depositions, affidavits, bills, answers, orders, decrees, verdicts, judgments of inferior courts, rules of courts, writs, testaments, letters of administration, and certain other documents, which, although not strictly records, partake of their nature and are subject generally to the same rules of evidence.¹ As to both classes the doctrine

Thompson, the judgment was reversed, and the cause remanded for further proceedings. The conclusion reached in the the Supreme Court, after careful consideration, was that the subject-matter of the investigation was judicial, and not legislative, and that there was no power in Congress, or in either house, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, to investigate the affairs of that partnership, and, consequently, no authority to compel a witness to testify on the subject. "The House of Representatives," said the court, by Miller, J., "has the sole right to impeach officers of the government, and the Senate to try them. Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases. Whether the power of punishment in either house by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either house, unless his testimony is required in a matter in which that house has jurisdiction to inquire, and that we are equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.

. . . If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constitution to the judicial, and not to the legislative department of the government. We think it equally clear that

the power asserted is judicial and that it is not legislative. . . . The resolution adopted as a sequence of this preamble shows no hint of any intention of final action by Congress on the subject. In all the argument of the case, no suggestion has been made of what the House of Representatives or the Congress could have done in the way of remedying the wrong, or securing the creditors of Jay Cooke & Co., or even the United States. Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By fruitless we mean that it could result in no valid legislation on the subject to which the inquiry referred."

When the case went back to the Supreme Court of the District of Columbia, and was tried, the plaintiff recovered a verdict for \$60,000 against the Sergeant-at-Arms. A new trial having been granted for excessive damages, the plaintiff recovered on the second trial a verdict for \$37,500. This amount was subsequently reduced to \$20,000, which was paid by order of Congress, with interests and costs of suit. 23 Sts. at Large 467; MacArthur & Mackey, 416, 432.

"This case," says Field, J., in *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 253, "will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a Congressional committee. The courts are open to the United States as they are to the private citizen, and both can there secure, by regular proceedings, ample protection of all rights and interests which are entitled to protection under a government of a written constitution and laws."

1. 2 Taylor Ev. (8th ed.), § 1534; 4 Min. Inst. (2d ed.) *718.

is the same, that they are generally not producible in court, but are proved by copies,¹ and this for several reasons: *first*, because to remove them might lead to their loss or mutilation; *secondly*, because being of interest to many persons, they might be wanted as evidence in different places at the same time; and, *thirdly*, because of the public character of the facts they contain, and the consequent facility in detecting any fraud or error in the copies made of them.² But statutes allowing copies of such records to be admitted as evidence do not exclude the production of the originals, when properly authenticated.³ A judicial writing is producible at the trial only when the cause is in the same court whose record it is, or when it is the subject of proceedings in a superior or appellate court of the same jurisdiction.⁴ And although copies are generally receivable as evidence in lieu of the original, there are two cases in which the original record itself must be produced: viz, *first*, where issue has been joined on a defense or reply of *nul tiel record*, in some cause in a court to which the disputed record belongs;⁵ and, *secondly*, where a person is indicted for perjury in a deposition, affidavit, or answer in chancery, or for forgery with respect to any record.⁶ In either of these cases the original document—unless it be shown that

1. But judgments of inferior courts may be proved at the trial by producing from the proper custody the book or minutes containing the proceedings. 1 Greenl. Ev. (14th ed.), § 513. So also depositions in chancery are producible at the trial; as are also the original minutes or memorial of the grant of letters of administration, in the absence of a formal record; and writs before they have been returned. 1 Greenl. Ev. (14th ed.), §§ 516, 519, 521.

2. 1 Greenl. Ev. (14th ed.), §§ 91, 482, 484; 2 Taylor Ev. (8th ed.), §§ 439, 1534, 1598; 4 Min. Inst. (2d ed.), *715; *Dunham v. Chicago*, 55 Ill. 357; *Berry v. Raddin*, 11 Allen (Mass.) 577; *Camden, etc., R. Co. v. Stewart*, 4 Green (N. J.) 343; *Davis v. Gray*, 17 Ohio St. 330; *Curry v. Raymond*, 28 Pa. St. 144; *Coons v. Renick*, 11 Tex. 134; *Winers v. Laird*, 27 Tex. 616; *Bovee v. McLean*, 24 Wis. 225. And see *Lord Melville's Case*, 29 How. St. Tr. 683-5; *Rex v. Lord George Gordon*, 2 Doug. 593, and note 3; *Jones v. Randall*, Lofft 383, 428; *Cowp.* 17.

3. 1 Greenl. Ev. (14th ed.), § 502, note b; *Gray v. Davis*, 27 Conn. 447; *Britton v. State*, 54 Ind. 535; *Odiorne v. Bacon*, 6 Cush. (Mass.) 185; *Vose v. Manly*, 19 Me. 331; *State v. Bartlett*, 47 Me. 396; *Folsom v. Cressey*, 73 Me. 290; *Müller v. Hale*, 26 Pa. St. 432;

Ballard v. Thomas, 19 Gratt. (Va.) 18.

4. 1 Greenl. Ev. (14th ed.), § 502; 1 Whart. Ev. (3d ed.), § 106; 4 Min. Inst. (2d ed.), *715; *Pitt v. Knight*, 1 Saund. 99; *Adams v. State*, 11 Ark. 466; *Harper v. Rowe*, 53 Cal. 233; *Gray v. Davis*, 27 Conn. 447; *State v. Bartlett*, 47 Me. 396; *Ward v. Saunders*, 6 Ired. (N. Car.) 382; *Burk v. Tregg*, 2 Wash. (Va.) 216; *Anderson v. Dudley*, 5 Call (Va.) 529; *Ballard v. Thomas*, 19 Gratt. (Va.) 18.

One court has no authority, as a rule, to require the production before itself of documents or papers on file in another court, and, *a fortiori*, such order cannot be made for their production before some other court entirely beyond the control of the court making the order. *Wright v. Dunklin*, 83 Ala. 317.

5. 2 Taylor Ev. (8th ed.), § 1535.

6. *Rex v. Howard*, 1 M. & Rob. 189; *Rex v. Morris*, 2 Burr. 1189; *Rex v. Benson*, 2 Camp. 508; *Rex v. Spencer*, Ry. & M. 97; *Crook v. Dowling*, 3 Doug. 77; *Stratford v. Greene*, 2 Ball & B.; *Garvin v. Carroll*, 10 Ir. Law R. 330; *Lady Dartmouth v. Roberts*, 16 East 340. In this last case the judges intimated an opinion that the same strictness was necessary in actions for malicious prosecution; but this would seem to be a mistake. 2 Taylor Ev.

the prisoner has got possession of it, or that it has been lost or destroyed,¹—must be actually produced.

b. NON-JUDICIAL WRITINGS.—These also, for the same reasons as in the case of judicial writings, are, with a few exceptions, not producible at the trial. Among the exceptions are acts of State,² and official registers,³ which, however, may also be proved by copies.⁴ But ordinarily such books, belonging to a particular custody, are not taken from it except by special authority granted only in cases where inspection of the book itself is necessary for the purpose of identifying it, or of determining some question arising upon the original entry, or of correcting an error which has been duly ascertained.⁵

2. Semi-public Documents.—As a general rule, these are produced at the trial in the same manner as private documents.⁶

3. Private Documents.—*a. DOCUMENTS IN THE HANDS OF THE PARTY.*—Where writings are in the possession of a party desiring to use them at the trial, he has nothing to do but to produce them; and since parol evidence of the contents of writings cannot be given as primary proof, a party relying upon a document can

(8th ed.), § 1535, note 7; *Purcell v. McNamara*, 1 Camp. 200.

1. *Reg. v. Milnes*, 2 Fost. & Fin. 10.

2. For the documents included under this head, see *supra*, p. 229, note 4.

3. For the various books and papers comprised under official registers, see *supra*, p. 229, note 5.

4. 1 Greenl. Ev. (14th ed.), § 479; 2 Taylor Ev. (8th ed.), §§ 1526–7.

5. 1 Greenl. Ev. (14th ed.), § 484; 2 Taylor Ev. (8th ed.), § 1598.

6. But it seems that the president or other officer of a corporation, which is a party to an action, cannot be compelled by a *subpœna duces tecum* issued by the adverse party to produce at the trial the books and papers of the corporation. And this rule includes the clerk or cashier of a bank. *Bank of Utica v. Hillard*, 5 Cow. (N. Y.) 153, 419; *LaFarge v. LaFarge Fire Ins. Co.*, 14 How. Pr. (N. Y.) 26, 31; *Central Nat. Bank v. White*, 37 N. Y. Super. Ct. 297. But see *U.S. Express Co. v. Henderson*, 28 N. W. Rep. 426.

In *Bank of Utica v. Hillard*, 5 Cow. (N. Y.) 153, the court by Savage, C. J., said: "The obligation of Colling [a bank clerk] to produce the books, upon the *duces tecum*, depends on the question, whether they were in his possession and under his control. He was the mere clerk of the plaintiffs, and in that character had no such property in, or possession of, the books as im-

posed the obligation to bring them. They were under control of the cashier, who might forbid their removal, or place them beyond the reach of the witness."

In *Bank of Utica v. Hillard*, 5 Cow. (N. Y.) 419, the court said: "The course for proving the books or papers of the bank, where it is the adverse party, is to give notice to produce them, and on its non-compliance, to show the contents by inferior evidence as in other cases. . . . The books are ordinarily in the possession of the cashier. How? He holds them as the officer, the agent, or servant of the bank in the same manner as an attorney holds the papers of his client. The cases in which the production of papers may be coerced by *subpœna* are where they are the property of a competent witness, or, at least, where they do not belong exclusively to the adverse party. When he can say 'these are my papers,' we will not compel one who happens to have the temporary possession of them, in the right of the party, to produce them on *subpœna*."

In *LaFarge v. LaFarge Fire Ins. Co.*, 14 How. Pr. (N. Y.) 26, 31, the court by Bosworth, J., said: "The proper place for the books and papers of a corporation is the office where the business to which they relate is transacted. No officer of the corporation, as

prove it no otherwise than by producing it, unless he is able to give such satisfactory reason for its non-production as will justify him in having recourse to secondary evidence.¹

b. DOCUMENTS IN THE HANDS OF THE ADVERSE PARTY.—Where the writing is in the power of the adverse party, there is, in general, no method at common law of compelling him to produce it, since he cannot be forced to give evidence against himself;² but the practice is, in such cases, to give him or his attorney a notice to produce the document, in order that, if it is not brought forward at the trial, secondary evidence of its contents may be admissible.³ It remains only to add that after notice to

such, has power or authority, on general principles, to use or control them, except in such manner and at such place as may be requisite to the proper performance of the duties imposed upon him by the corporation. He has no right by virtue of his position and office, and no obligation is imposed upon him by the service of such a subpoena, to remove the books and papers of his principal from the office in which they are required to be kept. It is generally as important to third persons, as to an officer of a corporation, and often of more importance, that its books and papers should not be subjected to the hazard of being lost or injured by being taken to a place of trial, and that they should be at all times retained in its office for use and reference there. Very serious consequences might result, if its officers were held to have the right, and to be under an obligation, to carry them to any part of the State, in obedience to a *subpoena duces tecum*."

But in *U. S. Express Co. v. Henderson*, 69 Iowa 40, it was held that a servant of a corporation might be required by subpoena to produce corporation books within his control, and that he could not refuse to produce the books because they would incriminate his employers.

1. 1 Greenl. Ev. (14th ed.), §§ 557, *et seq.*; 2 Taylor Ev. (8th ed.), § 1816; 1 Whart. Ev. (3d ed.), § 60. Mr. Taylor thus enumerates the cases in which the contents of documents in the hands of the parties may be established by secondary evidence: *first*, when the original writing is destroyed or lost; *second*, when its production is physically impossible, or, at least, highly inconvenient; *third*, when the law raises a strong presumption in favor of the existence of the document; *fourth*, when the papers are voluminous, and it is nec-

essary to prove only their general results; and *fifth*, when the question arises upon the examination of a witness on the *voir dire*. 1 Taylor Ev. (8th ed.), § 428. See also *LOST PAPERS*, vol. 13, p. 1059.

2. Since the abolition in many jurisdictions of the common law disqualification of parties to be witnesses, it seems that a *subpoena duces tecum* will be available, as well in the case of an adverse party, as of a third person, to secure the production of documents at the trial. 1 Thomp. Tr., § 731, *citing Merchants' Bank v. State Bank*, 3 Cliff. (U. S.) 201, in which case Clifford, J., refused to make an order under Rev. Sts. U. S., § 724, requiring the defendants to produce certain documents in their possession, until a *subpoena duces tecum* should have first been served upon them and should have failed. And see *Bishoffsheim v. Brown*, 29 Fed. Rep. 341, 343, in which the court by Wallace, J., said: "As a witness a party can be compelled by a *subpoena duces tecum* to produce books, documents, and papers in his possession the same as any other witness."

3. 1 Greenl. Ev. (14th ed.), § 560; 1 Taylor Ev. (8th ed.), §§ 440, *et seq.*, 1816; 1 Whart. Ev. (3d ed.), §§ 152, *et seq.*; *Rex v. Watson*, 2 T. R. 201; *Partridge v. Coates*, Ry. & M. 156; *Hanson v. Eustace*, 2 How. (U. S.) 653; *Bethea v. McCall*, 3 Ala. 449; *Merwin v. Ward*, 15 Conn. 377; *Avan v. Fry*, 69 Ind. 91; *Day v. Floyd*, 130 Mass. 488; *Spring Garden Ins. Co. v. Evans*, 9 Md. 1; *Jackson v. Livingston*, 9 Wend. (N. Y.) 136; *Trotti v. Hobby*, 42 Tex. 349; *Bonner v. Ins. Co.*, 13 Wis. 677.

See also *NOTICE TO PRODUCE PAPERS*, vol. 16, p. 843, where this topic is fully treated.

Production of Documents in Federal

Courts.—In the Federal Courts, the production of documents at the trial is regulated by U. S. Rev. Sts., § 724, as follows: "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

For the proper practice under this statute, see *Lowenstein v. Carey*, 12 Fed. Rep. 811, in which case the court by Hill, J., said: "The proper practice under this statute is for the party requiring the production of such books or writings to spread on the motion docket a motion for a rule upon the opposite party requiring the production of the books or papers desired. The motion should describe the books or papers with as much certainty as may be, and should further state that, according to the best of the mover's knowledge or information and belief, the books or papers called for will tend to prove the issue in favor of the mover. The motion should further state some fact or facts which the books or papers will tend to prove, pertinent to the issue, which issue should be made up before the motion is made, so that the court may determine the pertinency of the fact or facts which it is alleged the books or papers will tend to prove. What they will prove can only be determined after their production. The truth of the allegations stated in the motion should be verified by the affidavit of the mover or his agent, and the materiality of the testimony sought by the production of the books or papers, certified to by the counsel of the mover. Notice must be given the party required to produce the books or writings, or his attorney, a sufficient length of time for the party to appear and show cause, if any he has, why the rule shall not be made, when he may, in opposition to the rule, show by affidavit that he has no such books or

papers under his control, or any other reason he may have why the rule shall not be made. If any issue is made upon the motion, the court will hear proof, and grant or refuse the rule according to the proof and nature of the case."

It may be premised that as the production of books and papers in the Federal courts is expressly regulated by the above statute, it is not a matter as to which, under U. S. Rev. Sts., § 914, the practice of the State courts can be adopted. *U. S. v. Hutton*, 10 Ben. (U. S.) 268; *Beardsley v. Littell*, 14 Blatchf. (U. S.) 102; *Gregory v. Chicago, etc., R. Co.*, 3 McCrary (U. S.) 374; 10 Fed. Rep. 529; *Paine v. Warren*, 33 Fed. Rep. 357.

The remedy given by this section is cumulative, and is not intended to impair other remedies. *U. S. v. Hutton*, 10 Ben. (U. S.) 268; and see *Colgate v. Compagnie Française*, 23 Blatchf. (U. S.) 86; 23 Fed. Rep. 82. This section refers only to civil cases at common law, and does not apply to equity cases or to suits in admiralty. *U. S. v. Babcock*, 3 Dill. (U. S.) 566; *Bischoffsheim v. Brown*, 24 Blatchf. (U. S.) 175; 29 Fed. Rep. 341; *U. S. v. 28 Packages, Gilp.* (U. S.) 306. But see, as to equity cases, *Coit v. North Carolina Gold Amalgamating Co.*, 9 Fed. Rep. 577. It applies to bankruptcy cases, to cases under revenue laws, and under forfeiture proceedings. *In re Mendenhall*, 9 Nat. Bank Reg. 285; *U. S. v. Hughes*, 12 Blatchf. (U. S.) 553; *U. S. v. Distillery*, 6 Biss. (U. S.) 483; *U. S. v. Mason*, 6 Biss. (U. S.) 350; *U. S. v. 469 Barrels*, 10 Int. Rev. Rec. 205. But see as to the two latter, *U. S. v. 26 Packages, Gilp.* (U. S.) 306; *Finch v. Rikeman*, 2 Blatchf. (U. S.) 301; *Boyd v. U. S.*, 116 U. S. 616.

Since the books or writings are to be produced at the trial, the order must so require; and the application to the court and the order thereon, must be made before the trial. *Sampson v. Johnson*, 2 Cranch (C. C.) 107; *U. S. Bank v. Kurtz*, 2 Cranch (C. C.) 342; *Merchants' Bank v. State Bank*, 3 Cliff. (U. S.) 201; *Iasigi v. Brown*, 1 Curt. (U. S.) 401; but see *Central Bank v. Tayloe*, 2 Cranch (C. C.) 427. The party asking for such books, etc., has no right to examine them before trial. *Fost. Fed. Pract.* § 372; *Triplett v. Bank*, 3 Cranch (C. C.) 646; *Merchants' Bank v. State Bank*, 3 Cliff. (U.

S.) 204; *Paine v. Warren*, 33 Fed. Rep. 357; *Iasigi v. Brown*, 1 Curt. (U. S.) 401; *Guyot v. Hilton*, 32 Fed. Rep. 743. But *contra*, 1 Thomp. Tr., § 734; *citing U. S. v. Youngs*, 10 Ben. (U. S.) 264; *U. S. v. Hutton*, 10 Ben. (U. S.) 269; *Central Bank v. Tayloe*, 2 Cranch (C. C.) 424; *Jacques v. Collins*, 2 Blatchf. (U. S.) 23; *Finch v. Rikeman*, 2 Blatchf. (U. S.) 301. And see *Gregory v. Chicago, etc., R. Co.*, 3 McCrary (U. S.) 374; 10 Fed. Rep. 529; *Bronson v. Kenney*, 3 McLean (U. S.) 180.

The "due notice" required to be given of the motion may be directed to the party or his attorney, but must be served a reasonable time before the production of the paper is required, and must contain information that a motion will be made for a nonsuit, or for a judgment by default. *Geyger v. Geyger*, 2 Dall. (U. S.) 332; *U. S. v. 469 Barrels*, 10 Int. Rev. Rec. 205; *Macomber v. Clarke*, 3 Cranch (C. C.) 347; *Bas v. Steele*, 3 Wash. (U. S.) 381. If the notice was not served a sufficient length of time before the trial, the trial may be postponed. *Geyger v. Geyger*, 2 Dall. (U. S.) 332; *U. S. Bank v. Kurtz*, 2 Cranch (C. C.) 342. A court is not authorized to render a judgment of nonsuit upon the failure of the party to comply with the notice. The notice is merely a preliminary proceeding to enable the party to bring before the court the motion for the order to produce; and when that motion is made, the party called on has a right to be heard, and he is not bound to produce the books called for until the court shall order him to do so. *Thompson v. Selden*, 20 How. (U. S.) 194, 198.

The motion requisite must be made before the day of trial. *Central Bank v. Tayloe*, 2 Cranch (C. C.) 427; *U. S. Bank v. Kurtz*, 2 Cranch (C. C.) 342; *Iasigi v. Brown*, 1 Curt. (U. S.) 401; *Sampson v. Johnson*, 2 Cranch (C. C.) 107. The power to grant a motion for the production of books or writings is discretionary, but should be firmly exercised in a proper case. The court may at once refuse the motion, or make the rule absolute. Where an attempt to conceal or destroy the books or papers is shown, the rule should be made absolute without delay; but in the absence of fraudulent intent, and of certainty as to their pertinency, an order *nisi* should be made, which leaves the party to show cause at the trial for not producing. *Merchants'*

Bank v. State Bank, 3 Cliff. (U. S.) 201; *Iasigi v. Brown*, 1 Curt. (U. S.) 401; *Dunham v. Riley*, 4 Wash. (U. S.) 126. It has been held in a case which supports the right of the party to an inspection before trial, that the order may require the adverse party to produce the documents and leave them with the clerk, or else to furnish copies to his opponent. *Jacques v. Collins*, 2 Blatchf. (U. S.) 23.

The court cannot compel compliance with the order, since the penalty for a failure to produce the documents is nonsuit or default. The cause must be at issue, and the circumstances must be those in which a discovery would be decreed in chancery. The applicant must show that the paper exists, that it is in possession or control of the party, and that it is pertinent to the issue. These facts may be shown by an *ex parte* affidavit of the applicant, but not by affidavit of his attorney. *Merchants' Bank v. State Bank*, 3 Cliff. (U. S.) 201; *Triplett v. Bank*, 3 Cranch (C. C.) 646; *Jacques v. Collins*, 2 Blatchf. (U. S.) 23; *Finch v. Rikeman*, 2 Blatchf. (U. S.) 301; *Iasigi v. Brown*, 1 Curt. (U. S.) 401; *Bas v. Steele*, 3 Wash. (U. S.) 381; *U. S. v. 28 Packages*, Gilp. (U. S.) 306; *Buell v. Conn. Ins. Co.*, 1 Cin. L. Bul. 51.

Although a bill of discovery would not lie against the United States, it seems that an order under this statute may be made against them. *U. S. v. Youngs*, 10 Ben. (U. S.) 264; *U. S. v. Hutton*, 10 Ben. (U. S.) 269.

Under this section the right to relief by bill of discovery is taken away only where a complete remedy is given by the statute. *U. S. v. Hutton*, 10 Ben. (U. S.) 269; *Bryant v. Leyland*, 6 Fed. Rep. 127. That a bill of discovery has been filed, is no bar, nor is the fact that a copy of the paper has been filed in answer to the bill of discovery, unless the discovery has been completely effectual. *Iasigi v. Brown*, 1 Curt. (U. S.) 401. The time, place, and manner of the production, is in the discretion of the court, which is governed by the practice in chancery. *Gregory v. Chicago, etc., R. Co.*, 10 Fed. Rep. 529; 3 McCrary (U. S.) 374.

For additional adjudications under this statute, see *Hylton v. Brown*, 1 Wash. (U. S.) 208; *Vasse v. Miffin*, 4 Wash. (U. S.) 519; *Maye v. Carbery*, 2 Cranch (C. C.) 336; *U. S. Bank v. Wilson*, 3 Cranch (C. C.) 213; *Waller v. Stewart*, 4 Cranch (C. C.) 532; *U.*

the opponent to produce papers in his possession or power, the regular time for calling for their production is not until the party requiring them has entered upon his case; until which time the other party may in strictness refuse to produce them, and no cross-examination as to their contents is then allowable.¹ Still to insist upon this rule is considered rigorous, and, as a close adherence to it would be inconvenient, judges are unwilling to enforce it.²

In many of the States, however, and in the Federal courts also, the above rule at common law has been altered by statute, and the courts have been empowered to secure by an order the production at the trial of such documents in the hands of one party as may be material to his opponent's case.³

c. DOCUMENTS IN THE HANDS OF THIRD PARTIES.—Where papers are in the hands of a third party, who has a right to keep them, their production at the trial may be constrained in favor of a party who has an interest in them, and a consequent title to use them in evidence, by a *subpœna duces tecum*.⁴

PROFANITY.—See BLASPHEMY, vol. 2, p. 423.

PROFESSION; PROFESSIONAL.—(Compare BUSINESS, vol. 2, p. 699; EMPLOYMENT, vol. 6, p. 637; LICENSE, vol. 13, p. 538; OCCUPATION; TRADE)—See note 5.

PROFITS.—(See also MESNE PROFITS; LOSSES).—The advantage realized in money by the sale of property at a price exceeding the cost;⁶ or the receipts of any enterprise or busi-

S. v. Three Tons of Coal, 6 Biss. (U. S.) 379; Williams Mower Co. v. Raynor, 7 Biss. (U. S.) 245; Beardsley v. Littell, 14 Blatchf. (U. S.) 105; Johnson v. Donaldson, 18 Blatchf. (U. S.) 287; 3 Fed. Rep. 22; Schmieder v. Barney, 32 Fed. Rep. 657; Brewster v. Spring Co., 34 Fed. Rep. 679.

1. 1 Greenl. Ev. (14th ed.), § 563; Graham v. Dyster, 2 Stark. 23; Sinclair v. Gray, 9 Fla. 71.

It is premature before the jury are sworn and the trial commenced for either party to call on the other to produce a paper which he has been notified to produce on the trial. Hylton v. Brown, 1 Wash. (U. S.) 298.

2. 2 Taylor Ev. (8th ed.), § 1817; Sideways v. Dyson, 2 Stark. 49; 3 E. C. L. 312; Calvert v. Flower, 7 C. & P. 386; 32 E. C. L. 350.

3. See, for instance, Rose v. King, 5 S. & R. (Pa.) 241; Congdon v. Aylsworth (R. I. 1888), 15 Atl. Rep. 73. And 19 C. of L.—17

compare BILL OF DISCOVERY, vol. 2, p. 206.

4. 1 Greenl. Ev. (14th ed.), § 558; 2 Taylor Ev. (8th ed.), §§ 1240, et seq.; 1 Whart. Ev. (3d ed.), §§ 150, 377.

.See SUBPœNA.

5. **Professional Artist.**—A milliner is not a "professional artist," within the meaning of a United States immigration act. United States v. Thompson, 41 Fed. Rep. 28.

Professional Capacity.—See CAPACITY, vol. 2, p. 722, n.

Professional Employment can only relate to some of those occupations universally classed as professions, the general duties and character of which courts must be expected to understand judicially. Pennock v. Fuller, 41 Mich. 155. See also Bronson v. Newberry, 2 Doug. (Mich.) 52; People v. McAllister, 19 Mich. 217.

Professional Men.—LIBEL AND SLANDER, vol. 13, p. 312.

6. Abbott's Law Dict. Matthew v. Crosby, 56 N. H. 21.

ness exceeding the expenses incident to it.¹ The advantage

In estimating the profits of a corporation the assets, resources, and funds of the company must consist of cash on hand, and other property, and if such assets exceed the liabilities, then profit exists. *Hubbard v. Weare*, 30 Am. & Eng. Corp. Cas. 176; *Miller v. Beavish*, 69 Iowa 278. See also *Lee v. Neuchatel Asphalt Co.*, 27 L. J., Ch. 623; *People v. Savings Union*, 72 Cal. 203.

Under the *English Income Tax Act* 5 & 6 Vict., ch. 35, §§ 60-100, the "profits" assessable is the amount got from the property or business, minus the cost of getting it. Per *Jessel, M. R.*; *Mersey Docks v. Lucas*, 32 W. R. 34. See further *Erichsen v. Last*, 8 Q. B. Div. 414; *Russell v. Town & County Bank*, 58 L. J., P. C. 8. In the decision in *Mersey Docks v. Lucas*, it is laid down that excess of earnings over expenditures are profits, even though such excess had to be applied in reduction of a past debt.

Partnership or Company Established for Any Purpose of Profit.—A mutual benefit society formed by several persons, being partners or shareholders who subscribe money and carry on business substantially for the benefit of the individual members among themselves, and not for the benefit of the society, is not such a partnership or company. *Baer v. Bromley*, 11 Eng. L. & Eq. 414; 16 Jur. 450. See also *Commercial League Assoc. v. People*, 90 Ill. 166; *State v. Mutual Protection Assoc.*, 26 Ohio St. 19. In the following cases held to be such a company: *Farmer v. State*, 69 Tex. 561; *Bolton v. Bolton*, 73 Me. 299; *State v. Critchett*, 37 Minn. 13; *State v. Farmers' etc. Assoc.*, 18 Neb. 281. See also *BENEFICIAL ASSOCIATIONS*, vol. 2, p. 124.

Profits of a Partnership include the rise in value of partnership assets. *Robinson v. Ashton*, L. R., 20 Eq. 35. As to what sharing of profits constitutes the relation of partnership, see *PARTNERSHIP*.

1. *Abbott's Law Dict.*; *People v. Niagara Co.*, 4 Hill (N. Y.) 19; *Freeman v. Freeman*, 142 Mass. 102; *Providence Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788.

The word "profits" has a fixed and definite meaning, and imports the net amount made after deducting any

proper expenses incident to the business. *Jones v. Davidson*, 2 Sneed (Tenn.) 452. The usual, ordinary, and correct meaning of the word "profits" is the excess of receipts over expenditures; that is, net earnings. *Connolly v. Davidson*, 15 Minn. 519.

The expression "profits of a business" means the receipts, deducting current expenses; and is equivalent to net receipts. Depreciation of buildings in which the business is carried on, though they were erected by expenditure of the capital invested, is not ordinarily or necessarily considered in estimating the profits. *Eyster v. Centennial Board of Finance*, 94 U. S. 500.

The profits of a company are not such sum as may remain after the payment of every debt, but are the excess of ordinary receipts over expenses properly chargeable to revenue account. *Mills v. Northern Ry. of Buenos Ayres Co.*, 5 Ch. 621, 631; *Birch v. Cropper, Re Bridgewater Nav.*, 14 App. Ca. 525; *Lee v. Neuchatel Co.*, 58 L. J. Ch. 409.

Profits and Income Distinguished.—It is undoubtedly true that "profits" and "income" are sometimes used as synonymous terms; but strictly speaking, "income" means that which comes in, or is received from any business or investment of capital without reference to the outgoing expenditures; while "profits" generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account. "Income," when applied to the affairs of individuals, expresses the same idea that revenue does when applied to the affairs of a State or nation; and no one would think of denying that our government has any revenue because the expenditures for a given period may exceed the amount of receipts. *People v. Niagara Co.*, 4 Hill (N. Y.) 23.

Within English Income Tax.—After a remarkable conflict of judicial opinion and ultimately by the decision of the House of Lords, Lords Blackburn, Fitzgerald and Bramwell dissenting, it has been ruled that bonuses by an insurance company to participating policy holders, are profits within the meaning of the *English Income Tax Act*. *Last v. London Assur. Co.*, 10 App. Cas. 438. See *New York Ins. Co. v. Stiles*, 14 App. C. 381; *Mersey Loan Co. v.*

which land promises to the owner by way of compensation for its use. The phrase "rents, issues, and profits of lands" does not import that the land has been sold and an advance in price realized.¹

PROFITS À PRENDRE.—See also EASEMENTS, vol. 6, p. 142.

I. Definition, 259.

1. *In General*, 259.

2. *Appurtenant*, 260.

3. *In Gross*, 260.

[261.

II. Distinguished From an Easement,

III. How Acquired or Created, 262.

I. DEFINITION.—1. **In General.**—Profit à Prendre is a right to

Woolton, 4 Times Rep. 164; Gresham Assur. Co. v. Stiles, 24 Q. B. D. 500.

Profits as Stock Dividends.—See DIVIDENDS, vol. 5, p. 736.

Profits Used in Construction.—Monies used by a railroad company to replace an old and worn-out bridge by another of like materials and dimension, are not liable to internal revenue tax, as being "profits used for construction." Hartford etc. R. Co. v. Grant, 9 Blatchf. (U. S.) 542.

Where a wooden bridge is replaced by a much more costly stone bridge, the earnings adequate to pay for the latter, beyond the expense of building anew a like wooden bridge, are to be deemed "profits used for construction." But if the cost of such stone bridge is charged to the expense account of the company, and the whole amount of such account for the year, including such cost, is not more than a proper percentage of the gross receipts of the company to cover all proper ordinary current expenses, and the depreciation of its entire property, such cost is not to be deemed "profits used for construction." Hartford etc. R. Co. v. Grant, 9 Blatchf. (U. S.) 542. See also Grant v. Hartford etc. R. Co., 93 U. S. 225.

Net Profits and profits are, for all legal purposes, synonymous expressions, but the returns themselves are often called gross profits; hence it becomes necessary to call profits net profits to avoid confusion. Lindsay on Partnership 15; Story on Partnership, § 23; Connolly v. Davidson, 15 Minn. 519; Fuller v. Miller, 105 Mass. 103; Wallace v. Bebee, 12 Allen (Mass.) 354. See also NET PROFITS.

Commissions may be considered as profits for some purposes; for example, a participation in commissions

has been held such a participation in profits as to constitute the participants partners. Bouvier's Law Dict. citing Chap v. Cramond, 4 B. & Ald. 663; 2 H. Blackstone 235. Commissions received upon the sale of a pirated map are profits which must be accounted for by the commission merchant on a bill by the proprietor of the copyright. 2 Curt. (U. S.) 608.*

Expected Profits, as the proper subject of insurance, see INSURANCE, vol. 14, p. 326; as the measure of damages, see DAMAGES, vol. 5, p. 32; MARKET VALUE; WARRANTY.

1. Abbott's Law Dict.

Rents and Profits.—The words "rents and profits" in a devise may be so construed as to authorize a sale of the land when necessary to raise a sum so as to effect the object of the testator. Schermerhorne v. Schermerhorne, 6 Johns. Ch. (N. Y.) 73. See LEGACIES AND DEVISES, vol. 13, p. 113. The rents and profits of a trust estate do not include purchase money received by the trustee from a sale of land rescinded through the purchaser's abandonment of the contract. Mansfield v. Alwood, 84 Ill. 497.

In an order against an innocent occupier to account for "rents and profits," the latter word means profits in the nature of rent, and as arising from the land, and not such profits as may have been made by carrying on a business—e. g., a colliery upon the land. Errington v. Morewood, 29 S. J. 320; W. N. (85) 51. See also RENTS AND PROFITS.

"The rents and profits of an estate, the income or net income are all equivalent expressions." Andrews v. Boyd, 5 Me. 202; Earl v. Rowe, 35 Me. 420.

take either the fruit or products of the land of another, or the materials which constitute it.¹

2. Appurtenant.—This right of profit à prendre, if enjoyed by reason of holding a certain other estate, is regarded in the light of an easement appurtenant to such estate.²

3. In Gross.—Where the right of profit à prendre belongs to an individual, distinct from ownership in other lands, it takes the

"Under the term 'profit' is comprehended 'the produce of the soil, whether it arise above or below the surface, as herbage, wood, turf, coal, minerals, stones, also fish in a pond or running water.'" Jones v. Britton (N. Car., 1889), 9 S. E. Rep. 562, following Bouv. L. Dict.

1. Doe v. Wood, 2 B. & Ald. 724; Wait's Actions & Def., vol. 2, p. 655; Pierce v. Keator, 70 N. Y. 421. The right to take sea weed from another's land is the right to a profit à prendre. Hill v. Lord, 48 Me. 99. See Pickering v. Noyes, 4 B. & C. 639; 10 E. C. L. 429; Wickham v. Hawker, 7 M. & W. 63; Littlefield v. Maxwell, 31 Me. 134.

The right to take fish from another's unnavigable stream is a profit à prendre. Cobb v. Davenport, 33 N. J. L. 223; Wickham v. Hawker, 7 M. & W. 63; Waters v. Lilley, 4 Pick. (Mass.) 145; Tinicum Fishing Co. v. Carter, 61 Pa. St. 21. A contract that one may take coal for his salt works from the land of another, is a right of profit à prendre. Huff v. McCauley, 53 Pa. St. 206; Manning v. Wasdale, 5 A. & E. 758; 31 E. C. L. 433; Clark v. Way, 11 Rich. (S. Car.) 621.

Mining.—The grant of an exclusive right to all the coal in a certain lot of land is a corporeal grant—a part of the land itself. But a grant of a right to dig coal in such a lot, and carry it away, is an incorporeal hereditament. A right of profit à prendre, which does not interfere with the right of the owner of the land to mine in the same lot. See generally MINES AND MINING, vol. 15, p. 499.

Examples of Profits a Prendre.—The right to enter upon the lands of another for any of the following purposes has been held to be a right to take a profit in the soil: To cut grass, Viner, tit., Prescription; for pasturage, Cro. Eliz. 180, 363; for the purposes of hunting, Pickering v. Noyes, 4 B. & C. 639; 10

E. C. L. 429; Wickham v. Hawker, 7 M. & W. 63. So also to take away drifting sand from the beach. Blewett v. Tregonning, 3 A. & E. 554; 30 E. C. L. 151; Mervin v. Wheeler, 41 Conn. 25; or to pile wood and lumber thereon for the purpose of sale and shipment, Littlefield v. Maxwell, 31 Me. 134.

A claim to enter another man's land and dig a hole there can hardly be called a "profit à prendre." Maule, J., in Peter v. Daniel, 5 C. B. 568. Washb. on Easem. (4th ed.) *80.

2. Post v. Pearsall, 22 Wend. (N.Y.) 425; Pierce v. Keator, 70 N. Y. 421; Huff v. McCauley, 53 Pa. St. 209; Huntington v. Asher, 96 N. Y. 610; Washb. on Easem., p. 8.

"It would be difficult to treat of easements without embracing the right of taking profits in another's land which one may enjoy in connection with the occupancy of the estate to which such right is united. Washb. on Easem. p. *4.

This right or profit à prendre appurtenant is expressly included in the definition of easements by the court in Ritger v. Parker, 8 Cush. (Mass.) 145. See also Huntington v. Asher, 96 N. Y. 610; Karmuler v. Krotz, 18 Iowa 352; Owen v. Field, 102 Mass. 103; 2 Wait's Actions and Def. 656.

"Still another class of *quasi* easements are profits à prendre. They differ only in the nature of the advantage derived from the servient tenement." 2 Wait's Act. and Def. 656.

"It is immaterial, however, whether we call it" (the right to take iron ore from one estate appurtenant to another) "an easement or a right of profit à prendre annexed to land. It is the same in nature, and is such a right as can be annexed to other land by express grant, and will pass as appurtenant to it." Grubb v. Grubb, 74 Pa. St. 73.

In case of profit à prendre, it seems to be held uniformly that if enjoyed in connection with a certain estate, they

character of an interest or estate in the land itself, rather than that of a proper easement,¹ and may be held in fee, for life, or for years.²

II. DISTINGUISHED FROM AN EASEMENT.—Profits à prendre differ from easements, in that the former are rights of profit, and the latter are mere rights of convenience without profit.³ But the principal distinction is between easements and profits à prendre in gross, the latter being held independently of any dominant

are regarded as easements appurtenant thereto. *Goodrich v. Burbank*, 12 Allen (Mass.) 461.

1. *Post v. Pearsall*, 22 Wend. (N. Y.) 43; Washb. on Easem. p. 9; *Pierce v. Keator*, 70 N. Y. 421; *Huff v. McCauley*, 53 Pa. St. 209; *Huntington v. Asher*, 96 N. Y. 610; *Goodrich v. Burbank*, 12 Allen (Mass.) 460.

"If the easement consists in a right of profit à prendre, if granted to one in gross, it is treated as an estate and may therefore be for life or inheritance." Washb. on Easem. p. 9; *Tinicum v. Carter*, 61 Pa. St. 22.

In *Post v. Pearsall*, 22 Wend. (N. Y.) 433, the court by Walworth, Ch., said: "For a profit à prendre in the land of another, when not granted in favor of some dominant tenement, cannot be said to be an easement, but an interest or estate in the land itself."

2. Washb. on Easem. (4th ed.) *78; *Huff v. McCauley*, 53 Pa. St. 210; *Goodrich v. Burbank*, 12 Allen (Mass.) 461; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21.

Profits à prendre are both assignable and inheritable.

Post v. Pearsall, 22 Wend. (N. Y.) 325; Washb. on Easem. (4th ed.) *79. *et seq.*; *Goodrich v. Burbank*, 12 Allen (Mass.) 461. The grantee in fee of a right of common, in gross, and without number, may alienate it, and it descends to his heirs. *Leyman v. Abeel*, 16 Johns. (N. Y.) 30. See also *Huntington v. Asher*, 96 N. Y. 604; *Phillips v. Rhodes*, 7 Met. (Mass.) 324; *Gloninger Coal Co. v. Franklin*, 55 Pa. St. 14.

3. Abb. L. Dict.; *Gale on Easem.* 1; *Hall's Profits à Prendre* 1; *EASEMENTS*, vol. 6, p. 142; *Huff v. McCauley*, 53 Pa. St. 206; *Blewett v. Tregonning*, 3 A. & E. 554; 30 E. C. L. 151; *Race v. Ward*, 4 E. & B. 702; 82 E. C. L. 700;

Manning v. Wasdale, 5 A. & E. 758; 31 E. C. L. 433.

A profit à prendre is, in its nature, corporeal, and is capable of living, while easements are not, and may exist independently without connection with or being appendant to other property. *Pierce v. Keator*, 70 N. Y. 421; *Post v. Pearsall*, 22 Wend. (N. Y.) 433.

The distinction between an easement and a merely personal right to the profits of land was illustrated in the case of *Pierce v. Keator*, 70 N. Y. 419. In that case the facts were these: The plaintiff's intestate, owning a farm, granted a strip of it to a railroad company, reserving to himself the privilege of mowing and cultivating the surplus ground of the strip not required for railroad purposes. By foreclosure of a mortgage on the farm, it became the property of the defendant. The deed of foreclosure purported to convey all the farm excepting the strip already conveyed to the railroad company. The defendant claimed that by this deed the privilege reserved to the plaintiff's intestate passed to him as an easement appurtenant to the estate, and proceeded to reap and carry away the wheat sowed by the plaintiff's intestate, for which wrong the action was brought. The court of appeals sustained the distinction between easements and rights to the profits of land, holding the reservation in question to be the latter; and as it was not necessary or even useful to the cultivation of the farm, and as it was not to the grantor, as owner of the farm or for the benefit of the farm, or even to the grantor, his heirs and assigns, the reservation created a mere personal privilege which was not appurtenant to the farm, and did not pass under the foreclosure deed.

estate,¹ whereas, for the existence of an easement, two estates, the dominant and servient, are necessary.²

III. HOW ACQUIRED OR CREATED.—Profits à prendre are acquired by grant or prescription,³ and never by custom.⁴

1. *Huntington v. Asher*, 96 N. Y. 604; *Bainb. Mines* (ed. 1871), p. 237. A right of profit à prendre which may be held apart from the possession of land, differs therein from an easement, which requires a dominant tenement for its existence. *Grubb v. Grubb*, 74 Pa. St. 33; *Hill v. Lord*, 48 Me. 96; *Pierce v. Keator*, 70 N. Y. 421; *Hall v. Ionia*, 38 Mich. 498; *Leyman v. Abeel*, 16 Johns. (N. Y.) 30.

2. See EASEMENTS, vol. 6, p. 142.

Taking Water. When a Profit à Prendre and When an Easement.—The right to enter upon the close of another, and take water for domestic purposes, from any natural fountain, as a pond, *Manning v. Wasdale*, 5 A. & E. 758; or a running spring; *Race v. Ward*, 82 E. C. L. 700; has been held to be an easement only, sustainable by proof of custom by the inhabitants. The grounds upon which these decisions rest are, that running water is not a product of the soil, whether above or below the surface, and that it does not remain for any appreciable period of time in any one place. The courts, in these cases, expressly affirm that the right to water in wells, or cisterns, would be an interest in the land, or a right to a profit à prendre. *Hill v. Lord*, 48 Me. 100.

In the following cases the right to water was held to be an easement. *Bissell v. Grant*, 35 Conn. 288; *Spensley v. Valentine*, 34 Wis. 154; *Borst v. Empie*, 5 N. Y. 34.

Although there is a distinction made between the grant of water and of a profit à prendre, where water is as it may be a subject of sale in gross as a thing of value, it does not seem to be violating any principle of law to regard it as a species of profit à prendre, and therefore a subject of separate grant. Washb. on Easem. (4th ed.) *12; *Hall v. Ionia*, 38 Mich. 499; *Goodrich v. Burbank*, 12 Allen (Mass.) 459; *Owen v. Field*, 102 Mass. 100; *Hill v. Shorey*, 42 Vt. 614.

3. *Bird v. Higginson*, 2 Ad. & E. 606; 29 E. C. L. 177; *Worcester v. Green*, 2 Pick. (Mass.) 425; *Bryon v. Whistler*, 8 B. & C. 288; 15 E. C. L.

219. See *Cronkhite v. Cronkhite*, 34 N. Y. 323; *Sheets v. Allen*, 89 Pa. St. 471.

"A right of way, or a right of passage for water (where it does not create an interest in the land), is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, etc. It lies not in livery, but in grant; and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot), otherwise than by deed." *Hewlins v. Shippam*, 5 B. & C. 221; 11 E. C. L. 207. To the same effect are *Duirmeen v. Rich*, 22 Wis. 528; *Cook v. Stearns*, 11 Mass. 533.

"The right reserved being an incorporeal hereditament could pass only by deed, and, were it otherwise, the assignment of such an interest, since the Statute of Frauds, must be in writing." *Thompson v. Gregory*, 4 Johns. (N. Y.) 81.

4. *Smith v. Floyd*, 18 Barb. (N. Y.) 529; *Littlefield v. Maxwell*, 31 Me. 141; *Moor v. Carey*, 42 Me. 29; *Merwin v. Wheeler*, 41 Conn. 24; *Cobb v. Davenport*, 33 N. J. L. 223; *Grimstead v. Marlow*, 4 T. R. 717; *Perley v. Langley*, 7 N. H. 233; *Pearsall v. Vost*, 20 Wend. (N. Y.) 111; 22 Wend. (N. Y.) 425. "It is clear that there cannot be a custom to take a profit *in alieno solo*." *Blewett v. Tregonning*, 3 A. & E. 554; 30 E. C. L. 151; *Lockwood v. Wood*, 6 Q. B. 50; *Race v. Ward*, 4 E. L. & E. 702; 82 E. C. L. 700.

Though custom may support a claim for an easement, nothing less than prescription can sustain a claim for a profit à prendre *in alieno solo*. *Hill v. Lord*, 48 Me. 98; *Gateward's Case*, 6 Coke 60; *Fowler v. Sanders*, Cro. Jac. 446; *Waters v. Lilley*, 4 Pick. (Mass.) 148; *Manning v. Wasdale*, 5 A. & E. 758; 31 E. C. L. 433.

If one would prescribe for a profit à prendre *in alieno solo*, he must allege it in a *que estate*; in other words, if one would prescribe for such a right in another's soil, as authorizes the taking or having what is, by legal intentment, a profit therein, he must allege

PROHIBITION.—(See also INJUNCTIONS, vol. 10, p. 777; JURISDICTION, vol. 12, p. 244; MANDAMUS, vol. 14, p. 88; WRITS.)

- I. Nature of the Writ, 263.
- II. What Courts May Issue the Writ, 266.
 1. Generally, 266.
 2. State Courts, 267.
 3. Federal Courts, 267.
- III. When Granted, 268.
 1. Generally, 268.
 2. When Right Is Clear, 270.
 3. Doubtful Cases, 271.
 4. Time of Issuing the Writ, 271.
 5. Amount in Controversy, 272.
 6. Where Judge Is Interested, 272.
 7. To Prevent Execution of Judgment Appealed from, 272.
- IV. When Refused, 273.
 1. Generally, 273.
 2. Collection of Taxes, 274.
 3. Issue or Enforcement of Execution, 275.
- V. Against Whom Issued, 275.
 1. Generally, 275.
 2. Courts, 276.
 - (a) Generally, 276.
 - (b) County Courts, 277.
 - (c) Justices' Courts, 277.
 - (d) Courts Martial, 277.
 3. Coroners, 278.
 4. Executive Officers, 278.
 5. Referees and Commissioners, 278.
- VI. Procedure, 279.
 1. In General, 279.
 2. Parties, 280.
 3. When Writ May Issue, 281.
 4. Notice, 281.
 5. Service, 281.
 6. Answer, 281.
 7. Variance, 282.
 8. Motion to Quash, 282.
 9. Prohibition Issued in Excess of Jurisdiction, 282.
 10. Enforcement of Prohibition, 282.
 11. Costs, 282.

I. NATURE OF THE WRIT.—A writ of prohibition is an extraordinary writ issuing out of a court of superior jurisdiction and directed to an inferior court, commanding it to cease entertaining jurisdiction in a cause or proceeding over which it has no control; or where such inferior tribunal assumes to entertain a cause over which it has jurisdiction, but goes beyond its legitimate powers and transgresses the bounds prescribed to it by law.¹

it as pertaining to some specified lot of land, owned by himself, and that he and all those, whose estate he has in the land, have from time immemorial exercised the right which he now claims. *Littlefield v. Maxwell*, 31 Me. 141, and other cases cited above.

Again, this right is prescribed for in gross, and not as appurtenant to other lands. The right, if it exists, is a profit à prendre, and not a mere easement, and such rights must generally and perhaps universally be prescribed for not in gross, but as incident to other premises for the benefit of which and in connection with which the rights are to be exercised. *Merwin v. Wheeler*, 41 Conn. 25.

A custom that all the inhabitants of a particular town, for the time being, have the right to the depasture of uninclosed woodlands of individual proprietors within the town, is not a mere easement like a right of way,

or a right to flow water. It is a right to take a profit, and for such a right the commoner must prescribe in respect to some estate, and not in respect to mere inhabitancy. The custom is therefore void. *Smith v. Floyd*, 18 Barb. (N. Y.) 522.

1. See 3 Bl. Com. 112; *Quimbo Appo v. People*, 20 N. Y. 531; *Thomas v. Mead*, 36 Mo. 232; *Mauver v. Mitchell*, 53 Cal. 291; *Spring Valley Water Works v. San Francisco*, 52 Cal. 112.

In *United States v. Hoffman*, 4 Wall. (U. S.) 158, the court by Miller, J., says: "The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest that the writ of prohibition cannot undo it, for that would require an affirmative act, and the only effect of a writ of prohibition is to sus-

Prohibition is a remedy provided by the common law against the encroachment of jurisdiction.¹ Like other common law remedies it is regarded as generally applicable in this country, unless abolished by positive statutory enactment.² Being a preventive rather than a remedial process, it will not operate to restrain the party named therein generally, or from doing any act save proceeding in the pending suit or matter.³ It should be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity, and it is not demandable as a matter of right, but of sound judicial discretion, to be granted or withheld, according to the circumstances of each particular case,⁴ and since it is discretionary with the court whether to grant or deny the writ, its order refusing to grant it is not appealable.⁵ The proceeding for prohibition is not to be regarded as a continuation of the action or proceeding prohibited, but is collateral thereto, distinct from, and independent thereof, being intended to arrest that proceeding and prevent its further prosecution by a court having no jurisdiction thereof. It is the means, in other words, by which the superior court exercises its supervisory power over the inferior court and keeps it within the limits of its rightful jurisdiction.⁶

While prohibition and injunction have one common object, the restraining of legal proceedings, and each is resorted to only when all other remedies for attaining the desired result are unavailing, there is however, this difference: prohibition operates upon the court, and the judge and officers who disregard it may be punished; an injunction operates upon the party alone to restrain him, but does not interfere with the court itself.⁷

So prohibition and *mandamus* are different, in that prohibition arrests, while *mandamus* commands action. Prohibition may be used to arrest an unauthorized act of an officer or person clothed with authority, and *mandamus* may be employed to compel the

pend the action and to prevent any further proceedings in the prohibited direction."

1. *People v. Works*, 7 Wend. (N. Y.) 486; *Thomson v. Tracy*, 60 N. Y. 31.

2. *Arnold v. Shields*, 5 Dana (Ky.) 18; 30 Am. Dec. 669. See *Rickey v. Superior Ct.*, 59 Cal. 661.

3. *Thomson v. Tracy*, 60 N. Y. 31; *Ex parte Pennsylvania*, 109 U. S. 174; *Coker v. Superior Court*, 58 Cal. 178; *San José Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179; *Daniel v. Smith*, 64 Cal. 346.

4. *People v. Westbrook*, 89 N. Y. 152; *Ex parte Hamilton*, 51 Ala. 62; *Kinlock v. Harvey*, Harp. (S. Car.) 508; *Sweet v. Hulbert*, 51 Barb. (N. Y.) 315; *Gray v. Court of Magistrates*, 3 McCord (S. Car.) 175; *State v.*

Judge, 21 La. Ann. 123; *State v. Judge*, 38 La. Ann. 921; *State v. Seay*, 23 Mo. App. 623; *Spring Valley Water Works v. San Francisco*, 52 Cal. 117; *Chester v. Colby*, 52 Cal. 519; *Southern Pac. R. Co. v. Superior Ct.*, 59 Cal. 471; *Martin v. Thompson*, 62 Cal. 618; 45 Am. Rep. 663; *Southern Pac. R. Co. v. Superior Ct.*, 63 Cal. 607; *Washburn v. Phillips*, 2 Met. (Mass.) 296.

5. *People v. Westbrook*, 89 N. Y. 152. See *Bishop of St. David v. Lucy*, Ld. Raym. 539. Compare *People v. Justices*, 81 N. Y. 500.

6. *Mayo v. James*, 12 Gratt. (Va.) 17. See *Ex parte Hamilton*, 51 Ala. 62.

7. *Mayo v. James*, 12 Gratt. (Va.) 17.

performance of an act enjoined by law, with the condition in each case that the party has no other plain, speedy and adequate remedy. But prohibition as a remedy is not in every respect, the exact converse of *mandamus*. In prohibition it must be shown to the court that the inferior court or person has exceeded the powers conferred by law, and the court intervenes to prevent further proceedings without or in excess of such power. *Mandamus* may be resorted to whenever an officer or person refuses to perform a duty enjoined by law, although the act may have been an isolated one disconnected with any proceedings leading up to that which the recalcitrant official or individual refused to perform.¹ Like other extraordinary remedies, such as *mandamus*, for example, prohibition is not applicable where other adequate remedies exist.² It can not be made to perform the functions of an appeal,³ a writ of error, or a *certiorari*,⁴ its purpose being,

1. *Maurer v. Mitchell*, 53 Cal. 289; *People v. Board of Election Commrs.*, 54 Cal. 404; *Thomas v. Mead*, 36 Mo. 232.

2. *State v. Burton*, 11 Wis. 50; *State v. Braun*, 31 Wis. 600; *Sherlock v. Jacksonville*, 17 Fla. 93; *Cooper v. Stocker*, 9 Rich. (S. Car.) 292; *State v. Hudnal*, 2 Nott & M. (S. Car.) 419; *People v. Seward*, 7 Wend. (N. Y.) 518; *Ex parte Braudlacht*, 2 Hill (N. Y.) 367; 38 Am. Dec. 593; *Ex parte Hamilton*, 51 Ala. 62; *Ex parte Mobile etc. R. Co.*, 63 Ala. 349; *Sasseen v. Hammond*, 18 B. Mon. (Ky.) 672.

3. *State v. Judge*, 11 La. Ann. 696; *State v. Rightor*, 32 La. Ann. 1182; *State v. Judge*, 21 La. Ann. 123; *People v. Circuit Ct.*, 11 Mich. 393; *McDonald v. Elfe*, 1 Nott & M. (S. Car.) 501; *State v. Wakeley*, 2 Nott & M. (S. Car.) 410; *State v. Nathan*, 4 Rich. (S. Car.) 513; *Ex parte Peterson*, 33 Ala. 74; *Ex parte Reid*, 50 Ala. 439; *People v. Marine Ct.*, 36 Barb. (N. Y.) 341; *People v. Nichols*, 79 N. Y. 582; *Symes v. Symes*, Burr. 813; *Wreden v. Superior Ct.*, 55 Cal. 504; *State v. Municipal Ct.*, 26 Minn. 162; *State v. District Ct.*, 26 Minn. 233; *State v. Wilcox*, 24 Minn. 143; *State v. Judge*, 20 La. Ann. 252; *State v. Monroe*, 33 La. Ann. 923; *State v. Judge*, 33 La. Ann. 1284; *Powelson v. Lockwood*, 82 Cal. 613; *Mastin v. Sloan*, 98 Mo. 252; *Turner v. Forsyth*, 78 Ga. 683; *State v. Cory*, 35 Minn. 178; *State v. Seay*, 23 Mo. App. 623; *Levy v. Wilson*, 69 Cal. 105; *Coker v. Superior Ct.*, 58 Cal. 178; *Walcott v. Wells* (Nev. 1890), 24 Pac. Rep. 367; *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179;

Daniel v. Smith, 64 Cal. 346; *Bliss v. Superior Ct.*, 62 Cal. 543; *In re Berridge*, 4 B. & S. 187.

The county court having jurisdiction to grant a new trial, a writ of prohibition will not lie to prevent the court from proceeding further in the case, respondent's remedy being by appeal, if any error was committed. *In re Mason* (Supreme Ct.), 4 N. Y. Supp. 664.

Prohibition will issue to restrain the superior court from vacating a judgment, permitting an amendment, and proceeding with a trial after the affirmation on appeal of a judgment in defendant's favor, entered on sustaining his demurrer to the complaint, plaintiff having refused to amend. The remedy by appeal is not speedy. *Kirby v. Superior Ct.*, 68 Cal. 604.

4. *Ex parte Ellyson*, 20 Gratt. (Va.) 10; *Supervisor of Bedford v. Wingfield*, 27 Gratt. (Va.) 329; *Hogan v. Guigon*, 29 Gratt. (Va.) 705; *Arnold v. Shields*, 5 Dana (Ky.) 18; 30 Am. Dec. 669; *Wilson v. Berkstresser*, 45 Mo. 283; *Cooper v. Stocker*, 9 Rich. (S. Car.) 292; *State v. Columbia etc. R. Co.*, 1 Rich. N. S. (S. Car.) 46; *Ex parte Gordon*, 2 Hill (N. Y.) 363; *People v. Seward*, 7 Wend. (N. Y.) 518; *Leonard v. Bartels*, 4 Col. 95; *Ex parte Williams*, 4 Ark. 537; 39 Am. Dec. 246; *People v. Nichols*, 58 How. Pr. (N. Y.) 200; *State v. Municipal Ct.*, 26 Minn. 162; *Ex parte Smith*, 23 Ala. 94; *Russell v. Jacoway*, 33 Ark. 191; *People v. District Ct.*, 7 Colo. 462; *State v. Columbia etc. R. Co.* 1 S. Car. 46; *People v. Clute*, 42 How. Pr. (N. Y.) 157; *People v. Hills*, 5 Utah 410; *State v. Kyle*, 8 W. Va. 711; *Ensign*

not to correct errors, but to prevent an usurpation of jurisdiction.¹

II. WHAT COURTS MAY ISSUE THE WRIT—1. **Generally.**—The courts of last resort in many of the States have conferred on them by constitutional or statutory provisions power to issue the writ of prohibition.² The power is not, however, always limited exclusively to these courts, and in some of the States the courts of general common law jurisdiction, such as the various circuit and district courts throughout the State, issue the writ to courts inferior to them to prevent the exercise of jurisdiction pertaining to the higher tribunal.³ But these courts must sustain to each other the relation of superior and inferior, and when the

Mfg. Co. v. McGinnis, 30 W. Va. 532; *Ex parte Pennsylvania*, 109 U. S. 174; *People v. Ulster Co.*, 31 How. Pr. (N. Y.) 237; *Cooper v. Stocker*, 9 Rich. (S. Car.) 292; *Low v. Crown Point Min. Co.*, 2 Nev. 75; *People v. Marine Ct.*, 36 Barb. (N. Y.) 341; *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312; *State v. Burton*, 11 Wis. 50; *People v. Common Pleas*, 43 Barb. (N. Y.) 278; 18 Abb. (N. Y.) Pr. 438. To prevent the usurpation of an office *quo warranto* is the proper remedy. *Buckner v. Veuve*, 63 Cal. 304. Compare *State v. Ridgell*, 2 Bailey (S. Car.) §60; *Southern Pac. R. Co. v. Superior Ct.*, 59 Cal. 471.

In *Connecticut River R. Co. v. County Comm'rs*, however, it was held that the fact that *certiorari* might lie after final judgment should not preclude the issue of the writ of prohibition.

1. A writ of prohibition will not issue to prevent an inferior court from trying an action once properly before it, but claimed to have been afterwards dismissed, or, if not dismissed, then transferred to the *United States* courts, as the question of the dismissal or transfer is one for that court to determine, and error in so doing is only reviewable on appeal. *Walcott v. Wells*, (Nev. 1890), 24 Pac. Rep. 367.

Const. *Missouri* art. 6, § 3, providing that the supreme court shall have control over the courts of appeal by *mandamus*, prohibition and *certiorari* only authorizes the writ of prohibition when the court of appeals has no jurisdiction over the matter which it is proceeding to determine. *State v. St. Louis Ct. of Appeal*, 99 Mo. 216.

As an order of the superior court directing one who has received property for the benefit of minors, by a deed of trust to pay for the support of

the minors as guardian, is appealable under Code Civil Proc. *California*, § 963, subd. 3, a writ of prohibition will be denied. *Murphy v. Superior Ct.*, 84 Cal. 592.

The denial of a jury by a justice of the peace on a trial for misdemeanor does not affect his jurisdiction; and the error, if any—for which there is a plain, speedy, and adequate remedy by appeal to the superior court—cannot be arrested or corrected by the writ of prohibition. *Powelson v. Lockwood*, 82 Cal. 613.

Judgment was rendered against defendant in an action before a justice of the peace. The defendant applied for a writ of prohibition to restrain the issuing of an execution, on the ground that the justice had exceeded his jurisdiction, the action involving the title to real estate. *Held*, that defendant's remedy was by appeal. *Mancello v. Bellrude* (Cal. 1886), 11 Pac. Rep. 501.

2. *State v. Columbia*, 16 S. Car. 412; *State v. County Treasurer*, 4 Rich. N. S. (S. Car.) 520; *People v. Spiers*, 4 Utah 385.

In *California*, the supreme and superior courts are peers in the exercise of original jurisdiction of prohibition. *Santa Cruz Gap Turnpike etc. Co. v. Santa Clara Co.*, 62 Cal. 41.

3. *Reese v. Lawless*, 4 Bibb (Ky.) 394; *Howard v. Pierce*, 38 Mo. 206; *Singer Mfg. Co. v. Spratt*, 20 Fla. 122; *State v. Seay*, 23 Mo. App. 623.

A circuit judge has authority to grant writs of prohibition, or other original remedial writs which were grantable by judges at common law, and, when the writ is issued by him, though on an insufficient petition, or otherwise irregularly, it cannot be disregarded or disobeyed by the inferior tribunal to which it is directed, nor

court which it is sought to prohibit is in no way subordinate or inferior to that in which relief is sought, it will not be allowed.¹

2. State Courts.—When the jurisdiction of the supreme court of a State is, under the constitution of the State, purely appellate, it has no power to grant a writ of prohibition, this not being the exercise of an appellate jurisdiction, nor in aid or furtherance of such jurisdiction.² But under a constitution conferring upon the supreme court of the State, power to issue any remedial writs necessary to give it a general supervision or control over inferior courts, the power to grant writs of prohibition rests with the supreme court, not with an inferior court having no supervisory powers.³ And where a constitution of a State confers jurisdiction upon the supreme court to issue writs of prohibition, the power granted is construed under such provision with reference to the writ as known at common law and is confined to cases where the act which it is sought to prohibit is of a judicial nature. A statute therefore which extends the remedy to acts which are either judicial or ministerial is unconstitutional.⁴

3. Federal Courts.—The Supreme court of the *United States* has power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction.⁵ The writ cannot be made to perform the office of an appeal or writ of error,⁶ and if appeal lies to the Supreme court,

will the supreme court, in such case interfere by prohibition at the instance of the inferior tribunal, to restrain action under a writ irregularly issued. *Ex parte Boothe*, 64 Ala. 312.

The district court of the State of *Louisiana* is without jurisdiction to issue a writ of prohibition to a justice of the peace. *Louisiana Const.*, art. 90, vests the supreme court with exclusive jurisdiction in the premises. *State v. Judge*, 39 La. Ann. 97.

1. *High's Ex. L. Rem.*, § 785; *Burch v. Hardwicke*, 23 Gratt. (Va.) 51.

2. *Memphis v. Halsey*, 12 Heisk. (Tenn.) 210. See *Sasseen v. Hammond*, 18 B. Mon. (Ky.) 672.

3. *High's Ex. L. Rem.*, § 786; *Perry v. Shepherd*, 78 N. Car. 83; *Commonwealth v. Latham*, 85 Va. 632; *State v. Judge*, 39 La. Ann. 97; *Day v. Springfield*, 102 Mass. 310. See *State v. St. Louis Ct. of Appeal*, 97 Mo. 276.

4. *Camron v. Kenfield*, 57 Cal. 550. See *Le Conte v. Berkeley*, 57 Cal. 269.

It has been held, however, that, under the organic act of *Utah*, which confers on the territorial legislature authority to legislate upon all "rightful subjects of legislation," the legislature has power to provide for

the issuance of writs of prohibition to arrest the exercise of ministerial functions. *Ducheneau v. House*, 4 *Utah* 369; and that, under Code Civil Proc. *Utah*, § 982, a writ of prohibition might be issued against the exercise of ministerial functions, and to stay a justice of the peace from issuing an execution. *Ducheneau v. House*, 4 *Utah* 363.

5. U. S. Rev. St., § 688; *United States v. Peters*, 3 Dall. (U. S.) 129; *Ex parte City Bank*, 3 How. (U. S.) 294; *Ex parte Gordon*, 1 Black (U. S.) 503; *United States v. Hoffman*, 4 Wall. (U. S.) 158; *Ex parte Warmouth*, 17 Wall. (U. S.) 67; *Ex parte Graham*, 10 Wall. (U. S.) 541.

The *United States* Supreme court cannot interfere by prohibition to prevent the marshal from executing criminal process granted by the circuit court. It can only correct the proceedings of the circuit and district courts by prohibition, in the cases of admiralty and maritime jurisdiction expressly provided for by statute, and not in cases of conviction for piracy or slave trading. *Ex parte Gordon*, 1 Black. (U. S.) 503.

6. *Ex parte Gordon*, 1 Black. (U. S.) 503; *Ex parte Warmouth*, 17 Wall.

it has no power to issue prohibition until the appeal is taken.¹

III. WHEN GRANTED.—1. **Generally.**—The broad governing principle is that prohibition lies where a subordinate tribunal has no jurisdiction at all to deal with the cause or matter before it; or where, in the progress of a cause within its jurisdiction, some point arises for decision which the inferior court is incompetent to determine.² But a prohibition will not lie where the inferior court has jurisdiction to deal with the cause and with all matters necessarily arising therein, however erroneous its decision may be upon any point.³ The use of the writ of prohibition is not con-

(U. S.) 64; *Ex parte* Detroit R. Ferry Co., 104 U. S. 519.

1. *Ex parte* Warmouth, 17 Wall. (U. S.) 64.

2. *Ex parte* Smith, 34 Ala. 455; 23 Ala. 94; *Ex parte* Hill, 38 Ala. 429; *Ex parte* Greene, 29 Ala. 52; *Atkins v. Siddons*, 66 Ala. 453; *Russell v. Jacoway*, 33 Ark. 191; *Ex parte* Blackburn, 5 Ark. 27; *Ex parte* Williams, 4 Ark. 537; 38 Am. Dec. 46; *Hanger v. Keating*, 26 Ark. 51; *Ex parte* Little Rock, 26 Ark. 52; *Stale v. Williams*, 48 Ark. 227; *Cariaga v. Dryden*, 30 Cal. 246; *People v. Superior Ct.*, 47 Cal. 81; *Spring Valley Water Works v. San Francisco*, 52 Cal. 111, 117; *Maurer v. Mitchell*, 53 Cal. 289; *People v. Board of Election Comm'rs*, 54 Cal. 404; *Bandy v. Ransom*, 54 Cal. 87; *Clark v. Superior Ct.*, 55 Cal. 199; *Wreden v. Superior Ct.*, 55 Cal. 504; *Kalloch v. Superior Ct.*, 56 Cal. 231; *Coker v. Superior Ct.*, 58 Cal. 178; *Murphy v. Superior Ct.*, 58 Cal. 520; *Spect v. Superior Ct.*, 59 Cal. 319; *Sanborn v. Superior Ct.*, 60 Cal. 425; *Gray v. Superior Ct.*, 61 Cal. 337; *Day v. Superior Ct.*, 61 Cal. 490; *Ah Goon v. Superior Ct.*, 61 Cal. 555; *Farmers' etc. Union v. Thresher*, 62 Cal. 407; *Capital Sav. Bank v. Reel*, 62 Cal. 425; *Bliss v. Superior Ct.*, 62 Cal. 543; *Martin v. Thompson*, 62 Cal. 619; 45 Am. Rep. 663; *San José Sav. Bank v. Sirrea Lumber Co.*, 63 Cal. 179; *Buckner v. Veuve*, 63 Cal. 304; *Curtis v. Superior Ct.*, 63 Cal. 435; *Chapman v. Stoneman*, 63 Cal. 490; *Southern Pac. R. Co. v. Superior Ct.*, 63 Cal. 607; *More v. Superior Ct.*, 64 Cal. 345; *Hobart v. Tillson*, 66 Cal. 210; *People v. Whitney*, 47 Cal. 584; *Sherlock v. Jacksonville*, 17 Fla. 93; *Arnold v. Shields*, 5 Dana (Ky.) 18; 30 Am. Dec. 669; *Reese v. Lawless*, 4 Bibb (Ky.) 394; *Jasper Co. v. Skitler*,

13 Ind. 235; *State v. Skinner*, 32 La. Ann. 1092; *State v. Mix*, 33 La. Ann. 794; *State v. Third District Ct.*, 16 La. Ann. 185; *State v. Judge*, 14 La. Ann. 509; *State v. Judge*, 20 La. Ann. 239; *State v. Monroe*, 33 La. Ann. 923; *State v. Judge*, 33 La. Ann. 1284; *State v. Rightor*, 40 La. Ann. 837; *State v. Judges*, 40 La. Ann. 771; *In re Boye*, 18 La. Ann. 102; *Washburn v. Phillips*, 2 Met. (Mass.) 296; *Prignitz v. Fischer*, 4 Minn. 366; *Clayton v. Heidelberg*, 9 Smed. & M. (Miss.) 623; *Roper v. Cady*, 4 Mo. App. 593; *Thomas v. Mead*, 36 Mo. 232; *Howard v. Pierce*, 38 Mo. 296; *Casby v. Thompson*, 42 Mo. 133; *Thomson v. Tracy*, 60 N. Y. 31; *People v. Marine Ct.*, 36 Barb. (N. Y.) 341; *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312; *Quimbo Appo v. People*, 20 N. Y. 531; *People v. McAdam*, 58 How. Pr. (N. Y.) 442; *People v. Common Pleas*, 43 Barb. (N. Y.) 278; *Ex parte Brandlacht*, 2 Hill (N. Y.) 367; 38 Am. Dec. 593; *State v. Whyte*, 2 Nott & M. (S. Car.) 174; *Baldwin v. Cooley*, 1 S. Car. 256; *State v. Mitchell*, 2 Bailey (S. Car.) 225; *Zylstra v. Charleston*, 1 Bay (S. Car.) 383; *State v. Hopkins. Dudley* (S. Car.) 101; *McKee v. Town Council, Rice* (S. Car.) 24; *State v. Simons*, 2 Spears (S. Car.) 761; *Hutson v. Lowry*, 2 Va. Cas. 42; *Low v. Crown Point Min. Co.*, 2 Nev. 75; *State v. Burton*, 11 Wis. 50; *State v. Price*, 8 N. J. L. 358; *Jasper Co. v. Spittler*, 13 Ind. 235; *Pringle v. Child*, *Moore* 780; *Martin v. Archbishop of Canterbury*, And. 258; *Edwards' Case*, 13 Co. 9; *Buskirk v. Judges*, 7 W. Va. 91; *McConiha v. Guthrie*, 21 W. Va. 134; *Ensign Mfg. Co. v. McGinnis*, 30 W. Va. 532.

3. *Ex parte* Blackburn, 5 Ark. 21; *Hockaday v. Newson*, 48 Mo. 196;

fined to cases where a subordinate tribunal assumes to entertain some cause or proceeding over which it has no control, the necessity for the writ being the same where, in a matter of which such tribunal has jurisdiction, it goes beyond its legitimate powers.¹ These rules apply only to courts that go beyond their jurisdiction in the exercise of judicial not ministerial power. Prohibition cannot be invoked to prevent proceedings which are purely ministerial in their nature, but only those of a judicial character.²

Jasper Co. v. Spittler, 13 Ind. 235; Dayton v. Paine, 13 Minn. 494; Home Ins. Co. v. Flint, 13 Minn. 244; Morris v. Lenox, 8 Mo. 252; People v. Ct. of Oyer & Terminer, 27 How. Pr. (N. Y.) 14; People v. Russell, 49 Barb. (N. Y.) 351; 3 Abb. Pr., N. S. (N. Y.) 232; 29 How. Pr. (N. Y.) 176; 19 Abb. Pr. (N. Y.) 135; People v. Seward, 7 Wend. (N. Y.) 518; People v. Marine Ct., 36 Barb. (N. Y.) 341; 14 Abb. Pr. (N. Y.) 266; People v. Common Pleas, 43 Barb. (N. Y.) 278; 18 Abb. Pr. (N. Y.) 438; Bank Lick Turnpike Co. v. Phelps, 81 Ky. 613; More v. Superior Ct., 64 Cal. 345; *Ex parte* Brandlacht, 2 Hill (N. Y.) 367; 38 Am. Dec. 593; State v. Gary, 33 Wis. 93; State v. Judge, 29 La. Ann. 360; Leonard v. Bartels, 4 Colo. 95; Spring Valley Water Works v. San Francisco, 52 Cal. 111; State v. Judge (La. 1890), 7 So. Rep. 69; State v. Judge, 34 La. Ann. 782; State v. Judge, 36 La. Ann. 768; State v. Nathan, 4 Rich. (S. Car.) 513; State v. Southern R. Co., 100 Mo. 59.

The writ of prohibition does not lie to prevent a district judge from enjoining a *feri facias* issued against a party domiciled within his territorial jurisdiction by a court of another jurisdiction, where it is necessary to ward off an immediate injury otherwise unavoidable. State v. Houston, 35 La. Ann. 538; Dutens v. Robson, 1 H. Bl. 100.

Upon an application for a writ of prohibition, to stop the trial of an information against the plaintiff for assault with intent to commit murder, the grounds alleged were, that the magistrate before whom the preliminary examination took place did not examine on oath or otherwise the prosecutor or any witness. *Held*, that the omissions not affecting jurisdiction, prohibition was not the proper remedy. Murphy v. Superior Ct., 58 Cal. 520.

Prohibition does not lie to restrain the proceedings of a judge who has made an order upon supervisors of the county, inquiring why they propose to convert one of the jury rooms of his

court-room into a clerk's office. A judge has authority to conduct such an inquiry. Supervisors of Bedford v. Wingfield, 27 Gratt. (Va.) 329.

Removing Seat of Justice.—A writ of prohibition will not lie to prevent the county court, in *Arkansas*, from removing the seat of justice, the subject-matter being within its jurisdiction. *Ex parte* Blackburn, 5 Ark. 21.

Passing on Motion to Dismiss Information.—A writ of prohibition will not lie to restrain a superior court from passing upon a motion to dismiss an information. Wreden v. Superior Ct., 55 Cal. 504.

Punishing for Contempt.—The writ of prohibition will not issue to prohibit a district court from punishing for contempt a party defendant in an injunction suit, on the ground that said court had no jurisdiction of the suit. State v. Rightor, 32 La. Ann. 1182.

Contested Elections.—The supreme court will not grant a writ of prohibition to the chancellor, to restrain him from interfering by injunction, in the matter of a contested election, to prevent the use of a certificate of election, which is alleged in the bill to have been obtained on false and fraudulent returns, although the certificate was granted by the returning officer under a *mandamus* from the circuit court, and although the person who is in possession of the office, and by whom the bill in chancery was filed, is alleged by the petitioner to have been ineligible at the time of the election. *Ex parte* Reid, 50 Ala. 439.

1. Quimbo Appo v. People, 20 N. Y. 531; State v. Ridgell, 2 Bailey (S. Car.) 560.

A court that grants an appeal suspending a peremptory writ of *mandamus* has no further jurisdiction in the cause and prohibition will issue to restrain proceedings to enforce it. State v. Lewis, 76 Mo. 370.

2. Atkins v. Siddons, 66 Ala. 453; Kyle v. Evans, 3 Ala. 481; San

In granting a writ of prohibition it is to be observed that the question of the jurisdiction of the subordinate court must be decided by the superior court and not by the inferior tribunal, it being the province of all superior courts of law to confine subordinate tribunals within their proper bounds.¹ But the writ will not issue where the question of jurisdiction has not been raised or decided by the lower tribunal.²

Where an inferior tribunal is proceeding under an unconstitutional act,³ or where proceedings are wrongfully instituted under the law,⁴ or a magistrate proceeds to exercise jurisdiction under a misconstruction of the statute,⁵ or where proceedings are brought within the jurisdiction of an inferior court by legal fraud, prohibition is the proper remedy.⁶

2. When Right Is Clear.—To authorize the issuing of a writ of prohibition from a superior court, it should be clearly made to appear that the inferior court is about to proceed in some matter over which it possesses no jurisdiction; which may be done by

Jose Sav. Bank *v.* Sierra Lumber Co., 63 Cal. 179; Le Conte *v.* Berkeley, 57 Cal. 269; People *v.* Board of Election Comm'rs, 54 Cal. 404; Camron *v.* Kenfield, 57 Cal. 553; Farmers' etc. Union *v.* Thresher, 62 Cal. 407; Spring Valley Water Works *v.* Bartlett, 63 Cal. 245; Hobart *v.* Tillson, 66 Cal. 210; State *v.* Justices, 41 Mo. 44; *Ex parte* Brandlacht, 2 Hill (N. Y.) 367; 38 Am. Dec. 593; Home Ins. Co. *v.* Flint, 13 Minn. 244; Sherlock *v.* Jacksonville, 17 Fla. 93; People *v.* Queens Co., 1 Hill (N. Y.) 195; Seymour *v.* Almond, 75 Ga. 112; Sasseen *v.* Hammond, 18 B. Mon. (Ky.) 672.

A writ of prohibition will restrain the proceedings of an inferior court, only when such proceedings are of a judicial nature. If the inferior court be acting in a purely administrative capacity, for example, as agents of the county for the purpose of removing the seat of justice to a new site, a writ of prohibition is not the proper remedy, however illegal such ministerial acts may be. State *v.* Justices, 41 Mo. 44.

So prohibition will not lie to restrain a judge acting not in a judicial capacity but merely as a commissioner, in the taking of testimony. State *v.* Spaing, 31 La. Ann. 122.

The matter of fixing water rates is not judicial, and a writ of prohibition will not be awarded to restrain a board of supervisors from performing that duty. Spring Valley Water Works *v.* Bartlett, 63 Cal. 245.

1. Gray *v.* Ct. of Magistrates, 3 McCord (S. Car.) 175.

2. Succession of Whipple, 2 La. Ann. 236; Mayor etc. of London *v.* Cox, 2 L. R., H. L. Cas. 239.

3. Sweet *v.* Hurlbert, 51 Barb. (N. Y.) 312; State *v.* Simons, 2 Spears (S. Car.) 761; *Ex parte* Roundtree, 51 Ala. 42; Zylstra *v.* Charleston, 1 Bay (S. Car.) 382.

Minnesota act of March 2, 1881 provided for the issuance of certain State bonds, but, it being doubtful whether the bonds could be legally issued without a vote of the people upon the question, it was provided by the act that it should be left to certain judges to decide that question. *Held*, that if the act was void as conferring legislative power on the judges, a writ of prohibition would properly issue to restrain them from acting. State *v.* Young, 29 Minn. 474.

The Supreme court of *Alabama* will interfere by prohibition, to restrain a circuit judge from sitting as the presiding judge of a statutory inferior court, when the act creating that court, and making him the presiding judge thereof is declared unconstitutional. *Ex parte* Roundtree, 51 Ala. 42.

4. People *v.* McAdam, 22 Hun (N. Y.) 559. See State *v.* Houston, 35 La. Ann. 1195.

5. Baldwin *v.* Cooley, 1 S. Car. 256; Reese *v.* Lawless, 4 Bibb (Ky.) 394; Gould *v.* Gapper, 5 East 345.

6. Ramsey *v.* Ct. of Wardens, 2 Bay (S. Car.) 180.

setting forth any acts or declarations of the court, or officer, indicative of their intention to pursue such course.¹ The fact that replevin issued by a justice is returnable on Sunday, or that the action involves the title to real estate, or that plaintiffs and the officers making the levy were trespassers, is no ground for prohibition of such proceedings.²

3. Doubtful Cases.—Where the question of jurisdiction or no jurisdiction depends upon a doubtful point of law which the court below is peculiarly fitted to decide, prohibition will be refused.³ So, where the question of jurisdiction is doubtful and it can be more rapidly and cheaply tried by action, prohibition will not be granted.⁴ If the existence or non-existence of jurisdiction depends on contested facts which the inferior tribunal is competent to inquire into and determine, prohibition will not be granted, though the superior court should be of opinion that the questions of fact have been determined wrongly by the court below, and if rightfully determined, would have ousted the jurisdiction.⁵ The finding of the judge is, though not absolutely, yet practically conclusive in the absence of very peculiar circumstances.⁶

4. Time of Issuing the Writ.—A prohibition will not be granted *quia timet*,⁷ there must be some suit or matter pending; and the writ will not be granted against a person not actually a party to the suit at the time, though it may be open to him to join in it at any time.⁸ If once a proceeding has in fact been instituted before any subordinate tribunal, the prohibitory jurisdiction of the court may be invoked and exercised, at any time before judgment,⁹ and in some cases after judgment,¹⁰ and even after execu-

1. *Prignitz v. Fischer*, 4 Minn. 366. See *Tapia v. Martinez*, 4 N. Mex. 165; *Haile v. Superior Ct.*, 78 Cal. 418.

It is only when the cause alleged is seen to be true and is clearly sufficient that prohibition is granted. *Walton v. Greenwood*, 60 Me. 365.

2. *Tapia v. Martinez*, 4 N. Mex. 165.

3. *The Charkieh*, L. R., 8 Q. B. 197; 42 L. J., Q. B. 75; *Ex parte Higgins*, 10 Jur. 838.

4. *In re Birch*, 15 C. B. 743.

5. *Joseph v. Henry*, 1 L. M. & P. 388; 19 J. Q. B. 369; *Brown v. Cocking*, 9 B. & S. 503.

6. *Elston v. Rose*, 9 B. & S. 509.

If the superior court is of opinion that the judge below has perversely so decided and has not honestly and fairly exercised his judgment upon the evidence before him, or has proceeded on a wrong principle of law in arriving at his determination of the facts, prohibition will be granted. *Elston v. Rose*, 9 B. & S. 509; L. R., 4 Q. B. 4.

7. *Hill v. Bird*, Aleyn. 56; *Mealing v. City Council*, Dudley (Ga.) 221; *Ex parte Greene*, 29 Ala. 52; *Prignitz v. Fischer*, 4 Minn. 366; *State v. Monroe*, 33 La. Ann. 923; *State v. Judge*, 33 La. Ann. 1284; *Full v. Hutchins*, Cowp. 424; and see *Stainbank v. Bradshaw*, 10 East 349, n.

In *Prignitz v. Fischer*, 4 Minn. 366, it is held that if it be clearly made to appear that the inferior court is about to proceed in some matter over which it possesses no jurisdiction, prohibition will issue.

Prohibition will not lie to prevent an act not threatened. *Coker v. Superior Ct.*, 58 Cal. 178; *Carliaga v. Dryden*, 30 Cal. 245.

8. *Hill v. Bird*, Aleyn. 56. See *Maurer v. Mitchell*, 53 Cal. 292.

9. *Gray v. Ct. of Magistrates*, 3 McCord (S. Car.) 175; *Shortt on Prohibition* 449.

10. *Bodley v. Archibald*, 33 W. Va. 229.

Compare State v. Price, 8 N. J. L. 358.

tion.¹ But material delay will be a bar to the writ.² So prohibition will not be granted where it appears that the case is no longer pending in the lower court, because the case is out of court and the relator is no longer harassed by an attempt to exercise over him a jurisdiction which he claims to be unwarranted.³

5. Amount in Controversy.—Where courts, limited by law, in the decision of controversies, to amounts falling within a specified sum, as in justices' courts, attempt to assume jurisdiction by dividing a single matter into several suits so as to bring them within the limits fixed by law when the whole amount in controversy is sufficient to bring it within the jurisdiction of a higher court, prohibition may issue.⁴ But where suit on a claim is brought in a justice's court and the defendant has a counter-claim against the plaintiff that exceeds the jurisdiction of such court, he cannot by prohibition compel the inferior court to entertain jurisdiction so that the plaintiff can avail himself of a plea of set-off.⁵

6. Where Judge Is Interested.—A prohibition is also grantable where the judge of an inferior court proceeds to try, by himself or by his deputy, a cause in which he is himself interested.⁶

7. To Prevent Execution of Judgment Appealed from.—Where an appeal is taken from a lower to a higher court, prohibition will issue restraining the judge of the lower court from executing the judgment appealed from.⁷ So the writ will issue to withhold the

Prohibition will not lie after sentence, unless the want of jurisdiction appears on the face of the proceedings. *State v. Whyte, 2 Nott & M. (S. Car.) 174; Buggin v. Bennet, 4 Burr. 2035; Ricardo v. Maidenhead Board of Health, 2 H. & N. 257; Roberts v. Humby, 3 M. & W. 120.*

1. *Huton v. Lowry, 2 Va. Cas. 42; Shortt on Prohibition 449; West v. Ferguson, 16 Gratt. (Va.) 270; Ingersoll v. Buchanan, 1 W. Va. 181; State v. Judge, 38 La. Ann. 274.*

2. *In re Denton, 1 H. & C. 654; Yates v. Palmer, 6 D. & L. 283.*

3. *United States v. Hoffman, 4 Wall. (U. S.) 158. See Beade v. Supreme Ct., 60 Cal. 290.*

4. *Girling v. Aldas, 2 Keb. 617; Lawrence v. Warbeck, 1 Keb. 260; Hutson v. Lowry, 2 Va. Cas. 42.*

Plaintiff brought several distinct actions before a justice of the peace upon promissory notes against the defendant; each note was for an amount within the jurisdiction of the justice, but the aggregate amount was beyond his jurisdiction. Held that it was a clear defect of jurisdiction, as all the

notes constituted but one indebtedness, which made the aggregate amount exceed the jurisdiction of the justice, and prohibition would lie. *Hutson v. Lowry, 2 Va. Cas. 42.*

Court of Appeals.—Prohibition will lie to prevent the court of appeals of Louisiana from exercising jurisdiction over a controversy involving a right to servitude of light and view, valued at more than \$1,000, and a claim for \$1,000 damages, both exceeding \$2,000, the upper jurisdiction limit of said court. *State v. Judges, 49 La. Ann. 771.*

5. *Browne v. Rowe, 10 Tex. 184.*

6. *Hutton v. Fowke, 1 Keb. 648; Ex parte Medwin, 1 El. & Bl. 609; Anonymous, 1 Salk. 396; North Bloomfield Gravel Min. Co. v. Keyser, 58 Cal. 315.*

Prohibition lies against a judge who takes jurisdiction to decide a plea of recusation against himself made on the ground that he had been employed as advocate in the cause. *State v. Judge, 38 La. Ann. 247.*

See generally as to disqualification of judges, *Judge vol. 12, p. 40.*

7. *State v. Judge, 24 La. Ann. 598;*

collection of a judgment granted against a judgment creditor in a case in which the court rendering the decision had no jurisdiction, it appearing that execution had been issued, but not returned satisfied.¹ But prohibition will not lie to arrest the execution of a judgment rendered by a court vested with jurisdiction over the subject-matter.² So it will not be granted to prevent proceedings in execution of a judgment, where the court can see that the party will have an adequate remedy upon appeal.³

IV. WHEN REFUSED—1. **Generally.**—The writ will be refused where the act is already done.⁴ So, where application has not been made to the court below to refrain from proceeding,⁵ or where the question of its jurisdiction, after being properly submitted, remains undetermined,⁶ or where the proceedings ob-

State v. Judge, 21 La. Ann. 113; State v. Judge, 21 La. Ann. 123; State v. Judge, 38 La. Ann. 274.

Compare State v. Cassidy, 7 La. 274, where an appeal from an order of seizure and sale was taken, the judge regardless of the appeal proceeded to execute judgment. Prohibition was held to be the proper remedy. State v. Judge, 21 La. Ann. 735.

So where an appeal is taken from the decision of the board of county commissioners to the supreme court and there reversed, prohibition will lie when the board still attempts to enforce its own judgment regardless of the decision upon the appeal. Harri-man v. Waldo Co., 53 Me. 83.

Prohibition is the proper remedy to prevent the ordinary from proceeding further, pending an appeal from that court to the superior court. Fite v. Black, 85 Ga. 413.

A petition for a prohibition against execution of a judgment for want of jurisdiction, is not affected by the fact that a plea to the jurisdiction had been overruled below. State v. Lapey-rollerie, 38 La. Ann. 912.

A writ of prohibition will not issue to restrain the execution of a judgment, pending appeal, where the record shows that the bond given for the appeal is insufficient in amount to operate a *supersedeas*. State v. Judge, 22 La. Ann. 115.

A writ of prohibition is the proper proceeding to arrest the execution of an illegal judgment for costs awarded by the county court in proceedings to contest an election, under the act of April 22, 1852. West v. Ferguson, 16 Gratt. (Va.) 270.

1. Ingersoll v. Buchanan, 1 W. Va.

19 C. of L.—18

181. See Hayne v. Justice Ct., 82 Cal. 284.

2. State v. Houston, 35 La. Ann. 236. See *Ex parte* Brandlacht, 2 Hill (N. Y.) 367; 38 Am. Dec. 593.

A prohibition will not lie to restrain the execution of a judgment of an inferior court, on the ground that evidence offered on the trial was rejected, which should have been received. State v. Leonard, 3 Rich. (S. Car.) 111.

3. State v. Judge, 21 La. Ann. 123; Clark v. Superior Ct., 55 Cal. 199.

4. United States v. Hoffman, 4 Wall. (U. S.) 158; Dayton v. Paine, 13 Minn. 493; People v. Excise Comrs, 61 How. Pr. (N. Y.) 514; Haldeman v. Davis, 28 W. Va. 324; Brooks v. Warren, 5 Utah 89; Hull v. Superior Ct., 63 Cal. 179; Coker v. Superior Ct., 58 Cal. 178; More v. Superior Ct., 64 Cal. 346; State v. Ellis, 40 La. Ann. 818.

5. Barnes v. Gottschalk, 3 Mo. App. 111; State v. Laughlin, 9 Mo. App. 486; Southern Pac. R. Co. v. Superior Ct., 59 Cal. 471; State v. Henry, 41 La. Ann. 908.

If it appear upon the face of the proceedings that the inferior tribunal could have no jurisdiction, no averment need be made that a plea to the jurisdiction was pleaded and overruled. Otherwise, if the court could acquire jurisdiction by consent, or waiver of objection or default. Arnold v. Shields, 5 Dana (Ky.) 18; 30 Am. Dec. 669; De Haber v. Queen of Portugal, 17 Q. B. 171.

6. Chester v. Colby, 52 Cal. 516. See Succession of Whipple, 2 La. Ann. 236.

The writ will not lie until a plea to

jected to will be void if consummated.¹ As has been observed, prohibition lies to prevent courts from going beyond their jurisdiction in the exercise of judicial power, but if the point beyond the jurisdiction is one wholly immaterial to the question to be determined in the cause, prohibition will not be granted;² so, where an inferior court oversteps its authority in a portion of its judgment, when the general scope and the purpose of the action of which it has taken cognizance is within its jurisdiction, prohibition will be refused.³ Nor will the writ issue against an inferior court merely for irregularity in its proceedings, if it acts within its jurisdiction.⁴ Only the jurisdiction of the court and the competency of the judge can be considered.⁵ A bill in chancery may be fatally wanting in necessary averments, or it may be instituted in a district in which the defendants are not liable to be sued; yet, these, if they exist, are proper matters of defense, and cannot be reached by prohibition, which lies only where the court has assumed to act upon a matter, or upon the rights of a party, which it could not determine or proceed against.⁶

2. Collection of Taxes.—While there are cases where the writ has been granted against ministerial officers intrusted with the collection of taxes, yet, the better doctrine is that it will not lie against ministerial officers such as the collectors of taxes, to restrain them from levying or collecting taxes;⁷ and in *Georgia* it is provided

the jurisdiction has been interposed in the court below and overruled. *Hanger v. Keating*, 26 Ark. 51; *Ex parte Little Rock*, 26 Ark. 52; *State v. Judge*, 29 La. Ann. 806; *Ex parte McMeechen*, 12 Ark. 70; *State v. Vorhies*, 40 La. Ann. 607; *State v. Henry*, 41 La. Ann. 908; *State v. Steele*, 38 La. Ann. 569.

A motion to dismiss a suit for want of jurisdiction is sufficient objection to the jurisdiction to afford a foundation for an application for a writ of prohibition. *State v. Williams*, 48 Ark. 227.

1. *Barnes v. Gottschalk*, 3 Mo. App. 222.

2. *Rutland v. Bagshawe*, 14 Q. B. 869.

The trial of a case after the taking of an appeal from an order denying a motion for a change of venue, is not a proceeding without or in excess of the jurisdiction of the court, within the meaning of *California* Code Civ. Pro., § 1102, so as to authorize the issuing of a writ of prohibition. *People v. Whitney*, 47 Cal. 584.

3. *People v. Common Pleas*, 43 Barb. (N. Y.) 278; *Dutens v. Robson*, 1 H. Bl. 100; *Carslake v. Mapledoram*, 2 T. R. 473.

4. *McDonald v. Elfe*, 1 Nott & M. (S. Car.) 501; *Bowman's Case*, 67 Mo. 146.

Rejection of Evidence.—The rejection by a magistrate of competent evidence affecting the credibility of witnesses for the prosecution is not sufficient ground for a writ of prohibition. *Ex parte Bradley*, 9 Rich. (S. Car.) 95.

5. *State v. Judge*, 34 La. Ann. 611. In *People v. Russell*, 49 Barb. (N. Y.) 351, it was held that the writ should not issue to restrain an inferior court from entertaining summary proceedings under a statute not unconstitutional.

6. *Ex parte Green*, 29 Ala. 52.

When the residence of a testator necessary to give jurisdiction to a surrogate of proceedings for the probate of his will is denied, the denial does not afford ground for the issue of a writ of prohibition to the surrogate. *People v. Surrogate's Court*, 36 Hun (N. Y.) 218.

7. *Maurer v. Mitchell*, 53 Cal. 289; *Le Conte v. Berkeley*, 57 Cal. 269; *Farmers' etc. Union v. Thresher*, 62 Cal. 407; *Hobart v. Tillson*, 66 Cal. 210; *People v. Queens Co.*, 1 Hill (N. Y.) 195; *Clayton v. Heidelberg*, 9 Smed. & M. (Miss.) 623.

In *People v. Kern Co.*, 47 Cal. 81, it

by statute that prohibition or any other preventive remedy shall not be awarded by the courts against the collection of the State taxes.¹

3. Issue or Enforcement of Execution.—Prohibition will not issue to prevent the issue of an execution,² nor to prevent the officer holding it from enforcing it.³

V. AGAINST WHOM ISSUED.—**1. Generally.**—Originally, the writ of prohibition was understood to be a writ issuing out of some superior court, directed to the judge and parties of an inferior court, commanding them to cease from the prosecution of a suit, upon a suggestion that either the cause originally, or some collateral matter therein, did not belong to that jurisdiction, but to the cognizance of some other court.⁴ But in practice this writ has subsequently gone beyond this limit, and has been used not only to restrain inferior judicial tribunals within the orbit of their jurisdiction as to the subject-matter conferred upon them, but has also reached to their collateral proceedings when contrary to the common law or some statutory provision. Nor has it been confined entirely to inferior judicial tribunals, as seemed first to be intended; on the contrary, it has been extended to other public functionaries, officials, and persons charged with the performance of a duty not wholly judicial, and not even very extensively or strongly marked with a judicial character.⁵ So a

was held that a writ of prohibition would not issue to prevent a board of supervisors from collecting a tax, unless the proceedings themselves were absolutely without or in excess of the jurisdiction of the board.

So in *Mississippi* where the law confers upon the board of police, power to levy and collect special tax sufficient to build and repair any court house or jail or other county buildings for their counties, respectively, their jurisdiction over such matters is unquestionable, and hence there is no room for the interference of the circuit court by writ of prohibition to prevent the levy and collection of the tax for the payment of the construction or repair of such public buildings. *Clayton v. Heidelberg*, 9 Smed. & M. (Miss.) 623.

In *Kentucky*, the writ of prohibition is not an appropriate remedy to test the legality of a law relating to a tax by preventing the officer from proceeding to collect the tax, but the writ is given for such purpose by statute in Louisville. *Talbot v. Dent*, 9 B. Mon. (Ky.) 527.

But see *Burger v. Carter*, 1 McMull. (S. Car.) 410; *People v. Works*, 7 Wend. (N. Y.) 486.

1. *Cody v. Lennard*, 45 Ga. 85.

Tax on National Banks.—A writ of prohibition against a board of supervisors commanding them to desist from levying a tax on a national bank will be refused where the legal right for such a writ is doubtful and the remedy will involve public inconvenience. *People v. Ulster Co.*, 31 How. Pr. (N. Y.) 237.

2. *Ex Parte Brandlacht*, 2 Hill (N. Y.) 367; 38 Am. Dec. 593; *Atkins v. Siddons*, 66 Ala. 453; *Kyle v. Evans*, 3 Ala. 481; *State v. Justices*, 41 Mo. 44. See *Ducheneau v. Ireland*, 5 Utah 108.

3. *Brooks v. Warren* (Utah) 12 Pac. Rep. 659. See *State v. Judge*, 38 La. Ann. 49. Where injunction of an exemption has been asked and regularly tried below, prohibition of the execution will not be granted. The proper remedy is by appeal. *State v. Robinson*, 38 La. Ann. 968. See *Brooks v. Warren*, 5 Utah 89.

4. 3 Bl. Com. 112; *State v. Stackhouse*, 14 S. Car. 427; *Sherlock v. Jacksonville*, 17 Fla. 93. See *Clayton v. Heidelberg*, 9 Smed. & M. (Miss.) 623; *People v. Queens Co.*, 1 Hill (N. Y.) 195; *Grier v. Taylor*, 4 McCord (S. Car.) 206; *Jasper Co. v. Spittler*, 13 Ind. 235.

5. *State v. Stackhouse*, 14 S. Car.

town council or municipal court is held to be a proper subject for prohibition when it undertakes to adjudge and administer the laws of the State and usurp a jurisdiction not belonging to it,¹ but so long as a city council confines itself within the limits of the charter to mere police regulations under its own ordinances, it cannot be considered a court subject to prohibition.²

2. Courts—*a. GENERALLY.*—In *England*, any court that exceeds its jurisdiction may be restrained by prohibition.³ So, in this country where the supreme court of a State is vested by the constitution of the State with power to issue such remedial, original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions, it may grant a prohibition against any subordinate court whether of general or limited jurisdiction, and whether a court of law or chancery.⁴

427; *People v. Road Comm'rs*, 3 Hill (S. Car.) 314; *Harrington v. Road Comm'rs*, 2 McCord (S. Car.) 400; *Lynch v. Road Comm'rs*, Harp. (S. Car.) 336.

Minnesota.—At common law a writ of prohibition was only issued to restrain the exercise of judicial powers. The *Minnesota* statute confirms its use, and does not purport to limit, extend, or determine the cases in which it will lie. *Home Ins. Co. v. Flint*, 13 Minn. 244.

In *California*, it was held that the legislature had no power to enact the statute which purports to amend *California* Code, § 1102, in so far as it attempts to enlarge the office of the writ of prohibition. *Camron v. Kenfield*, 57 Cal. 550. See *Maurer v. Mitchell*, 53 Cal. 292; *Farmers' etc. Union v. Thresher*, 62 Cal. 407; *Hobart v. Tillson*, 66 Cal. 210.

State Auditor.—A writ of prohibition will not lie against the State auditor to forbid him from proceeding by distress against a defaulting collector and his sureties. *Casby v. Thompson*, 42 Mo. 133.

Secretary of State.—The supreme court will not award a writ of prohibition against a circuit court to prohibit it from proceeding by *mandamus* to compel the secretary of State to deliver the sealed returns of an election for governor on the petition of a party who alleges that he is plaintiff in an injunction suit to prevent the secretary from delivering said returns, and that the circuit court has ignored his injunction, although it appears that said court had no jurisdiction to award said *mandamus*. *Fleming v. Guthrie*, 32 W. Va. 1.

1. *McKee v. Town Council*, 1 Rice (S. Car.) 24; *Zylstra v. Charleston*, 1 Bay (S. Car.) 382. See *Mealing v. City Council*, Dudley (Ga.) 221; *People v. District Ct.*, 6 Colo. 534.

The Supreme court of *South Carolina* having power to issue "writs of injunction, *mandamus*, *quo warranto*, *habeas corpus* and such other original and remedial writs as may be necessary to give it a general supervisory control over all other courts in this State," held, that it could not issue a writ of prohibition to restrain a city council from issuing liquor licenses. *State v. Columbia*, 16 S. Car. 412.

2. *Mealing v. City Council*, Dudley (Ga.) 221.

Mayor.—Where the mayor is by law made the chief executive officer of a city, and as such is authorized to supervise the other officers thereof in the execution of their duties, prohibition will not lie to restrain him from proceeding with the investigation of charges against the chief of police, because he acts as the chief executive officer of the city and not as a court. *Burch v. Hardwicke*, 23 Gratt. (Va.) 51.

3. *Warner v. Suckerman*, 3 Bulst. 120.

4. *High's Ex. L. Rem.*, § 776; *Henshaw v. Cotton*, 127 Mass. 60. See *Henry v. Steele*, 28 Ark. 455; *Ex parte Smith*, 23 Ala. 94; *Ex parte Hill*, 38 Ala. 429; *Hudson v. Judge*, 42 Mich. 239; *Quimbo Appo v. People*, 20 N. Y. 531; *State v. Judge*, 11 La. Ann. 187.

But where a bill in equity is filed and it shows a case of equity jurisdiction to grant the preliminary relief prayed, a writ of prohibition to restrain the action of the court of chancery upon it will

b. COUNTY COURTS.—Prohibition will lie against county courts whenever a proper case is presented to warrant the exercise of the jurisdiction, as where county courts have exceeded their jurisdiction by granting writs of prohibition to justices of the peace, the superior courts will restrain them by prohibition.¹

c. JUSTICES COURTS.²—Where justices courts proceed without authority of law, prohibition affords the proper remedy to restrain their action.³

d. COURTS MARTIAL.—A court martial ordered and organized to try persons against whom are preferred certain charges, will not be restrained by prohibition where the application is made before that court has proceeded to the consideration of any other ques-

be refused. *People v. Circuit Ct.*, 11 Mich. 393. See *Ex parte Walker*, 25 Ala. 81.

Court of Appeals.—A writ of prohibition from the supreme court cannot affect the practice or jurisdiction of the *New York* court of appeals, or the rights of parties to its process and a hearing thereon. Any question as to jurisdiction of the latter court, the rights of parties to appeal, or the validity of an appeal, is for that court alone to determine. *Thomson v. Tracy*, 60 N. Y. 31.

Circuit Court.—Where a circuit judge, without jurisdiction, has issued *certiorari* to review the action of the county court in changing the location of a bridge that has been washed away, and made the writ returnable at a remote time, thus delaying a necessary public improvement, a writ of prohibition is the proper remedy. *Wood Co. Ct. v. Boreman* (W. Va. 1890), 11 S. E. Rep. 747.

A writ of prohibition will not lie to prevent the circuit court of the city of St. Louis from entertaining proceedings for the condemnation of property on the ground that it had no jurisdiction over the special class of property involved in the proceedings. *State v. Southern R. Co.*, 100 Mo. 59.

District Courts.—Prohibition lies to a district court in *Louisiana* to prevent it from passing as an appellate court over city courts upon questions involving the legality or constitutionality of a tax title to real estate. *State v. Voorhies*, 41 La. Ann. 540.

1. *Jackson v. Maxwell*, 5 Rand. (Va.) 636.

Under Const. *Virginia* providing that the supreme court of appeals shall have appellate jurisdiction only, except in cases of *habeas corpus*, *mandamus*

and prohibition, and Code 1873, ch. 156, § 4, providing that said court shall have jurisdiction to issue writs of *mandamus* and prohibition to the circuit and corporation court, and to the hustings court and the chancery court of the city of Richmond, and in all other cases in which it may be necessary to prevent a failure of justice in which a *mandamus* may issue according to the principles of the common law—the court has no power to issue a writ of prohibition to a county court. *Gresham v. Ewell*, 84 Va. 784.

2. See *supra*, this title, *Amount in Controversy*.

3. *South Carolina R. Co. v. Ellis*, 40 Ga. 87; *Miller v. Marshall*, 1 Va. Cas. 158; *Yearian v. Speirs*, 4 Utah 482; *State v. McCrea*, 40 La. Ann. 20; *Arnold v. Shields*, 5 Dana (Ky.) 18; 30 Am. Dec. 669; *Bodley v. Archibald*, 33 W. Va. 229; *People v. Spiers*, 4 Utah 385; *Hayne v. Justices' Ct.*, 82 Cal. 284.

Justices of the peace have jurisdiction to abate the stopping of a way, claimed as an easement, by piling up dirt and building fences, and therefore the superior court errs when it grants a writ of prohibition against them in such a case. *Hart v. Taylor*, 61 Ga. 156.

The province of the writ of prohibition is to restrain from acting as a court. The board of police justices of the city of New York, when acting under the act of April 17, 1860, in the appointment of clerks, etc., does not act as a "court" and is not subject to prohibition. *Norton v. Dowling*, 46 How. Pr. (N. Y.) 7.

Where a justice of the peace acts wholly beyond his jurisdiction, and there is no provision for a trial by jury in his court, or in the appellate

tion than that of its jurisdiction, unless it appears upon the face of the proceedings that the court has no jurisdiction of any part of the subject-matter of these charges.¹

3. Coroners.—Where a coroner acts beyond the proper limits of his office and jurisdiction in holding an inquest, it has been held that prohibition will lie.²

4. Executive Officers.—A prohibition will not be granted in respect of any proceeding belonging to the executive government of the country.³ Thus, the writ will not issue to restrain a governor from granting a commission to a sheriff who has been improperly elected,⁴ nor to prevent a mayor from investigating charges against an inferior officer of the city.⁵

5. Referees and Commissioners.—Referees provided for by statute to hear and determine the question of a right of way of one citizen over the lands of another, partake of the character of a judicial body, and prohibition is a proper and necessary remedy to keep this *quasi* court within the boundary of its extraordinary powers.⁶ So, a board of county commissioners acting in a judicial capacity may be prohibited from proceeding under an unconstitutional act.⁷

court, prohibition will lie, as appeal is not an adequate remedy. The objection that there is no jury trial in the justice's court, is not satisfied by appeal. *Yearian v. Speirs*, 4 Utah 382.

1. *Washburn v. Phillips*, 2 Met. (Mass.) 296. See *State v. Edwards*, 1 McMull. (S. Car.) 215.

2. *Reg v. Herford*, 3 El. & El. 115.

3. *Chabot v. Morpeth*, 15 Q. B. 446.

By *Wisconsin Rev. Stat.*, ch. 159, §§ 8–13, no less than at common law, the writ of prohibition does not issue to restrain the acts of executive or administrative officers, but only those of a court or other inferior tribunal, exercising some judicial power which it has no legal authority to exercise. *State v. Gary*, 33 Wis. 93.

4. *Grier v. Taylor*, 4 McCord (S. Car.) 206; 17 Am. Dec. 731.

5. *Burch v. Hardwicke*, 23 Gratt. (Va.) 51.

6. *State v. Stackhouse*, 14 S. Car. 427.

7. *Connecticut River R. Co. v. Franklin Co.*, 127 Mass. 50. See *Sweet v. Hurlbert*, 51 Barb. (N. Y.) 312; *State v. Simons*, *Spears* (S. Car.) 761; *Ex parte Roundtree*, 51 Ala. 42; *Zylstra v. Charleston*, 1 Bay (S. Car.) 382.

The writ has been issued against road commissioners to prevent the imposition or collection of fines for road

work in cases where the law does not authorize such fines. *People v. Road Comm'rs*, 3 Hill (S. Car.) 314; *Harrington v. Road Comm'rs*, 2 McCord (S. Car.) 400; *Lynah v. Road Comm'rs*, *Harper* (S. Car.) 336; *Gist v. Cole*, 2 Nott & M. (S. Car.) 456; 10 Am. Dec. 616; *State v. Comm'rs*, 1 Mill. (S. Car.) 55.

Connecticut Laws 1881, ch. 124, giving the county commissioners sole jurisdiction of the granting of liquor licenses,—does not constitute them a "court" within the constitution; and a writ of prohibition cannot be issued against them. *La Croix v. Fairfield Co.*, 50 Conn. 321; 47 Am. Dec. 648; *Jasper Co. v. Spitler*, 13 Ind. 235.

Railway Commissioners.—A prohibition was granted to prevent the railway commissioners from enforcing orders requiring two companies to act jointly in doing what neither could do separately. *Toomer v. London etc. R. Co.*, L. R., 2 Ex. Div. 450. Also where they granted an injunction to restrain a railway company from making charges for the conveyance of passengers in excess of those authorized by their special acts, but without any undue preference. *Great Western R. Co. v. Railway Comm'rs*, L. R., 7 Q. B. D. 182. Also where they undertook an arbitration between two railway companies under § 8 of 36 & 37 Vict., ch. 48, the specific differ-

VI. PROCEDURE.—1. In General.—In the absence of statutory regulations as to the pleadings and procedure in prohibition, the common law practice is still applicable,¹ and is as follows: The party aggrieved in the court below applies to the superior court, setting forth in a suggestion, petition, or information, the nature and cause of his complaint.² If the facts are not presented by the record of the inferior court the party wishing the writ must make the proper suggestion to the superior tribunal, setting forth all the material facts upon which he relies, with the proper allegations, and, if the facts do not appear on the record, verify the truth of them by affidavit.³ A rule should then be entered upon the opposite party to show cause upon a given day why

ence between the two companies not being required or authorized by any general or special act to be referred to arbitration. *Great Western R. Co. v. Waterford etc. R. Co.*, L. R., 17 Ch. D. 493; 44 L. T., N. S. 723. Also, where a railway company having guarantied to a canal company that if the income of the latter was in any year insufficient to pay a dividend of four per cent. the railway company would make up the deficiency, the commissioners, without the consent of the railway company, and without hearing it, made an order allowing through rates for goods traffic between two points, the effect of which would be to reduce the tolls of the canal company below the maximum allowed by its acts, which tolls the canal company was prohibited from reducing or varying without the consent of the railway company. *Warwick etc. Canal Co. v. Birmingham*, L. R., 5 Ex. Div. 1.

Election Commissioners.—Prohibition, from a court of equity, does not lie to control election officers, when there is a statutory remedy by proceedings to contest the election. *Kemp v. Ventulett*, 58 Ga. 419.

The board of election commissioners, in complying with *California* Const., art. 11, § 18, as to ordering an election for fifteen freeholders to propose a charter to be submitted to the voters of San Francisco, are not acting judicially, and a writ of prohibition will not lie to arrest the proceeding. *People v. Board of Election Comm'rs*, 54 Cal. 404.

Under *West Virginia* Const., art. 8, § 12, providing that "the circuit court shall have supervision and control of all proceedings before justices and other inferior tribunals, by *mandamus*, prohibition, and *certiorari*," and *West*

Virginia Acts 1882, ch. 73, § 3, authorizing the judge of the circuit court to issue a writ of prohibition in vacation, held, that such writ would lie from the judge to the county commissioners assembled in special session to ascertain the result of an election, to prevent them from transcending their powers by examining witnesses and hearing evidence to determine whether the precinct commissioners have returned votes which ought not to be counted. *Brazie v. Fayette Co.*, 25 W. Va. 213.

1. High Ex. Rem., § 796. For a summing up of the common law procedure, see *Ex parte Williams*, 4 Ark. 537; 38 Am. Dec. 46. This procedure has been recognized in the following cases: *State v. Comm'rs*, 1 Mill (S. Car.) 55; *State v. Hudnal*, 2 Nott & M. (S. Car.) 419; *Ex parte Richardson*, Harp. (S. Car.) 308; *M'Kenna v. Road Comm'rs*, Harp. (S. Car.) 381; *Johnson v. Basquere*, 1 Spears (S. Car.) 329; *Johnson v. Boon*, 1 Spears (S. Car.) 268; *Warwick v. Mayo*, 15 Gratt. (Va.) 528.

And see also as to the practice in prohibition, *South Carolina Soc. v. Gurney*, 3 Rich., N. S. (S. Car.) 51; *Burch v. Hardwicke*, 23 Gratt. (Va.) 51; *Doughty v. Walker*, 54 Ga. 595.

2. 3 Black. Com. 113.

3. *Ex parte Williams*, 4 Ark. 537; 38 Am. Dec. 46; *Carliaga v. Dryden*, 30 Cal. 246. See *Santa Cruz Gap Turnpike etc. Co. v. Santa Clara Co.*, 62 Cal. 41; *Buggin v. Bennett*, 4 Burr. 2037; *Caton v. Burton*, Cowp. 330.

An affidavit to a petition for a writ of prohibition is not properly made, which fails to state that the affiant has either knowledge or information concerning the matter stated in the petition. *Carliaga v. Dryden*, 30 Cal. 244.

the writ should not issue.¹ The entry and service of such rule stay all proceedings in the case. And upon the return the court will make the rule absolute or will discharge it as seems proper.² But sometimes the point may be too nice and doubtful to be decided merely upon a motion, and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to declare prohibition; that is, to prosecute an action, by filing a declaration against the other, and if, upon demurrer and argument, the court shall finally be of the opinion that the matter suggested is a good and sufficient ground of prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any further. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above, and a writ of consultation shall be awarded; so called, because, upon deliberation and consultation had, the judges find the prohibition to be ill-founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined in the inferior court.³

2. **Parties.**—The application for prohibition may be made not only by either of the parties to the proceeding in the inferior court,⁴ but also by a stranger.⁵ The application may be made either against the other party to the suit, or the judge to be prohibited, or both. In modern practice the application in the first instance is made in form against the party and the court;⁶ the

1. *Mayo v. James*, 12 Gratt. (Va.) 17; *Ex parte Williams*, 4 Ark. 537; 38 Am. Dec. 46. See *Withers v. Road Comm'rs*, 3 Brev. (S. Car.) 83.

The execution of such a rule will have the effect of a prohibition *quousque*, or until the discharge of the rule. *Mayo v. James*, 12 Gratt. (Va.) 17.

The writ of prohibition will not issue until after opportunity given parties to show cause why it should not issue; and where it clearly appears that no ground for the writ exists, the application will be dismissed without entry of rule to show cause. *Ex parte Tucker*, 25 Ark. 567.

2. *Ex parte Williams*, 4 Ark. 537; 38 Am. Dec. 46.

The common law procedure was modified in *England* by St. 1 Geo. IV, enacted in 1831, authorizing the application to be made on affidavits only, simplifying the declaration, when such should be directed, and regulating the subsequent pleadings and the judgment.

3. *Ex parte Williams*, 4 Ark. 537; 38

Am. Dec. 46; 3 Black. Com. 113; *Bishop of Winchester's Case*, 1 Coke Rep. (edition of 1826), p. 535, note; *Croucher v. Collins*, 1 Saund. 136, note.

4. *Strausham v. Medcalfs*, 1 Leon 130; *Worts v. Clayston*, Cro. Jac. 350; *Clapham v. Wray*, 12 Mod. Rep. 423; *Walton v. Greenwood*, 60 Me. 363; *Bridge v. Branch*, 1 L. R., C. P. Div. 633.

5. *Wadsworth v. Queen of Spain*, 17 Ad. & E., N. S. 171; *Trainer v. Porter*, 45 Mo. 336; Com. Dig. Prohibition E; *High's Ex. L. Rem.*, § 779; *Walton v. Greenwood*, 63 Me. 363; *De Haber v. Queen of Portugal*, 17 Q. B. 171; *Worthington v. Jefferies*, 44 L. J., C. P. 209; *In Reg. v. Twiss*, 10 B. & S. 298; 4 L. R., Q. B. 407. See *Chambers v. Green*, 44 L. J. Ch. 600. The granting of a prohibition on the application of a stranger was held to be discretionary.

6. *Mayor etc. of London v. Cox*, 2 E. & I. App. 280; *Arnold v. Shields*, 5 Dana (Ky.) 18; 30 Am. Dec. 669. In

writ is usually issued in *England* in the name of the sovereign and in this country in the name of the State.¹ For separate suits against individuals there should be separate applications for prohibitions.²

3. When Writ May Issue.—The judges at common law did not issue writs of prohibition in vacation. In the *United States* necessity may require the application for prohibition to be made in vacation, but the writ itself should only be issued in term time. When the application is made in vacation, a rule to show cause should first issue, returnable to the next term of the court, and this rule should be served upon the judge, or court, and the parties to be affected by it.³ When a circuit judge has irregularly granted the writ in vacation, on a petition which did not justify it, and without notice or a preliminary rule to show cause, although the supreme court will not interfere by prohibition, at the suit of the inferior tribunal which has disregarded the writ, it will grant a writ in the nature of a *mandamus*, commanding the circuit judge to set aside the writ issued by him, and to reverse his action back to the filing of the original petition.⁴

4. Notice.—In proceedings for a writ of prohibition service upon the person or persons adversely interested is essential. To proceed without such notice would violate the fundamental rule that in all suits in courts of common law a service upon the persons or parties adversely interested is indispensable.⁵

5. Service.—The writ is served in the same manner as an ordinary summons, and a summons can be served on the defendant personally or by leaving a certified copy thereof at his usual place of abode with some suitable person.⁶

6. Answer.—A petition for a writ of prohibition will be dismissed if submitted simply on the petition and answer, and the answer denies the leading allegations of the petition.⁷ So, if the respondent files a demurrer and answer, and the demurrer is overruled, and judgment absolute is given against respondent on the insufficiency of his answer, when, in the absence of a motion for judgment on the pleadings, he expects that only the

Armstrong v. Taylor Co. Ct., 15 W. Va. 190, a declaration by citizens and tax-payers for a writ of prohibition against the county court, to prevent reduction of taxation on property of a railroad company in the county, was held to be demurrable for not making the company a party respondent.

1. *Baldwin v. Cooley*, 1 S. Car. 256; *High's Ex. L. Rem.*, § 779. In *State v. Seay*, 23 Mo. App. 623, it was held that a State is not a necessary party to a writ of prohibition.

2. *Gerrard v. Sherrington*, 1 Leon 286; *Kadwalader v. Bryan*, Cro. Car. 162.

3. *Ex parte Boothe*, 64 Ala. 312.

A writ of prohibition, when allowed by a justice out of court, may be quashed on motion at special term, even if returnable at the general term. *People v. Russell*, 19 Abb. Pr. (N. Y.) 136.

4. *Ex parte Booth*, 64 Ala. 312. See *Ex parte Keeling*, 50 Ala. 474; *Ex parte Ray*, 45 Ala. 15.

5. *Walton v. Greenwood*, 60 Me. 364; *Ex parte Davis*, 41 Me. 59.

6. *Jones v. House*, 4 Utah 484.

7. *Cariaga v. Dryden*, 30 Cal. 244.

Truth of Facts Admitted.—A general demurrer was pleaded to a declaration in prohibition, which stated a trial by unauthorized individuals, and the ad-

demurrer would be passed on, a motion to vacate the decision on the ground of surprise, and to allow an amended answer, will be granted.¹

7. **Variance.**—A variance between the suggestion (or affidavit which the statute has substituted for it) and the declaration, is not fatal in bar and consequently is not ground of demurrer.²

8. **Motion to Quash.**—The motion to quash the return to the alternative writ of prohibition is in the nature of a demurrer thereto. Like a demurrer it reaches back to the first defective pleading. So if the relation does not state cause for issuing writ of prohibition, it may be quashed upon this motion.³

9. **Prohibition Issued in Excess of Jurisdiction.**—Where the writ of prohibition is issued in excess of jurisdiction, it may be annulled by *certiorari*.⁴

10. **Enforcement of Prohibition.**—Implicit obedience to the mandates of the prohibition is exacted in all cases, and the proper remedy for enforcing the writ, if disobeyed, is by attachment for contempt of court and not by writ of restitution.⁵

11. **Costs.**—Where a motion for prohibition has been dismissed, without order concerning the costs, the defendant is not entitled to recover costs against the relator.⁶

PROMISE is a declaration, verbal or written, made by one person to another for a good or valuable consideration, by which the promisor binds himself to do, or forbear, some act, and gives to the promisee a legal right to demand and enforce a fulfillment.⁷

mission of testimony in opposition to the rules of law; the truth of the facts alleged being thereby admitted, a prohibition issued without view of the proceedings of the court below. *State v. Hudnall*, 2 Nott & M. (S. Car.) 419.

Compliance.—An alternative writ of prohibition was issued to the superior court on the petition of an executor, who alleged that, notwithstanding his appeal from an order settling his account, the court, on the application of the heirs, was proceeding to a final distribution. *Held*, that, on the withdrawal of their application by the heirs, and their stipulation not to renew it until the determination of the appeal, the alternative writ would be dismissed, though the heirs expressly reserve the right to apply for a partial distribution. *Pezuela v. Superior Ct.*, 83 Cal. 49.

1. *Heilbron v. Campbell* (Cal. 1890) 23 Pac. Rep. 1032.

2. *Warwick v. Mayo*, 15 Gratt. (Va.) 528.

3. *State v. Brawn*, 31 Wis. 600.

4. *California Furniture Co. v. Halsey*, 54 Cal. 318.

5. *Howard v. Pierce*, 38 Mo. 296;

State v. Hungerford, 8 Wis. 345; 3 Black. Com. 112, 113.

6. *Beaufort v. Danner*, 1 Strobb. (S. Car.) 176.

7. *Newcomb v. Clark*, 1 Den. (N.Y.) 226. And yet it was said in that case that a guaranty which reads: "I hereby promise to pay," etc., does not impart or imply a consideration, within the meaning of the *New York* statute of frauds, requiring the consideration to be expressed.

In *Bassett v. Den*, 17 N. J. L. 432, the court said: "According to Walker, to promise is to make a declaration of some benefit, or an assurance of some ill. To say, then, that 'I declare that I will, do so and so' means exactly the same thing and imposes precisely the same obligation as the words 'I promise that I will' do so and so." That case turned upon the sufficiency of the oath of a surveyor of highways. The statute using the words "promise and affirm," and the surveyor having used the form "declare and affirm," it was held that the statute had been sufficiently complied with.

Promise is an engagement by which

Definition.

PROMISSORY NOTE—PROPERTY.

Definition.

PROMISSORY NOTE.—See *BILLS AND NOTES*, vol. 2, p. 313.

PROMOTERS.—See *CORPORATIONS*, vol. 4, p. 201.

PROMPT.—Prompt is synonymous with quick; sudden; precipitate. Indeed, one who is ready, is said to be prepared at the moment; one who is prompt, is said to be prepared beforehand.¹

PROOF.—(See also *BURDEN OF PROOF*, vol. 2, p. 649; *EVIDENCE*, vol. 7, p. 42).—The terms "proof" and "evidence" are often used indifferently as synonymous with each other; but the former is applied, by the most accurate logicians, to the effect of evidence, and not to the medium by which truth is established.²

PROPER.—See note 3.

PROPERTY.—(See also *CONSTITUTIONAL LAW*, vol. 3, p. 714; *EMBEZZLEMENT*, vol. 6, p. 459; *PERSONAL PROPERTY*; *REAL*

the promisor contracts with another to perform or do something to the advantage of the latter. *Bouv. Law Dict.*

Mutual Promises.—In *Schneider v. Lang*, 29 Minn. 256, the court by Berry, J., said: "The case is, then, one of a promise on the part of the plaintiff to do something of advantage in law to the defendant, and on the part of the defendant to do something of advantage in law to the plaintiff—a case of mutual promises one of which is the consideration of the other."

Promise and Representation Distinguished.—A representation applies to the present, a promise to the future. *Murdock v. Chenango Ins. Co.*, 2 N. Y. 220.

Concurrent Promises.—Where the acts to be performed are simultaneous. *And. Law Dict.*; *Dermott v. Jones*, 23 How. (U. S.) 220.

Dependent Promises — Independent Promises.—When the agreements go to the whole of the consideration of both sides the promises are dependent, and one of them is a condition precedent to the other. If the agreements go to a part only of the consideration on both sides, the promises are so far independent. *Dermott v. Jones*, 23 How. (U. S.) 220.

Original and Collateral Promise.—Expressions used in speaking of liability under the Statute of Frauds "to answer for the debt or default of another;" the former designating the obligation of the principal debtor, the latter the obligation of the person undertaking to answer for the debt. "Original" also characterizes any new promise to pay an antecedent debt of another. *And.*

Law Dict., citing *Mallory v. Gillett*, 21 N. Y. 414.

See also *FRAUDS, STATUTE OF*, vol. 8, p. 677.

New Promise.—See *LIMITATION OF ACTIONS*, vol. 13, p. 748.

1. *Tobias v. Lissberger*, 105 N. Y. 412; 59 Am. Rep. 14.

2. 1 Greenl. Ev., § 1; *Schloss v. Creditors*, 31 Cal. 203; *Perry v. Dubuque etc. R. Co.*, 36 Iowa 106.

"Proof is that quantity of approximate evidence which produces assurance and certainty." *Buffalo etc. R. Co. v. Reynolds*, 6 How. Pr. (N. Y.) 98.

"Proof, in strict legal construction, means evidence before a court or jury, in a judicial way." *Lenox v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 224.

"This is a technical word, used in a technical sense, and implies the application, to some extent, of those rules under which evidence is ordinarily admitted." *Hill v. Hunt*, 20 N. J. L. 478.

Proof, as used in *South Carolina Rev. Stat.* 497, allowing a judgment to be set aside on "satisfactory proof," is synonymous with evidence. *Hill v. Watson*, 10 S. Car. 268.

Full Proof.—Evidence which satisfies the mind of the truth of the facts in dispute, to the entire exclusion of every reasonable doubt. *Kane v. Hibernia Mut. F. Ins. Co.*, 38 N. J. L. 450.

Proof is Evident.—See *HABEAS CORPUS*, vol. 9, p. 207.

See generally, *Brown v. Hinchman*, 9 Johns. (N. Y.) 75; *Hill v. Hunt*, 20 N. J. L. 476; *Ex parte Cook*, 2 Tex. App. 388; *McCoy v. State*, 25 Tex. 38.

3. The *California* insolvency act of

PROPERTY).—Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others; yet the term is often used to indicate the *res* or subject of the property, rather than the property itself.¹ The word is *nomen generalissi-*

1880, requires that merchants should have kept "proper books" in order to obtain a discharge. *Held*, that books which did not contain a loan to the firm, which, if entered, would have shown that the firm was utterly insolvent, were not "proper books" within the meaning of the statute. *In re Good*, 78 Cal. 399. See generally *INSOLVENCY*, vol. 11, p. 167.

Proper Instructions.—Within the meaning of a statute which provides that in a contested will case, an issue shall be made up and submitted to the jury under "proper instructions" by the court, it was held, that "proper instructions" are such as the law of the case and the testimony before the jury make pertinent. *Davis v. Gelhaus*, 44 Ohio St. 69. See also *INSTRUCTIONS*, vol. 11, p. 236.

1. *Rigney v. Chicago*, 102 Ill. 77. See also *Dorman v. State*, 34 Ala. 239.

Arrest of a Female for Injury to Property.—*New York Code*, § 179, provides that "no female shall be arrested in any action except for a willful injury to person, character or property." "Property," as used in this section means the right of the owner of a thing to its disposal, use, and enjoyment, as well as the thing itself, and any detention of the subject is an injury to the owner's "property" in it, within the meaning of the statute. *Eypert v. Bolenius*, 2 Abb. N. Cas. (N. Y.) 193; *Starr v. Kent*, 2 Code Rep. (N. Y.) 30; *Northern R. Co. v. Carpenter*, 3 Abb. Pr. (N. Y.) 259; *Solomon v. Waas*, 2 Hilt. (N. Y.) 179; *Duncan v. Katen*, 64 N. Y. 625.

But in *Tracy v. Leland*, 2 Sandf. (N. Y.) 731, it was held, that by "injury to property," within the above section, an injury to the thing itself was meant, and not an injury to the owner's interest or estate in it.

Other Definitions.—The highest right a man can have to anything, being used for that right which one hath in lands or tenements, goods or chattels, which no way depends on another man's courtesy. *Jacobs Law Dict.*, quoted in *Stief v. Hart*, 1 N. Y. 24;

Jackson v. Housel, 17 Johns. (N. Y.) 282.

The right to possess, use, enjoy, and dispose of a thing. *Babcock v. Buffalo*, 56 N. Y. 268.

The free use, enjoyment and disposal of all one's acquisitions without control or direction. *Caro v. Metropolitan Elev. R. Co.*, 46 Super. Ct. (N. Y.) 138.

Property is the exclusive right of possessing, enjoying and disposing of a thing which is in itself valuable; it is ownership. *Jones v. Van Zandt*, 4 McLean (U. S.) 603.

The word "property" denotes the interest one may have in lands and chattels to the exclusion of others. *Ayers v. Lawrence*, 59 N. Y. 192. See also *Morrison v. Semple*, 6 Binn. (Pa.) 94.

An exclusive right to things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or giving them away to any other person without consideration, or even throwing them away. *Wynehamer v. People*, 13 N. Y. 397. See also *Toledo Bank v. Bond*, 1 Ohio St. 623; *Sherman v. Elder*, 24 N. Y. 381.

The right and interest a man has in lands and chattels. It is the right to enjoy and dispose of certain things in the most absolute manner, as he pleases, provided he makes no use of them prohibited by law. *Dow v. Gould* etc. *Min. Co.*, 31 Cal. 637; quoting *Bouv. Law Dict.*

The unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to use it and exclude every one else from interfering with it. *Bruch v. Carter*, 32 N. J. L. 561; quoting *Burrill Law Dict.*

Property consists of those things which belong to us by that exclusive right which enables us to exclude all others from having anything at all to do with them. . . . *Toledo Bank v. Bond*, 1 Ohio St. 623.

Property consists in the free use, enjoyment, and disposal by a person of

mum, and extends to every species of valuable right and interest, including real and personal property, easements, franchises and other incorporeal hereditaments.¹ Standing alone,

all his acquisitions, without any control or diminution, save only by the laws of the land. *Stevens v. State*, 2 Ark. 291.

The sole and exclusive dominion which one man claims and exercises over the external things of this world in total exclusion of the right of any other individual in the universe. *Law of Burial*, 4 Bradf. (N. Y.) 516.

"Property itself, in a legal sense, is nothing more than the exclusive right 'of possessing, enjoying, and disposing of a thing,' which, of course, includes the use of a thing." *Chicago etc. R. Co. v. Englewood etc. R. Co.*, 115 Ill. 375, 385.

"Property, in its broader and more appropriate sense, is not alone the chattel or land itself, but the right to freely possess, use, and alienate the same; and many things are considered property which have no tangible existence, but which are necessary to the satisfactory use and enjoyment of that which is tangible." *Denver v. Bayer*, 7 Colo. 113.

An interesting and instructive article by Mr. A. G. Sedgwick, in which he considers the different meanings of the word property, will be found in the *North American Review* for September, 1882, vol. 135, p. 253. And see *Eaton v. Boston C. & M. R. Co.*, 51 N. H. 511; *St. Louis v. O'Flynn*, 19 Ill. App. 64; *Tripp v. Overocker*, 7 Colo. 72.

Power of Disposition.—In *Wynehamer v. People*, 13 N. Y. 396, the court by Comstock, J., said: "Nor can I find any definition of property which does not include the power of disposition." *Sherman v. Elder*, 24 N. Y. 381.

Property does not consist merely of the title and possession. It includes the right to make any legal use of it, and the right to pledge or mortgage it, or to sell and transfer it. *Kuhn v. Common Council*, 70 Mich. 537.

1. *Boston etc. R. Co. v. Salem etc. R. Co.*, 2 Gray (Mass.) 35. See also *People v. Mayor etc. of Brooklyn*, 9 Barb. (N. Y.) 535; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389; *Williston Seminary v. Hampshire Co.*, 147 Mass. 427.

"Property" is of very extensive signi-

fication, and reasonably and fairly embraces articles not included in the phrase "goods and merchandise." *Chamberlain v. Western Transportation Co.*, 45 Barb. (N. Y.) 218.

Franchises—Privileges.—It has been held that "property" in a law authorizing taxes, does not include the franchise of a corporation. *State v. Philadelphia etc. R. Co.*, 45 Md. 361.

The power to authorize the laying down of gas pipes, is, in no true sense of the word, a part of the city property, to which the corporate authority of the city is to resort for purposes of revenue. *Smith v. Metropolitan Gas Light Co.*, 12 How. Pr. (N. Y.) 187.

But in general a franchise is property and it possesses the valuable incidents of other species of property. *Billings v. Breinig*, 45 Mich. 70; *Lippencott v. Allander*, 27 Iowa 462; *Conway v. Taylor*, 1 Black (U. S.) 603; *Benson v. Mayor etc. of N. Y.*, 10 Barb. (N. Y.) 223; *State Board of Assessors v. State* (N. J. 1886), 4 Atl. Rep. 587; 8 Atl. Rep. 724; *Soc. for Savings v. Coite*, 6 Wall. (U. S.) 594; *State Railroad Tax Cases*, 92 U. S. 575. See also **FRANCHISE**, vol. 8. p. 584.

Property in Land.—The term property as applied to lands comprehends every species of title, inchoate and complete. It is supposed to embrace those rights which lie in contract, those which are executory as well as those which are executed. *Soulard v. United States*, 4 Pet. (U. S.) 512; *Delassus v. United States*, 9 Pet. (U. S.) 117, 133; *Smith v. United States*, 10 Pet. (U. S.) 326, 329; *Figg v. Snook*, 9 Pet. (U. S.) 202; *Bryan v. Kennett*, 113 U. S. 179.

Article 10 of the *Massachusetts* bill of rights, assuring compensation for private property taken for public use is not confined to lands held in fee, but includes every valuable interest which can be recognized and enjoyed as property. *Old Colony etc. R. Co. v. Plymouth Co.*, 14 Gray (Mass.) 155; *Bryan v. Kennett*, 113 U. S. 179.

The mere possession of real estate is constantly treated as property. *King v. Gotz*, 70 Cal. 240.

Easements.—Property is defined as being "the right to possess, use, enjoy and dispose of a thing." The thing

the term includes everything that is the subject of ownership.¹

mentioned does not always have a tangible or physical existence; it may be an easement or anything else that can become the subject of private ownership. The proprietor of an irrigating ditch, whether upon his own premises or those of another, has a property ownership both in the ditch and the right of way therefor, and using or enlarging such ditch without the owner's consent is as much a taking or damaging of private property, within the meaning of the constitution as would be appropriating the right of way therefor in the first instance. *Tripp v. Overocker*, 7 Colo. 74. See also IRRIGATION, vol. 11, p. 846.

1. *Stanton v. Lewis*, 26 Conn. 449; *Baker v. State*, 109 Ind. 58; *Jones v. Skinner*, 5 L. J. Ch. 90; *Morrison v. Hoppe*, 4 DeG. & S. 234; *Washington Co. v. Weld Co.*, 12 Colo. 152. Includes everything which goes to make up one's wealth or estate. *Carlton v. Carlton*, 72 Me. 116. Any estate whether goods, money, or lands, and in its general signification, includes anything capable of ownership. *People v. New York etc. R. Co.*, 84 N. Y. 565; aff'g, 22 Hun (N. Y.) 95.

Labor is Property.—*In re Jacobs* 33 Hun (N. Y.) 379; *Slaughter-house Cases*, 16 Wall. (U. S.) 127; *In re Fiburcio Parrott*, 1 Fed. Rep. 481. See also *Foxall v. McKenny*, 3 Cranch (C. C.) 206.

Includes Both Real and Personal Property.—"Property," in its general and popular sense, includes both lands and chattels. *Owen v. Smith*, 31 Barb. (N. Y.) 641; *DeWitt v. San Francisco*, 2 Cal. 289; *Moffett v. Moffett*, 67 Tex. 644; *Primm v. Belleville*, 59 Ill. 143. But the meaning may be restricted by the context: as in *People v. New York, etc. Co.*, 84 N. Y. 565, where it was held, under an act which authorized the people to bring an action to recover "money, funds, credits, and property," that "property," when taken in connection with the other words used in the statute, must be restricted to property of the same general character as that already mentioned. See also *Chicago v. Hulbert*, 118 Ill. 633, where it was held that the word "property," as used in a statute defining a pawn-broker, did not include real estate. And see *Merritt v. Carpen-*

ter, 3 Keyes (N. Y.) 142; *Bridgers v. Taylor*, 102 N. Car. 86; *Bancroft v. Curtis*, 108 Mass. 50; *Brailey v. Southborough*, 6 Cush. (Mass.) 142.

In a Will.—In a devise the word "property," if unrestricted by the context, will include both real and personal property. *Jackson v. Housel*, 17 Johns. (N. Y.) 281. See also *Monroe v. Jones*, 8 R. I. 526; *Den v. Payne*, 5 Hayw. (Tenn.) 104; *Morris v. Henderson*, 37 Miss. 492; *Rossetter v. Simmons*, 6 S. & R. (Pa.) 452; *Tyrone v. Waterford*, 1 De G. F. & J. 613; *Arnold v. Arnold*, 2 My. & K. 365; *Doe v. Langlands*, 14 East 370; *Doe v. Morgan*, 6 Barn. & C. 512; *Hunt v. Hunt*, 4 Gray (Mass.) 193; *Robinson v. Randolph*, 21 Fla. 638; *Laing v. Barbour*, 119 Mass. 525. See generally *Howland v. Howland*, 100 Mass. 222; *King v. George*, L. R., 5 Ch. D. 627; *Moake's Eng. Rep.* 364; *Chapman v. Chick*, 81 Me. 109; *Chandler v. Simmons*, 97 Mass. 507.

And the term has been held to include everything which may be the subject of ownership, as money, securities, etc. *Pell v. Ball*, *Spears Eq.* (S. Car.) 48.

And even to include the services of a testator's servants, engaged in the business, where the bequest was of the use of the testator's "property," in a certain baking business. *Foxall v. McKenny*, 3 Cranch (C. C.) 206.

So stock in a railroad company is embraced in the term "property," which was directed by a will to be sold. *Adams v. Jones*, 6 Jones Eq. (N. Car.) 221.

The words in a will, "my will and desire is, that all my property that I have not before given away and lent be equally divided," etc., conveys every residuary interest whatsoever. *Harrell v. Hoskins*, 2 Dev. & B. (N. Car.) 479.

But the meaning of the term may be so restricted by the context, as by the application of the principle of *noscitur a sociis*, that it will carry only personal property. *Wheeler v. Dunlap*, 13 B. Mon. (Ky.) 291; *Harwood v. Lowell*, 4 Cush. (Mass.) 313; *Buchanan v. Harrison*, 1 J. & H. 662; *Belaney v. Belaney*, 2 Ch. 138; *Chapman v. Prickett*, 6 Bing. 602; *Smith v. Hutchinson*, 61 Mo. 87. See also *NOSCITUR A SOCIIS; OTHER.*

Equivalent to Estate.—In *Fogg v.*

Clark, 1 N. H. 167, a testator devised all his "landed property in M to F." The court, by Bell, J., said: "The word property in its most strict and proper sense relates solely to the quantity of estate in the land, and, unless words restraining its signification are added, always means the whole interest. The word 'property' in such connection is synonymous with the word estate or interest, and includes everything in the land which the testator possessed." See also *Robinson v. Randolph*, 21 Fla. 638; *Stanley v. Stanley*, 26 Me. 198; *Hunt v. Hunt*, 4 Gray (Mass.) 193; *Foster v. Stewart*, 18 Pa. St. 24. See also *INTENT*, vol. 11, p. 373.

Choses in Action.—The word "property" includes choses in action. *Stanton v. Lewis*, 26 Conn. 449; *Carlton v. Carlton*, 72 Me. 116; *Winfree v. Bagley*, 102 N. Car. 515; *Ide v. Harwood*, 30 Minn. 195; *Stahl v. Webster*, 11 Ill. 511; *M'Lezare v. Goode*, 1 Harp. Eq. (S. Car.) 272; *New Orleans v. Mechanics' etc. Ins. Co.*, 30 La. Ann. 876; 31 Am. Rep. 232. See also *Savings & Loan Society v. Austin*, 46 Cal. 416; *Fling v. Goodall*, 40 N. H. 215; *Cross v. Haldeman*, 15 Ark. 202; *Banning v. Sibley*, 3 Minn. 389; *Crone v. Braun*, 23 Minn. 239. See generally *In re Turcan*, L. R., 40 Ch. D. 5; *Lombard v. Willis*, 147 Mass. 13; *McClain v. Buck*, 73 Cal. 322; *Redmond v. Tarboro*, 106 N. Car. 122; *Jenkins v. International Bank*, 106 U. S. 571.

Within the meaning of § 292 *New York Code*, requiring, if execution is returned unsatisfied, that the judgment debtor shall appear and answer concerning his "property," a chose in action is property. *Ten Broeck v. Sloo*, 12 How. Pr. (N. Y.) 28. In *Tyrone v. Waterford*, 1 De G. F. & J. 613, it was held that a bequest of all the testator's property in a certain county carried debts due to his collieries in that county.

A bequest of "all my property of every description," has been held to pass choses in action. *Hurdle v. Outlaw*, 2 Jones Eq. (N. Car.) 75.

It has been held, that a debt due an American citizen from a foreign government, was property. *Meade v. U. S.*, 2 Ct. of Cl. 224.

The right which an insolvent debtor has in a policy of insurance on his life payable to him in case he survives a certain day, which day is after the first publication of notice, passes to his assignee as "property" within the mean-

ing of Pub. Stat. of *Massachusetts*, ch. 157, § 46. *Smith v. Dickinson*, 140 Mass. 171. See also *Pierce v. Charter Oak Ins. Co.*, 138 Mass. 151; *Goreley v. Butler*, 147 Mass. 10.

But in *Pippin v. Ellison*, 12 Ired. (N. Car.) 61, it was held that the term "property" in its legal sense does not include choses in action, and in reference to personalty, is confined to "goods," which embraces things inanimate, as furniture, etc., and to "chattels," which embraces living things, as horses, etc. And in *Vaughan v. Murfreesboro*, 96 N. Car. 318, where a statute permitted a municipal corporation to "levy a tax upon all persons and property within the town," it was held that this did not authorize a tax on solvent credits, money or bonds. And see *Pullen v. Commissioners*, 68 N. Car. 451. These cases, however, were disapproved in *Redmond v. Tarboro*, 106 N. Car. 122, which declares that *Pullen v. Comm'rs*, 68 N. Car. 451, is no longer an authority.

Nor is the right to damages arising from the commission of a tort, though in one sense a chose in action included within the term "property," as, for example, a claim for malicious prosecution. *Hopkins v. Fogler*, 60 Me. 266; or an action for damages to the person. *Stone v. Boston etc. R. Co.*, 7 Gray (Mass.) 539.

And the term "property" may be used in such a manner as to make it referable solely to such an estate or interest as one may have in lands or goods subject to manual occupation. *Goepp v. Bethlehem*, 28 Pa. St. 255; *Mifflintown v. Jacobs*, 69 Pa. St. 152.

So the context may so restrict the meaning of the word as to exclude choses in action. *Jameson's Appeal*, 1 Mich. 102.

See also *CHOSSES IN ACTION*, vol 3, p. 235.

Right to Take an Appeal—Right of Action.—Within the meaning of § 519 of the Penal Code of *California*, which constitutes it an offense to write a letter to any other person, threatening to expose any secret affecting him, with intent to extort money or other "property," it was held that the right to take and prosecute an appeal is property. *People v. Cadman*, 57 Cal. 464.

There is no doubt that a right in action, where it comes into existence under common law principles, and is not given by statute as a mere penalty, or without equitable basis, is as much

property as any tangible possession, and as much within the rules of constitutional protection. *Dunlap v. Toledo etc. R. Co.*, 50 Mich. 474; *Johnson v. Jones*, 44 Ill. 142; *Hubbard v. Brainard*, 35 Conn. 563; *Griffin v. Wilcox*, 21 Ind. 370.

A right of action is as much property as is a corporeal possession. *Power v. Harlow*, 57 Mich. 111.

Money Is Property.—An act, carving two new counties out of an old one, reserved "all county records and other property," to the old county. *Held*, that money was included in the term "property." *Washington Co. v. Weld Co.*, 12 Colo. 152.

So, within the meaning of *Michigan* Comp. Laws, § 579, which enacts that if any person shall feloniously steal the property of another in any other State, and shall bring the same into *Michigan* he shall be guilty of larceny, it was held that money was property. *People v. Williams*, 24 Mich. 156.

"Money" is "property" within the meaning of art. 219, of the *Texas* Code of Crim. Pro., by which the venue of prosecutions for embezzlements, is regulated. *Brown v. State*, 23 Tex. App. 214.

To the same effect see *Baker v. State*, 109 Ind. 58; *Brown v. Brown*, 41 N. Y. 513; *People v. Mayor etc. of Brooklyn*, 9 Barb. (N. Y.) 535; *Mitchell v. Mitchell*, 35 Miss. 114.

But in *Martin v. McNealey*, 101 N. Car. 634, where a testator bequeathed to his wife certain personal property and a legacy of \$1,000, and by a subsequent clause gave his daughter, upon the death of his wife, "all the property of all descriptions that I have heretofore willed to my wife," it was held, that the legacy did not pass to the daughter under the term "property." The court said: "While the term property, in its broad legal sense, embraces money, in its ordinary acceptation among people not familiar with legal terms and phraseology, it does not." See also *MONEY*, vol. 15, p. 701.

Property at a Bank.—A bequest of "half my property at R's Bank." The testator had at the bank, a cash balance and some certificates of French shares. It was held, that a moiety of the shares, as well as of the cash balance, passed by the will.

It was said by Halsbury, L. C., that there was nothing at the bank, if the words of the bequest were taken in

their strict and proper signification, answering this description, as both the cash balance and the shares were choses in action and had no locality. *In re Prater*, L. R., 37 Ch. Div. 481.

Business — Profession — Occupation.—The imposition of a tax upon the occupation of wholesale liquor-selling is not a tax upon "property," within the meaning of the word as used in the *Arkansas* constitution. *Straub v. Gordon*, 27 Ark. 625.

A constitutional restriction upon taxation of property does not apply to taxes upon a profession or business, such as the business done by an insurance company. *Home Ins. Co. v. City Council of Augusta*, 50 Ga. 530, 543.

The profession of a priest is his property, and a prohibition of the exercise of that profession by his bishop, without accusation or hearing, is contrary to the law of the land. *O'Hara v. Stack*, 90 Pa. St. 477.

Prospective Patent.—Section 1753 Rev. Stats. of *Wisconsin* authorizes the issue of the stock of a corporation in consideration of labor or "property." It was held that, within the meaning of this statute, a prospective patent is property. *Whitehall v. Jacobs*, 75 Wis. 479.

Within the Meaning of Acts Providing Compensation for the Exercise of the Right of Eminent Domain.—The *Texas* constitution provides that no person's "property" shall be applied to a public use without adequate compensation. Construing this language, it has been held, that the term "property," as here used, means, "not only the tangible thing owned, but also every right which accompanies ownership and is its incident." *Gulf City etc. R. Co. v. Fuller*, 63 Tex. 467. See also *Fort Worth etc. R. Co. v. Jennings*, 76 Tex. 373.

Depriving a proprietor of the beneficial use and enjoyment of his lands, is as much a taking and appropriation of his property as is the taking of the land itself. *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 309. See also *EMINENT DOMAIN*, vol. 6, p. 509.

General Property—Special Property.—General property, the general right which one person has in a thing; special property, some temporary right of control, until a common purpose is accomplished.

In a contract of bailment the bailor has the general property, and the bailee a special property, in the thing bailed; and an officer has a special property in

PROPOSAL.—See note 1.

PROPRIETARY.—Belonging to ownership; or pertaining to a proprietor. One who has the legal right or exclusive title to anything, whether in possession or not; an owner; relating to a certain owner or proprietor.²

PROPRIETOR.—See note 3. (See also COPYRIGHT, vol. 4, p. 157; OWNER.)

goods levied upon. 2 Bl. Com. 388, 391; And's L. Dict.

Absolute Property.—**Qualified Property.**—Absolute property. A full and complete title to and dominion over personality. Qualified property. A temporary or special interest, liable to be totally destroyed by the happening of a particular event. 2 Kent's Comm. 347; And's L. Dict.

The interest which can be acquired in external objects or things is "property." The things themselves are not, in a true sense, property, but they constitute its foundation and material, and the idea of property springs out of the connection, control, or interest which, according to law, may be acquired in or over them. This interest is "absolute" when a thing is objectively and lawfully appropriated by one to his own use in exclusion of all others; and "limited" or "qualified" when the control acquired falls short of that. To entitle one to bring an action for an injury to any specific object or thing, he must have a property therein of one kind or another. An administrator has no property in the body of his intestate. *Griffith v. Charlotte etc. R. Co.*, 23 S. Car. 38.

Property and Effects.—See EFFECTS, vol. 6, p. 187.

Property in Dogs.—See ANIMALS, vol. 1, p. 573.

As Used in a Policy of Insurance.—See MARINE INSURANCE, vol. 14, p. 320.

1. Under a *Connecticut* statute making it a criminal offense to publish within the State any written or printed proposals to sell or procure lottery tickets, it was held that an advertisement purporting to be a caution against fraudulent and bogus lotteries, and setting forth that certain lottery companies, of which the advertisers were the managers, were the only ones authorized by law, but not giving the address of the managers, nor the address of any person from whom tickets might be procured,

was not a "proposal," within the meaning of the statute. *State v. Sykes*, 28 Conn. 225.

2. From the Imperial, Webster's and Worcester's Dicts., And. Law Dict., cited in *Ferguson v. Arthur*, 117 U. S. 487, a case involving the meaning of the term "proprietary medicines" as used in the tariff act.

Proprietary Preparations.—All goods protected by a trade mark do not come within the description of "proprietary preparations," as that term is used in the tariff law, but only those goods which by reason of the care bestowed upon their preparation, the direction for their use and the special use for which they are intended, are brought within the fair commercial meaning of those words. *Grommes v. Seeberger*, 41 Fed. Rep. 32.

3. A *Massachusetts* statute provided that, "If the life of any person being a passenger shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, etc.," such "proprietor or proprietors" shall be liable to a fine. In *Com. v. Boston etc. R. Co.*, 11 Cush. (Mass.) 516, the court by Dewey, J., said: "The term 'proprietors' as used here, may not technically describe a corporate body created in the manner and form our railroad corporations are, but we can have no doubt as to the intended meaning and the effect that ought to be given to it, and that it applies to all common carriers whether corporate or joint stock companies, the terms used being general, and embracing common carriers incorporated or not."

A *California* act provides that the fact of the publication of a summons shall be verified by the affidavit of the printer of the newspaper in which the publication was made, the court held that the terms "printer" and "proprietor" are, in the sense of the statute, synonymous. *Quivey v. Porter*, 37 Cal. 458.

PROPRIETY.—See note 1.

PRO RATA.—According to certain part; in proportion.²

PROSECUTE.—To carry forward, wage, or maintain a judicial proceeding.³

PROSECUTING ATTORNEY.—See DISTRICT ATTORNEY, vol. 5, p. 713; PUBLIC OFFICERS.

PROSECUTION.—The act of conducting or waging a proceeding in court.⁴

The means adopted to bring a supposed offender to justice and punishment by due course of law.⁵

Though it is true that there is a distinction between "proprietors" and those to whom buildings are rented, it is also true that in common parlance the person who runs a mill is, though but a tenant, usually spoken of as the proprietor of it. *Wilson v. Hampden F. Ins. Co.*, 4 R. I. 167.

1. As used in an ancient *Massachusetts* ordinance, held to be "nearly, if not precisely," equivalent to property. *Com. v. Alger*, 7 Cush. (Mass.) 70.

2. Webster and Worcester, followed in *Rosenberg v. Frank*, 58 Cal. 405.

Two persons jointly agreeing with another party "to *pro rata* the loss or gain in the value" of certain shares of hotel stock at the end of two years—held, to be jointly liable for half the loss. *Penniman v. Stanley*, 122 Mass. 310.

3. Abbott's Law Dict.; *Carpenter v. Camp*, 39 La. Ann. 1024.

Under a fire insurance policy stipulating that claims under it must be "prosecuted" within a limited time after the loss, it was held that the presentation of the loss, and a demand of its payment, were not such a prosecution of the claim as was meant, but a prosecution by a suit or action. *Merchants' Mut. Ins. Co. v. Lacroix*, 35 Tex. 249.

Prosecute with Effect.—See EFFECT, vol. 6, p. 170.

4. It does not necessarily refer to a criminal proceeding. Abbott's Law Dict.; *Dollaway v. Turrill*, 26 Wend. (N. Y.) 399; Fenner, J., in *Carpenter v. Camp*, 39 La. Ann. 1024. Compare *Rawlins v. Jenkins*, 4 Q. B. 419.

5. Bouvier's Law Dict.; *State v. Williams*, 34 La. Ann. 1198. A criminal proceeding at the suit of the government. *Tennessee v. Davis*, 100 U. S. 269.

It is defined to be the institution or

commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal and pursuing them to final judgment on behalf of the State or government, as by indictment or information. Burr. Law Dict.; followed in *Schulte v. Keokuk Co.* (Iowa), 37 N. W. Rep. 376.

"Now, what is a prosecution. It is not an action, it is not a suit; none of our books confound it with those two words. It is the following up, or carrying on of an action or suit already commenced, until the remedy be attained." *State v. Hardenburgh*, 2 N. J. L. 339. See also *Knowlton v. Read*, 11 N. J. L. 321.

May be Synonymous with Indictment.—Within the meaning of the *Pennsylvania* Act of March 31, 1890, § 77, providing that "All indictments and prosecutions for all misdemeanors, perjury excepted, shall be brought, or exhibited within two years next after such misdemeanor shall have been committed," prosecution is synonymous with indictment. *Com. v. Haas*, 57 Pa. St. 443.

May Apply to a Defense.—Under a *Vermont* statute providing that the court may, when necessary, require of either party sufficient security for the cost of the prosecution, it was held that the word "prosecution" as used here applies as well to the defense as to the plaintiff's action, whenever the defense consists of an affirmative claim in avoidance of the orator's claim. *Badger v. Taft*, 58 Vt. 585.

Does Not Apply to the Investigation of a Grand Jury.—Under the *Connecticut* Bill of Rights providing that "In all criminal prosecutions, accused shall have a right to be heard by himself and by counsel, etc.," it was held

PROSECUTING WITNESS.—See note 1.

PROSTITUTE; PROSTITUTION—(See also ABDUCTION, vol. 1, p. 21; DISORDERLY HOUSE, vol. 5, p. 693; FORNICATION, vol. 8, p. 555; LEWD AND LASCIVIOUS COHABITATION AND CONDUCT, vol. 13, p. 274).—A prostitute is a female given to indiscriminate lewdness for gain.² By the word prostitution, in its most general sense, is understood the act of letting one's self to sale, or of devoting to infamous purposes what is in one's power; as, the prostitution of talents or abilities; the prostitution of the press, etc. In a more restricted sense, the word means the act or practice of a female offering her body to an indiscriminate intercourse with men; the common lewdness of a female.³

that "prosecution" did not apply to an investigation by the grand jury. *State v. Wolcott*, 21 Conn. 279.

Criminal Prosecution.—A prosecution in a court of justice in the name of the government against one or more individuals accused of crime. *Harger v. Thomas*, 44 Pa. St. 130.

The *Kansas* Bill of Rights provides that "in all prosecutions the accused shall be allowed to have a speedy public trial by an impartial jury." *Held*, that "all prosecutions," as here used, were intended to mean only all criminal prosecutions for violations of the laws of the State, and were not intended to mean or include prosecutions for the violation of ordinary city ordinances which have relation only to the local affairs of the city. *State v. Topeka*, 30 Kan. 653.

1. Under the *Illinois* Act of 1869, which provides that one-half the penalty to be recovered against a railroad company for an omission to ring the bell or sound the whistle on the approach of a train to a crossing of a public highway, shall go to the "prosecuting witness," it is not essential, to entitle the person in whose name the suit is brought, to recover, that he should actually have testified in the case. *Illinois Cent. R. Co. v. Herr*, 54 Ill. 356.

2. *State v. Stoyell*, 54 Me. 27; *followed* in *Davis v. Sladden*, 17 Oregon 259; *And. Law. Dict.*

A woman who is unchaste, who has surrendered herself to illicit sexual intercourse with men. *Springer v. State*, 16 Tex. App. 593.

Though in the definitions above, a prostitute is defined as a woman "given to indiscriminate lewdness," it has been held that "incontinence with one or two persons" may constitute a

woman a prostitute; and that it is not essential that she should have "submitted her person to illicit sexual intercourse with various persons." *State v. Rice*, 56 Iowa 432.

But in *Fahnestock v. State*, 102 Ind. 161, where, upon the trial of one charged with unlawfully frequenting houses of ill-fame, within the prohibition of § 2002 Rev. Stat. *Indiana*, 1881, the trial court charged that: "A female prostitute is a woman who has or holds unlawful sexual intercourse with men; and any act of voluntary sexual intercourse between an unmarried female and a male person is whoredom; and a single act of that kind makes a woman a whore or prostitute. These two terms mean the same thing," it was held that the charge was erroneous, as being outside the statutory definition of "prostitute" in the following section of that statute (§ 2003, Rev. Stat. *Indiana* 1881), viz: "Any female who frequents or lives in houses of ill-fame, or associates with women of bad character for chastity, either in public or at a house which men of bad character frequent or visit, or who commits fornication for hire, shall be deemed a prostitute."

A common prostitute is a public prostitute, who makes a business of selling the use of her person to the male sex for the purpose of illicit intercourse. A woman may be a prostitute and yet have illicit connection with one man only; but to be a common prostitute, her lewdness must be more general and indiscriminate. *Morgan v. State*, 16 Tex. App. 593.

See, however, the following note.

3. *Carpenter v. People*, 8 Barb. (N. Y.) 610; *Miller v. State*, 121 Ind. 297; *State v. Stoyell*, 54 Me. 26.

PROTECT.—See note 1.

PROTEST.—(See also **BILLS AND NOTES**, vol. 2, p. 313; **DEMAND**, vol. 5, p. 522; **NOTARY PUBLIC**, vol. 16, p. 752.)

- I. Definition, 292.
- II. By Whom Made, 293.
- III. Form of Protest, 293.

- IV. When Protest Is Necessary, 295.
- V. Protest as Evidence, 296.
- VI. Waiver of Protest, 297.

I. DEFINITION.—When a foreign bill of exchange is presented for acceptance or for payment and is dishonored (*i. e.*, such acceptance or payment is refused), a solemn declaration, usually written by a notary, must be made, stating the fact of the non-acceptance or non-payment, the reason for it, if any, and that the bill is "protested." This declaration is known as a protest—its object is to fix the liability of the indorsers and other parties to the bill.²

Intercourse with One Man Is Not Prostitution.—The phrase "illicit sexual intercourse," and the word "prostitution," are not convertible terms. "Prostitution," as used in the criminal statutes of the several States, meaning common indiscriminate, meretricious illicit intercourse, and not sexual intercourse confined exclusively to one man. *Fahnestock v. State*, 102 Ind. 163; *Com. v. Cook*, 12 Met. (Mass.) 93. See also *Carpenter v. People*, 8 Barb. (N. Y.) 610; *Miller v. State*, 121 Ind. 296; *Osborn v. State*, 52 Ind. 526; *State v. Stoyell*, 54 Me. 26; *State v. Ruhl*, 8 Iowa 453. Compare *Morgan v. State*, 16 Tex. App. 593; *State v. Rice*, 56 Iowa 432.

Not Necessarily for Gain.—Prostitution as sometimes defined, consists in sexual intercourse for gain. "But we think if a woman submits to indiscriminate sexual intercourse, which she invites or solicits by word or act, or any device, she is a prostitute. Her avocation may be known from the manner in which she plies it, and not from pecuniary charges and compensation gained in any other manner." *State v. Clark*, 78 Iowa 492.

Not a Technical Word.—"Prostitution" is in no sense a technical term, and has no common law meaning.

People v. Cummons, 56 Mich. 544; *Henderson v. People*, 124 Ill. 607.

See also *Miller v. State*, 124 Ind. 294; *Com. v. Cook*, 12 Met. (Mass.) 97.

1. A *Wisconsin* statute provides that every person who, as principal contractor, etc., "furnishes any material in or about the erection,

construction, protection, or removal of any machinery erected or constructed so as to be or become a part of the freehold, shall have a lien for such materials." In *Standard Oil Co. v. Lane*, 75 Wis. 636, the court, by Cole, C. J., said: "It will be noticed that the word 'protection' is used in connection with 'erection,' 'construction,' and 'repairs,' as well as 'removal.' And while the word, 'protect' often means to cover, shield or defend from injury, harm or danger of any kind, the word imports in the statute something used or furnished for the machinery which not only preserves from injury, but becomes a part of the machinery itself."

An agreement by a lessor "to protect" the lessee in "the use and enjoyment" of the premises, in connection with other words, were held to constitute a covenant for quiet enjoyment. *Peters v. Grubb*, 21 Pa. St. 455. See also **REAL COVENANTS**.

2. *Dennistown v. Stewart*, 17 How. (U. S.) 606; *Platt v. Drake*, 1 Dougl. (Mich.) 296; 1 *Randolph on Com. Paper*, § 6; *Davis v. Coddington*, 1 N. Y. 186; *Union Bank v. Hyde*, 6 Wheat. (U. S.) 572; *Smith's Mercantile Law* (3rd Am. ed.) 327.

Bouvier (Law Dict.) defines protest to be "a notarial act made for want of payment of a promissory note, or for want of acceptance or payment of a bill of exchange, by a notary public, in which it is declared that all parties to such instrument would be held responsible to the holder for all damages, exchanges, re-exchange, etc.

As used with reference to commer-

II. BY WHOM MADE.—Where the case is one governed by the rules of the law-merchant, it is always necessary that the protest be made by a notary if one is procurable; if no notary is to be had it may be made by any suitable person.¹ In other cases, while it is preferable that the protest be a notarial act, it is not always essential to its value as evidence, and it may be done by any convenient party;² in all such cases the necessity of protest being a creation purely of statute, it is generally provided by statute what form and character it shall have.

The notary is always required to act personally, therefore demand, presentment, or protest cannot be made by his clerk; this rule of the commercial law, however, may be varied by statute or by the usage of particular localities.³

III. FORM OF PROTEST.—The form in which a protest is to be made is a matter governed by the usage and law of the place where it is made.⁴ It is a well fixed principle, however, that a protest should state (1) the time of presentment, (2) place of presentment, (3) fact and manner of presentment, (4) demand of payment, (5) fact of dishonor, (6) names of the party by whom and to whom presentment was made. The signature of the notary or other

cial paper, in a popular sense, protest includes all steps necessary to charge an indorser. *Beals v. Peck*, 12 Barb. (N. Y.) 245; *Davis v. Coddington*, 1 N. Y. 186; *Townsend v. Lorain Bank*, 2 Ohio St. 345; *Woodbury v. Sackrider*, 2 Abb. Pr. (N. Y.) 402; *Davis v. Coddington*, 3 Den. (N. Y.) 16; *Ayrault v. Pacific Bank*, 6 Robt. (N. Y.) 337.

In *Smith's Mercantile Law* a protest is defined as "a minute of the non-acceptance or non-payment accompanied by a solemn declaration on the part of the holder against any loss to be sustained thereby." *Smith's Mercantile Law* (3rd Am. ed.) 327.

In an action by the holder of a bill of exchange against the drawer or indorser, the words "duly protested," in the complaint, must be considered equivalent to an averment that the bill was presented at maturity, at the place of payment named in it. *Battle v. Weems*, 44 Ala. 105.

1. *Burke v. McKay*, 2 How. (U. S.) 66; *Munroe v. Woodruff*, 17 Md. 159; *Proffatt on Notaries*, § 107. See also 3 Kent's Com. 95 *et seq.*

But a State law or general usage may overrule the general law-merchant in this respect. See authorities just cited. That a protest should be made by a notary may be seen from the very definition of the word—"a notarial act," etc. See *Bouvier's Law Dict.*, Protest.

See also *supra*, this title, *Definition*, and authorities.

2. The *California Civ. Code* provides that "protest must be made by a notary public, if with reasonable diligence one can be obtained; if not, then by any reputable person in the presence of two witnesses. *California Civ. Code*, § 3226.

This rule is quite general. See *Reed v. Bank of Kentucky*, 1 Mon. (Ky.) 91; *Proffatt on Notaries*, § 107; *Chitty on Bills* 333; *Herkimer Co. Bank v. Cox*, 21 Wend. (N. Y.) 119; 35 Am. Dec. 220; *Bank v. Porter*, 2 Watts (Pa.) 141; *French Code of Commerce*, art. 173. See also NOTARY PUBLIC, vol. 16, p. 752.

The codes of some States provide who shall make a protest in case of the absence or incapacity of the notary. Thus in the *Alabama Code*, § 1091, it is provided that any justice of the peace may act. A similar provision is found in *Civ. Code of Lower Canada*, art. 2304.

3. *Cribbs v. Adams*, 13 Gray (Mass.) 597.

This subject is fully treated in NOTARY PUBLIC, vol. 16, p. 752.

4. 3 *Randolph on Com. Paper*, §§ 1137-8; 2 *Daniel on Neg. Instr.*, § 10; *Carter v. Union Bank*, 7 Humph. (Tenn.) 548; 46 Am. Dec. 89; *Orono Bank v. Ward*, 49 Me. 26; *Tickner v.*

officer making it should, of course, be attached; also the official seal—though this latter is not so universally required.¹

Roberts, 11 La. 14; 30 Am. Dec. 706.

1. Daniel on Neg. Instr., § 950; Proffatt on Notaries, § 110; Smith's Mercantile Law (3rd Am. ed.), 327-8; 3 Randolph on Com. Paper, §§ 1137-8.

A form for a protest is given in *BILLS AND NOTES*, vol. 2, p. 316.

Date of Protest.—The date of protest must expressly appear, for otherwise it will not be apparent whether or not the bill was really dishonored; for if the protest state that the bill was "this day protested" and is dated on a day previous to or after the day of maturity it is defective on its face. When the hour of the day is not stated it will be presumed that demand, etc., were made at the usual and proper business hours of the day. *Walmsley v. Acton*, 44 Barb. (N. Y.) 312; *Burbank v. Beach*, 15 Barb. (N. Y.) 326; *Proffatt on Notaries*, § 111; *Fleming v. Fulton*, 6 How. (Miss.) 473.

Where, upon an order, there was an indorsement, "I protest the within," without date, it must be referred to the date of the order, and a refusal to pay as therein directed. *Prigden v. Cox*, 13 Tex. 257.

Place of Presentment.—When the bill or note is payable at no particular place it is not absolutely necessary to state at what place presentment and demand was made, if the fact appears that it was presented to the person entitled to pay it; but when it is made payable at a particular place, as at a bank, the certificate of protest must show a presentment and demand at such place. *People's Bank v. Brooke*, 31 Mo. 7; 1 Am. Rep. 11; *Proffatt on Notaries*, § 112.

Fact and Manner of Presentment.—It would seem that a presentment at maturity implies a demand for payment and that the demand may be inferred from the presentment. But it is held in several cases that the fact both of presentment and demand must be stated. *Naver v. Richardson*, 36 Mo. 130; *Farmers' etc. Bank v. Allen*, 18 Md. 475. See also *Farmers' Bank v. Bowie*, 4 Md. 290.

In the case of *Nott v. Beard*, 16 La. 308, it was presumed that a demand necessarily implied a presentment of the bill, but the contrary was decided in *Musson v. Lake*, 4 How. (U. S.) 262.

It is therefore always the safer course to state both the fact of presentment and demand.

In *Crowley v. Barry*, 4 Gill (Md.) 194, it was said that a protest which states in substance a demand on the drawer and notice of non-payment is sufficient in point of form.

Where a protest is defective in not stating particularly how notice was given to an indorser, the necessary facts may be supplied by evidence *aliunde*. *Bradley v. Davis*, 26 Me. 45.

A protest of a note should state both the demand and notice of non-payment and is evidence of both. *Dobson v. Laval*, 4 McCord (S. Car.) 57. Compare *Walker v. Turner*, 2 Gratt. (Va.) 534.

A protest is not vitiated because the notary adds to the usual form a statement of all that transpired when the notes were presented and protested. *Reapers' Bank v. Willard*, 24 Ill. 439; 76 Am. Dec. 755.

Signature.—The signature, it is said, may be made by the notary's clerk or it may even be printed; it suffices that it appears as the act of the notary. 3 *Randolph on Com. Paper*, § 1138; *Fulton v. McCracken*, 18 Md. 528; 81 Am. Dec. 620.

Seal.—In the case of *Bank of Kentucky v. Pursley*, 3 Mon. (Ky.) 238, it is strongly maintained that a seal is never essential to the validity of a protest unless it is made so by statute; and this idea is also maintained in other cases. *Huffaker v. National Bank*, 12 Bush (Ky.) 287; *Lambeth v. Caldwell*, 1 Rob. (La.) 61. See also *NOTARY PUBLIC*, vol. 16, p. 752.

In *Iowa* a seal is made an essential to the validity of a protest, but it may be affixed when the instrument is offered in court. *Rindskoff v. Malone*, 9 Iowa 540.

The protest of a bill was written and signed on the day that payment was refused, but the notary did not affix his seal until several months afterwards, but before trial. *Held*, that the protest was completed in time. *Billingsley v. State Bank*, 3 Ind. 375.

When the court can perceive that a seal is attached to a protest, the protest is sufficiently authenticated; and neither the seal nor the signature of the notary

IV. WHEN PROTEST IS NECESSARY.—By the law-merchant a protest is always necessary to charge an indorser in case of the non-acceptance or non-payment of a foreign bill of exchange—in all other cases it is unnecessary and is no evidence of the facts stated therein.¹ But by statute in very many of the States the law of protest is made applicable to inland bills of exchange, and to promissory notes negotiable, and a protest is made necessary in order to charge the drawee or indorsers in either case.² It should be noticed, however, that a foreign promissory note (*i. e.*, a note made in one State or country, payable in another), when indorsed, assumes all the characteristics of a foreign bill of exchange, the payee (indorser) becoming the drawer, the indorsee, the payee, and the maker, the drawee or acceptor. Therefore it has been maintained that the same ceremony as to presentment when due, and protest for non-payment, should be observed as in case of a foreign bill of exchange, and that the protest when so made should be as complete and sufficient evidence as when made upon

need be proved. *Crowley v. Barry*, 4 Gill (Md.) 194.

As to what constitutes a seal, it may be either an impression on wax or some other tenacious material, or by statute a scroll affixed by way of a seal. By the law-merchant, however, no seal was recognized except an impression on wax or similar material. See 4 Minors' Inst. (2nd ed.) 19; 2 Daniel on Neg. Instr., § 15. See also SEAL.

Should Identify the Note.—A protest of a note by a notary public should identify the note; this is usually done by copy; but if the original note is annexed and referred to, it will be sufficient; or in default of either of these, an indorsement on the protest containing name of maker, amount, indorser and date of protest, and in these particulars agreeing with the note sued on, and so far identifying it, must be deemed sufficient. *Fulton v. Mac-cracken*, 18 Md. 528; 81 Am. Dec. 620.

1. *Young v. Bryan*, 6 Wheat. (U. S.) 146; *Union Bank v. Hyde*, 6 Wheat. (U. S.) 572; *Coddington v. Davis*, 1 N. Y. 186; *Orr v. Maginnis*, 7 East 359; *Nichols v. Webb*, 8 Wheat. (U. S.) 326; *Burke v. McKay*, 2 How. (U. S.) 69; *Bank of U. S. v. Leathers*, 10 B. Mon. (Ky.) 64; *City Bank v. Cutter*, 4 Pick. (Mass.) 414; *Smith v. Curlee*, 59 Ill. 221; 2 Daniels on Neg. Instr., § 1.

In the case of *Coddington v. Davis*, 1 N. Y. 186, it was said that while protest in a strict technical sense is not applicable to promissory notes, yet it had by general usage acquired a more

extensive signification and included in some cases all the steps necessary to charge an indorser.

Without a special statutory provision otherwise the protest of a domestic bill of exchange is superfluous, unauthorized, and no proof of the alleged dishonor of the bill. *Bank of U. S. v. Leathers*, 10 B. Mon. (Ky.) 64; *Turner v. Greenwood*, 9 Ark. 44; *Gilman v. Lewis*, 15 Me. 452.

Nor does the law require that a promissory note, negotiable in form, but remaining in the hands of the original payee, should be protested for non-payment; and therefore neither notarial fees for protest nor statutory damages can be recovered. *German v. Ritchie*, 9 Kan. 106; *Banks v. Besser*, 56 Ga. 199; *City Bank v. Cutter*, 3 Pick. (Mass.) 414.

2. 2 Daniel on Neg. Instr. 1; *Story on Prom. Notes*, § 340; 2 *Bouvier's Law Dict.*, Protest; *Ticonic Bank v. Stackpole*, 41 Me. 302; 66 Am. Dec. 246; *Bowling v. Arthur*, 34 Miss. 41; *Tevis v. Randall*, 6 Cal. 632; 65 Am. Dec. 547; *Conolly v. Goodwin*, 5 Cal. 220.

Checks and Drafts.—Protest of a check is not essential in order to hold the indorsers. Giving information to the indorsers, seasonably that the bank has refused to pay it, is enough. *Mutual Nat. Bank v. Rotge*, 28 La. Ann. 933; 26 Am. Rep. 126; *Pollard v. Bowen*, 57 Ind. 232; *Griffin v. Kemp*, 46 Ind. 172.

Likewise a draft drawn by an agent on his principal, in the usual course of his business, is as if drawn by the principal on himself, and the drawee is not

a bill of exchange.¹ When, however, the drawer of a bill of exchange has failed to place funds in the hands of the drawee to meet it, and has no reasonable expectation that it will be met, a demand of payment and consequently protest are necessary to charge him.² And an instruction by the drawer to the drawee not to pay a bill, will excuse a failure to protest it.³

V. PROTEST AS EVIDENCE.—In cases where a protest is requisite, either by the law-merchant or by statute, it is made complete and sufficient evidence of the fact stated therein, provided there are no material defects as to its form or contents;⁴ and in case of foreign bills of exchange no other evidence of the dishonor is

entitled to notice or protest. *Raymond v. Mann*, 45 Tex. 301.

1. Mr. Daniel in speaking of this subject has to say: "Almost every consideration of convenience which would make a protest necessary and competent evidence of presentment and notice in case of a foreign bill, would recognize it as equally competent in respect to the indorser of a note." *Daniel on Neg. Instr.*, § 928.

Likewise *Parker, C. J.*: "The similarity between the indorsement of notes and the drawing and indorsement of bills of exchange is so great that there can be no sound reason given for establishing or preserving a distinction between them, and requiring a different character of evidence to prove the same facts with regard to two instruments which . . . are so essentially similar in their nature and operation." *Daniel on Neg. Instr.*, § 928; *Williams v. Putnam*, 14 N. H. 540; 40 Am. Dec. 204; *Edwards on Bills and Notes*, § 540.

This view is sustained by other authority. See *Ticonic Bank v. Stackpole*, 41 Me. 302; 66 Am. Dec. 246; *Piner v. Clary*, 17 B. Mon. (Ky.) 645; *Proffatt on Notaries*, § 106; *Brooke's Office and Prac. of a Notary* 130. See also *Carter v. Burley*, 9 N. H. 558.

2. *Harness v. Davies Co.*, 46 Mo. 357; *Merchants' Bank v. Easley*, 44 Mo. 286; *Mehlberg v. Tisher*, 24 Wis. 607; *Proffatt on Notaries*, § 115; *Daniel on Neg. Instr.*, § 1074.

A drawee's statement at the time of the demand that he had no funds for the purpose of the payment, cannot be proved by the notary's recital in the protest. *Dakin v. Graves*, 48 N. H. 45.

Protest Unnecessary.—In *Indiana*, a negotiable note, payable at a bank in that State need not be protested for non-payment in order to charge the

indorser, notice of demand and non-payment being sufficient. *Green v. Louthain*, 49 Ind. 139.

Likewise in *Georgia*, unless a note is payable at a chartered bank no protest is necessary. *Salmons v. Hoyt*, 53 Ga. 493.

In *Texas*, by statute in case of the non-acceptance of a bill of exchange, the drawer becomes immediately responsible without protest. *Thatcher v. Mills*, 14 Tex. 13; 65 Am. Dec. 95; *Henderson v. Glass*, 16 Tex. 559; *Carrson v. Russell*, 26 Tex. 452.

3. *Manning v. Maroney*, 87 Ala. 563. See also generally *Pier v. Heinschoffer*, 52 Mo. 333.

4. *Young v. Bryan*, 6 Wheat. (U. S.) 146; *Joseph v. Salomon*, 19 Fla. 623.

By the tenth section of the *California* act, the protest of a notary is expressly made evidence of demand and non-payment of notes as well as bills. *Connolly v. Goodwin*, 5 Cal. 220.

In nearly all instances, however, the evidence furnished by the certificate of protest is only *prima facie*. Thus it is held in *West Virginia* that the true construction of their statute is that the protest of a negotiable note and other instruments mentioned therein is *prima facie* evidence of the facts "stated therein, or at the foot or on the back thereof, in relation to presentment and dishonor, and notice thereof." *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528.

The production of a first bill of exchange duly protested for non-acceptance is sufficient *prima facie* evidence that neither the second nor third of the set were paid, and the party alleging that one of the latter was paid has the burden of proving it. *Miller v. Palmer*, 58 Md. 451. See also *BILLS AND NOTES*, vol. 2, p. 406; *NOTARY PUBLIC*, vol. 16, p. 752.

admissible.¹ The notary's certificate of protest is in the nature of documentary evidence; and the proper construction, as well as the legal effect thereof as an instrument of evidence of the facts stated in it, are questions of law to be determined by the court.² The use of such certificate as evidence only makes it evidence of such facts as are distinctly stated therein and of which it purports to give evidence.³

VI. WAIVER OF PROTEST.—Protest may be waived, either by an express declaration indorsed on the bill or note, or otherwise. As already mentioned, protest in its broad and general acceptance, includes all the steps necessary to charge an indorser (*i. e.*, demand, presentment, protest and notice). Therefore where there is nothing in a waiver of protest to limit its meaning, the word is to be taken as used in its broadest sense, whether applied to foreign or domestic bills or to promissory notes.⁴

The rule in *Louisiana*, in regard to protests of foreign bills by foreign notaries, is that they are received in aid of commerce to establish the facts of presentment, demand, and non-payment, and this without proof of their signatures and official capacities. But beyond this the rule has not been extended. *Schorr v. Woodlief*, 23 La. Ann. 473.

1. *Joseph v. Salomon*, 19 Fla. 623; *Young v. Bryan*, 6 Wheat. (U. S.) 146; *Proffatt on Notaries*, § 105.

A bill of exchange, the parties to which reside in one State, but payable in another, is so far a foreign bill that the notarial protest in the latter is competent evidence in the former to prove its presentment and dishonor. *Grafton Bank v. Moore*, 14 N. H. 142.

But a plaintiff, in a suit on a promissory note is not obliged to rely solely on the protest. He may cure the defect by evidence *aliunde* and he has the right to commence with any part of his evidence; and it is error to reject any part that is, *per se*, pertinent to the issue. *Nailor v. Bowie*, 3 Md. 251.

Admission of the Drawee.—Some authorities maintain that the protest of a bill of exchange for non-acceptance and non-payment may be proved by the admission of the drawee. *Derrickson v. Whitney*, 6 Gray (Mass.) 248; *Long v. Crawford*, 18 Md. 220. 2. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528.

3. It cannot be presumed that any step was regularly taken or that any fact existed which is not certified to. See, as maintaining this and the prop-

osition stated in the text, *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528; *Bradshaw v. Hedge*, 19 Iowa 402; *Sprague v. Tyson*, 44 Ala. 340; *Turner v. Rogers*, 8 Ind. 140; *Daniel on Neg. Instr.*, § 962.

Therefore where such protest simply states that notice was addressed to the indorsers at a certain place, without adding that such place was the post-office or residence of the indorser, the court will not infer that such was the fact, and such certificate is therefore insufficient to prove due notice. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528.

4. Thus where an indorsement read "For value received I waive notice and protest," the indorser was not entitled to demand and notice. *Wolford v. Andrews*, 29 Minn. 250.

So where the indorsement read, "Protest waived, and I hold myself liable as indorser." *Carpenter v. Reynolds*, 42 Miss. 807. See also, as supporting the proposition in the text, *Baker v. Scott*, 29 Kan. 137; 44 Am. Rep. 628; *Annville Nat. Bank v. Kettering*, 106 Pa. St. 531; 2 *Daniel on Neg. Instr.*, § 929, 1094-5; *Higgins v. Wright*, 53 Barb. (N. Y.) 467. See also *Coddington v. Davis*, 1 N. Y. 186; 3 Den. (N. Y.) 25; *Anderson's Law Dict.*, Protest; *Brannon v. Hursell*, 112 Mass. 70; *First Nat. Bank v. Hatch*, 78 Mo. 13.

Waiver.—Where the words "presentation and protest waived" are contained in the body of a bill of exchange, the waiver affects and forms a part of the contract of the indorser as well as the drawer, and is binding upon him according to the tenor and legal effect

PROTESTANT.—A Christian who protests against the doctrines and practices of the Roman Catholic Church; one who adheres to the doctrines of the Reformation.¹

PROTESTATION.—The name of a particular formula formerly used in common law pleading, when it was expedient for a party to plead in such a manner as to avoid any implied admission of a fact which could not with propriety or safety be positively affirmed or denied; the party interposed an oblique allegation or denial of the fact by protesting (*protestando*) that the matter does or does not exist, at the same time avoiding a direct affirmation or denial. Coke's definition is "An exclusion of a conclusion."²

PROVIDED, PROVISIO.—(See also **CONDITION**, vol. 3, p. 422; **DEEDS**, vol. 5, p. 457; **ESTATES**, vol. 6, p. 875).—The words "proviso" and "provided," when used in a deed or will, are apt words to create a condition, and this is the effect usually given them.³ But, though their usual, it is not their invariable effect; and they may be shown by the context to express simply a covenant or limitation.⁴

of the bill. *Bryant v. Merchants' Bank*, 8 Bush (Ky.) 43.

Where the indorser of a note, before maturity, writes on it a waiver of protest, he cannot relieve himself from the effect of the waiver on the ground that it was without consideration. *Wall v. Bry*, 1 La. Ann. 312.

1. Webster's *Dict.*, followed in *Hale v. Everett*, 53 N. H. 57, in which case the authorities are collected and exhaustively discussed; and it is held that the term "Protestant" includes all Christians who deny the authority of the Pope of Rome, but that the term is not broad enough to include any who do not, nominally at least, assent to the truth of Christianity as a distinct system of religion, and that a Mohammedan, a Jew, a Pagan, or an infidel cannot properly be called a Protestant, not being a Christian.

"Protestant" includes all those who believe in the Christian religion, and do not acknowledge the supremacy of the Pope. The word is capable of sustaining a charitable bequest. *Tappan's Appeal*, 52 Conn. 418; *Beardsley v. Bridgeport*, 53 Conn. 493.

2. *Abbott's Law Dict.*; *Anderson's Law Dict.*; 3 *Blackstone's Com.* 311; *Coke's Litt.* 124; 1 *Chitty's Pleading* 534; *Stephen's Pleading* 235.

Protestation is a saving to the party who takes it from being concluded by any matter alleged or objected against

him, upon which he cannot join issue and it is no more than an exclusion of a conclusion, for he that takes it excludes the other from concluding him; and it ought to be consistent with the sequel of the plea. *Graysbook v. Cox*, *Plowden*, 276. See generally **PLEADING**.

3. **Proper Words to Express a Condition.**—The words usually employed to create a condition are "on condition;" but the phrases "so that," "provided," "if it shall happen" are of the same import. "Provided always" may constitute a condition, limitation, or covenant, according to circumstances. *Heaston v. Randolph Co.*, 20 Ind. 403.

There is no word more proper to express a condition than the word "provided," and it shall always be so taken unless it appears from the context to be the intent of the parties that it shall constitute a covenant. *Rich v. Atwater*, 16 Conn. 419.

4. **Do not Invariably Express a Condition.**—"This word (proviso) hath diverse operations. Sometimes it worketh qualification or limitation; sometime condition; and sometime a covenant. *Co. Litt.* 146 b; 203 b. "'Proviso' is condition inserted into any deed, upon the performance whereof the validity of the deed consisteth. Sometimes is only a covenant, whereof see *Coke* 1, 2, in the *Lord Cromwell's Case*. *Termes de la Ley*."

PROVISIONAL.—See note 1.

PROVISIONAL REMEDY.—A remedy provided for present need or for the occasion; one adapted to meet a particular exigency.²

PROVISIONS.—See note 3.

PROVISO.—See PROVIDED.

It is true that the word "proviso" is an appropriate one to constitute a common law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties, as gathered from the examination of the whole instrument, and frequently has been thus explained and applied as expressing simply a covenant or limitation in trust. *Stanley v. Colt*, 5 Wall. (U. S.) 509.

See also *Woodruff v. Woodruff*, 44 N. J. Eq. 353.

"Provided" is an apt word to create a condition, yet it does not necessarily import a condition, and it is often used by way of limitation or qualification only; especially when it does not introduce a new clause but only serves to qualify or restrain the generality of a former clause." *Chapin v. Harris*, 8 Allen (Mass.) 596.

Proviso Distinguished from Exception.

—There is some distinction between a proviso and an exception. A proviso is properly the statement of something extrinsic of the subject-matter of the covenant, which shall go in discharge of that covenant by way of defeasance; an exception is the taking out of a covenant some part of the subject-matter of it. *LaPoint v. Cady*, 2 Pinn. (Wis.) 515; following 1 Saund. Pl. & Ev. 393.

See also EXCEPTION, vol. 7, p. 113.

Proviso in a Statute.—See STATUTES.

1. Provisional Committee.—A provisional committee is an association formed for carrying into effect the preliminary arrangements necessary to promote a scheme; it is not a partnership, for it constitutes no agreement to share in profit or loss. *Reynell v. Lewis*, 15 M. & W. 526; 16 L. J. Ex. 25.

2. McCarthy v. McCarthy, 54 How. Pr. (N. Y.) 97.

The order which, in *Wisconsin*, is a substitute for a bill of discovery, is a "provisional remedy," and as such is appealable, under laws of *Wisconsin* 1860, ch. 264, § 10, which gives an ap-

peal from an order that grants a provisional remedy. *Noonan v. Orton*, 28 Wis. 600. See also *Blossom v. Ludington*, 31 Wis. 283.

The approval of a plaintiff's undertaking by the sheriff in an action of claim and delivery of personal property is not the allowance of a provisional remedy, within section 139 *New York Code*, which declares that from the time of the allowance of "a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings." *Nosser v. Corwin*, 36 How. Pr. (N. Y.) 540.

8. The following articles have been held to be included under the general term "provisions"; fat cattle, as used in the *United States act*, 6th July, 1812, prohibiting American vessels from trading with the enemy. *U. S. v. Barber*, 9 Cranch (U. S.) 243; *U. S. v. Sheldon*, 2 Wheat. (U. S.) 119; *Indian corn*, *Atkinson v. Gatcher*, 23 Ark. 103; wine and brandy, *Mooney v. Ivens*, 6 Ired. Eq. (N. Car.) 363.

Meat purchased and kept by a dealer for sale, is not exempt as "provisions" under Gen. Laws of *New Hampshire*, ch. 224, § 27. "Provisions" as there used is only intended to extend to articles provided for consumption by the debtor's family. *Bond v. Tucker* (N. H. 1889), 18 Atl. Rep. 653.

See also *State v. Connor*, 73 Mo. 575; *Nash v. Farrington*, 4 Allen (Mass.) 157.

As used in the *Alabama Rev. Code*, § 1858, giving a lien for advances to make a crop, "provisions" means food for man and beast employed in making the crop, and does not include money or supplies to pay the hire of laborers. *McLester v. Somerville*, 54 Ala. 670.

"Provisions" will not include a milch cow, as the word is used in the *Georgia exemption law*. *Wilson v. McMillan*, 80 Ga. 733; nor cotton, *Butler v. Shiver*, 79 Ga. 172.

Provisions and Stores.—A *New York* statute gives a lien and summary remedy for debts created by masters of vessels for such "provisions and stores

PROVOKE—PROXIMATE AND REMOTE CAUSE.

PROVOKE.—See note 1.

PROXIMATE AND REMOTE CAUSE.—The question of proximate and remote cause arises in insurance cases and in cases of negligent injury.²

furnished within this State as may be fit and proper for the use of such vessel," etc., etc. In *Crooke v. Slack*, 20 Wend. (N. Y.) 177, the court by Nelson, C. J., said: "The provisions furnished a ship, strictly considered, are confined to such articles as enter into the food or subsistence for hands and passengers, but stores is a more general term, and may embrace wood and coal."

1. Upon an indictment under a *Connecticut* Statute (Gen. stat., tit. 12, § 123) for breach of the peace. The court construing the word "provoke" said: "To provoke is to excite, to stimulate, to arouse." *State v. Warner*, 34 Conn. 279.

2. **Cross-References.**—The article *FIRE INSURANCE*, vol. 7, pp. 1040, 1043, under the heading *Risk or Peril Insured Against*, contains a lengthy enumeration of what have been considered losses by fire; the question always being whether the fire was the proximate cause of the loss.

In *MARINE INSURANCE*, vol. 14, p. 380, the doctrine is treated in its connection with that immediate subject.

In *NEGLIGENCE*, vol. 16, p. 428, *et seq.*, and in *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 25, the doctrine of proximate and remote cause, as connected with the subject of negligent injury, is exhaustively discussed. See also *ACCIDENT INSURANCE*, vol. 1, p. 90.

Distinction Between Insurance and Negligent Injury.—There is really no essential difference in the principles applied, whether the question of proximate cause concerns insurance or negligent injury, except in this, that in an action for a breach of contract, the liability of a negligent party involves only such consequences as were the direct result of the breach, and were within the contemplation of the parties at the time of the formation of the contract, while in an action for negligent injuries, the liability of the negligent party is more extensive, and embraces all the natural or necessary consequences of his wrongful act. *NEGLIGENCE*, vol. 16, p. 476; *DAMAGES*, vol. 5, pp. 6, 13; *Shearman & Redf. on Neg.*, § 739.

This, then, is the distinction between the two classes of cases, an action upon a policy of insurance being in the nature of an action for a breach of contract, so far as proximate cause is concerned. And, in consideration of what is or is not the proximate cause, this distinction is essential.

For example, in *Metallic etc. Co. v. Fitchburg*, 109 Mass. 277, a burning house might have been saved but for the hose of the fire company being cut by a railroad engine running over it. It was held, in an action against the railroad company, that its negligence, in running over and cutting the hose was the proximate cause of the fire, so as to allow a recovery for the negligent injury. Had the building been insured against fire, it is certain that the fire would have been considered, within the meaning of the policy of insurance, the proximate cause of the loss, so as to have enabled the owner of the building to recover on the policy.

In 1 *Abbott's Law Dict.*, p. 192, it is said: "In actions to recover damages on account of injury, the principle of this maxim is applicable, although with not so much strictness as in cases of insurance."

"To determine the question whether the peril insured against was the proximate or remote cause of loss . . . the peculiar nature of the policy of insurance and the question of interest it covers are to be taken into account. The particular intent of the parties is subservient to the public bearing of the question. The terms proximate and remote in their application to questions of insurance thus receive in some respects a more enlarged and in some a more restricted significance than that of one giving a construction to other contracts." 4 *Am. Law Rev.* 215.

Consequences and Effects.—It is a common supposition that between "consequences" and "effects" there exists no material distinction. But the following from Crabb's English Synonyms negatives this idea: "A consequence is that which follows of itself without any qualification or restriction

Definition. PROXIMATE AND REMOTE CAUSE. Definition.

The proximate cause of an event has been thus defined: "That which, in a natural and continuous sequence, unbroken by any new cause, produced that event, and without which that event would not have occurred."¹

A remote cause is defined as "One which has so far expended itself that its influence in producing the injury is too minute for the law's notice; or a cause which some independent force merely took advantage of to accomplish something not the natural or probable effect thereof."²

In insurance policies are found clauses providing that the insurers shall be liable only for injuries caused by certain perils, or that there shall be no indemnity for damage caused by the negligence of the insured. In these cases, the maxim *causa proxima, non remota spectatur* applies.³ Where, in an action on such a

an effect is that which is effected or produced by, or which follows from the connection between the thing effecting, as a cause, and the thing effected. In the nature of things, causes will have effects, and for every effect there will be a cause, although it may not be visible. Consequences, on the other hand, are either casual or natural; they are not always to be calculated upon. Effect applies to physical or moral objects; consequences to moral objects only; diseases are the effects of intemperance; the loss of character is the general consequence of an irregular life. Consequences follow either from the actions of men, or from things where there is no direct agency or design; results follow from the actions or efforts of men; consequences are good or bad; results are favorable or unfavorable. We endeavor to avert consequences and to produce results."

1. **Proximate Cause Defined.**—Shearman & Redf. on Negligence (4th ed.), § 261; the definition, though stated in connection with the law of negligence, is believed to be generally applicable. See also NEGLIGENCE, vol. 16, p. 428.

2. **Remote Cause.**—Bishop on Non-contract Law (Rights and Torts), § 41. And see Cooley on Torts 69; Sheffer v. Washington etc. R. Co., 105 U. S. 252; 8 Am. & Eng. R. Cas. 59. NEGLIGENCE, vol. 16, pp. 428, *et seq.* This definition, like that preceding, while found in a treatment of the law of negligent injury, seems also to be as well applicable to other cases.

3. **Maxim, Causa Proxima, etc.**—Broom's Leg. Max. 216, *et seq.*; Swan v. Union Ins. Co., 3 Wheat. (U. S.) 168; Smith v. Universal Ins. Co., 6 Wheat.

(U. S.) 176; Waters v. Merchant's etc. Ins. Co., 11 Pet. (U. S.) 213; Peters v. Warren Ins. Co., 14 Pet. (U. S.) 99; Howard Ins. Co. v. Norwich etc. Tr. Co., 12 Wall. (U. S.) 194; Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222. Erle, C. J., in Ionides v. Universal Marine Ins. Co., 14 C. B., N. S., 259, declares this maxim to be "peculiarly applicable to insurance law." See also Redman v. Wilson, 14 M. & W. 476; Laurie v. Douglass, 15 M. & W. 746; Patrick v. Commercial Ins. Co., 11 Johns. (N. Y.) 14; Deveaux v. Salvador, 4 Ad. & El. 320; Wilson v. New-port Dock Co., 4 H. & C. 235. Compare 13 Am. L. Reg., N. S. 44.

"For in determining what losses are within the perils insured against, '*causa proxima, non remota spectatur*.'" Shaw, C. J., in Copeland v. New England Mar. Ins. Co., 2 Met. (Mass.) 437.

Lord Bacon paraphrases the maxim thus: "It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." Maxims, Reg. 1.

It is to be borne in mind that in criminal cases, and in cases of willful injury, the maxim does not apply, and the wrongdoer is held liable for the remote as well as the proximate consequences of his wrongful act. "The maxim, *in jure non remota causa sed proxima spectatur*, does not, however, apply to any transaction originally founded in fraud or covin; for the law will look to the corrupt beginning, and consider it as one entire act, according to the principle, *dolus circuitu*

policy, the issue is the liability of one for the consequences alleged to result from a certain cause, there is no question as to the applicability of the maxim; the difficulty lies in determining what is and what is not a proximate cause, and as this depends upon the circumstances of each case, no invariable rule can be formulated nor standard fixed; the safe and proper course, where doubt exists, being to submit the question for the decision of the jury.¹

PROXY.—See STOCKHOLDERS.

PRUDENTIAL.—See note 2.

PUBLIC.—What is meant by the public is not any corporation, like a city, town, or county, but the body of the people at large. The people of the neighborhood—the community at large—without reference to the geographical limits of any corporation, constitute the public. The people are the public.³ This term is joined frequently to other terms to designate those things which have a relation to the public, as public officer, public house, public lands, public places, etc., for which see the various titles beginning with this word, and the phrases collected in the notes. When applied thus to property, the word sometimes describes the use to which the property is applied; at other times the character in which it is held.⁴

non purgatur—fraud is not purged by circuitry." Broom's Leg. Max., p. 228; Bac. Max., reg. 1; Noy Max. (9th ed.), p. 12; Tomlin's Law Dict., tit. Fraud. Judgm., 6 E. & B. 948. This distinction is elaborated in NEGLIGENCE, vol. 16, pp. 428, *et seq.* And see Bloom v. Franklin Life Ins. Co., 97 Ind. 478; 40 Am. Rep. 469; Billman v. Minneapolis etc. R. Co., 76 Ind. 166, 178; 40 Am. Rep. 230; Forney v. Geldmacher, 75 Mo. 113; 42 Am. Rep. 388.

1. In Mutual Ins. Co. v. Tweed, 7 Wall. (U. S.) 52, Miller, J., observes: "If we could deduct from the cases the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations."

Question for the Jury.—That the question of proximate cause is one for the jury, under instructions from the court, see Traveler's Ins. Co. v. Seaver, 19 Wall. (U. S.) 543; Howard Fire Ins. Co. v. Transportation Co., 12 Wall. (U. S.) 199; Aetna Fire Ins. Co. v. Boon, 95 U. S. 130; Milwaukee etc. R. Co. v. Kellogg, 94 U. S. 469; West Mahoney v. Watson, 112 Pa. St. 574; 116 Pa. St. 344; Kreuziger v.

Chicago etc. R. Co., 73 Wis. 158; Lake v. Milliken, 62 Me. 240; 16 Am. Rep. 466; Chicago etc. R. Co. v. Pennel, 110 Ill. 435.

But this of course is subject to the rule that where there is no room for reasonable doubt, or question, it is for the court to decide. Pike v. Grand Trunk etc. R. Co., 39 Fed. Rep. 255; Hathaway v. East Tennessee etc. R. Co., 19 Fed. Rep. 489.

2. Prudential Concerns of a Town.—Massachusetts statute of 1785, ch. 75, § 7, empowers a town to make such orders and by-laws as are necessary for managing and ordering the "prudential affairs of the town." In Willard v. Newburyport, 12 Pick. (Mass.) 231, the phrase, "prudential concerns of a town" was said by Shaw, C. J., to embrace "that large class of miscellaneous subjects affecting the accommodation and convenience of the inhabitants, which have been placed under the municipal jurisdiction of towns by statute or by usage."

3. Baker v. Johnston, 21 Mich. 335.

4. Gerke v. Purcell, 25 Ohio St. 241. See also Montgomery v. Wymen (Ill. 1889), 22 N. E. Rep. 846; Davenport Gas Light Co. v. Davenport, 13 Iowa 229.

The term "public" may be applied to a house, either on account of the proprietorship, as a court-house, which belongs to the county, or the purposes for which it is used, as a tavern, store-house, etc. See *Shihagan v. State*, 9 Tex. 430.

Public Notice.—The charter of a mutual insurance company provided that the managers of the company in making an assessment should publish the same, and that the members within sixty days thereafter should pay their assessments, or in default thereof, should be proceeded against, "according to the provision of this act." The section, providing the method of procedure in case of default concluded thus: "Public notice of this section to be given, when advertising an assessment made, and how the same will be collected." *Held*, that the "public notice" required, was notice by advertising in a newspaper. *Pennsylvania Training School v. Mut. F. Ins. Co.*, 127 Pa. St. 559.

Public Trust.—The *New York* constitution prescribes a certain oath to be taken by every person holding an office or "public trust." *In re Wood*, Hopk. Ch. (N. Y.) 6, the court, by Sanford, Ch., said: "The words public trust appear to include every agency in which the public, reposing special confidence in particular persons, appoint them for the performance of some duty or service." So it was held that the station of a solicitor or counselor was a public trust. And in *Seymour v. Ellison*, 2 Cow. (N. Y.) 13, it was held that the section of the constitution, which provided that "neither the chancellor nor justices of the Supreme Court, nor any circuit judge shall hold any other office or public trust," prohibited a circuit judge from acting as attorney in a case. But see *In re Oaths*, 20 Johns. (N. Y.) 492; *ATTORNEY AND CLIENT*, vol. 1, pp. 942, 944, n.

Public Grounds.—See *GROUND*, vol. 9, p. 62.

Public Ground.—Where certain town lots were dedicated to the public, by recording the official town plat upon which they were designated as "public ground," it was held that they should be taken for a public square for the use of the town. The court by Lane, C. J., said: "The words expressed in the act of dedication were 'public ground;' a phrase which, in reference to a lot in a town, of shape, dimension and position

suitable for this purpose naturally, though not necessarily, means a public square." *Lebanon v. Warren Co.*, 9 Ohio 80; 33 Am. Dec. 422.

Public Lot.—See *LOT*, vol. 13, p. 1163.

Public Square.—As used in *Indiana* statutes, the term "public square" must be given its popular import, and refers almost exclusively to grounds occupied by the court house, and owned by the county. *Westfall v. Hunt*, 8 Ind. 177; *Logansport v. Dunn*, 8 Ind. 378.

See also *DEDICATION*, vol. 5, p. 416; *PARKS*, vol. 17, p. 107.

Public Domain.—"Domain," in its broadest sense, when used in connection with property, means "ownership," and "public domain" means, when used in such connection, "public ownership." But where a *Texas* statute provided that certain certificates which had been issued to a meritorious class of persons, "may be located as headright certificates upon any of the public domain, and patented as in other cases," it was held that the words "public domain" were evidently not used in their most general sense, for if so used they would embrace lands appropriated by the State for public purposes, but that the term must be construed as if written "unappropriated public domain." *Day Co. v. State*, 68 Tex. 547. See generally *PUBLIC LANDS*.

Public Grant.—See *GRANTS*, vol. 9, p. 44.

Public Debt—Public Securities.—In *Morgan v. Cree*, 46 Vt. 786; 14 Am. Rep. 640, the court by Peck, J., said: "The terms 'public debt' and 'public securities' used in legislation, are terms generally applied to national or State obligations and dues, and would rarely, if ever, be considered to include town debts or obligations."

Public Institutions — Quasi Public Institutions. — Public institutions are those which are created and exist by law or public authority. Private institutions are those which are created or established by private individuals for their own private purposes. The only sensible distinction between public and private institutions is to be found in the authority by which, and the purpose for which, they are created and exist. *Toledo Bank v. Bond*, 1 Ohio St. 643. And see this case for a valuable commentary upon the distinction between corporations strictly private and those which, though technically private, have for their object the promotion of some public interest, and

Definition.

are of a *quasi* public character. See also *FRANCHISES*, vol. 8, p. 588.

"Public Libraries."—A *New York* statute provides that the real and personal property of every "public library" shall be exempt from taxation. The charter of a corporation specified as one of its objects the permanent establishment in the city of New York of an institution in which shall be collected, classified, and arranged, geographical scientific works, voyages, etc., "having special reference to that kind of information which should be collected, preserved, and be at all times accessible for public uses in a great maritime and commercial city." It was held that this clause of the charter was an implied guaranty that a library should be maintained to which the public would have free access; and, as such a library had been maintained free and open to all, it was practically and to all intents and purposes a "public library;" and as such entitled to exemption from taxation. *People v. Tax Com'rs etc.*, 11 Hun (N. Y.) 505.

A *Rhode Island* statute exempts from taxation "public libraries and the lands and buildings used in connection therewith." *Held*, that an incorporated library, the ownership of which is in the corporation and the use of which is confined to the stockholders, their immediate families, and their licensees, is not a "public library" in the meaning of the statute. *Providence Athenæum v. Tripp*, 9 R. I. 559.

See generally **TAXATION**.

Public Money.—In the statutes of the *United States*, this term ordinarily means the money of the Federal government received from the public revenues, or intrusted to its fiscal officers, wherever it may be. It does not include the money of States, counties, cities, and towns, although, with reference to those governments and municipalities, such funds, in other connections, would be deemed public moneys. Nor does it include money in the hands of the marshals, clerks, and other officers of courts held by them to await the judgment of the court in relation to the ownership thereof. Such money constitutes trust funds held for individual litigants, and not for the public as represented by the government. *Branch v. U. S.*, 12 Ct. of Cl. 286.

The money appropriated to the payment of the Cherokee Indians, upon their removal, and the cession of their land, was properly "public money," al-

PUBLIC.

Definition.

though money stipulated by treaty to be paid them upon such cession and removal. *Minis v. U. S.*, 15 Pet. (U. S.) 448.

"Public worship" may mean the worship of God conducted and observed under public authority; or it may mean worship in an open or public place, without privacy or concealment; or it may mean the performance of religious exercises under a provision for an equal right in the whole public to participate in its benefits; or it may be used in contradistinction to worship in the family or the closet. In this country, what is called public worship is commonly conducted by voluntary societies, constituted according to their own notions of ecclesiastical authority and ritual propriety, opening their places of worship, and admitting to their religious services such persons, and upon such terms, and subject to such regulations, as they may choose to designate and establish. A church absolutely belonging to the public, and in which all persons without restriction have equal rights, such as the public enjoy in highways or public landings, is certainly a very rare institution, if such a thing can be found." *Attorney-Genl. v. Merrimac Mfg. Co.*, 14 Gray (Mass.) 602.

Under a *New York* statute exempting from taxation every building of "public worship," it was held that the building of a Young Men's Christian Association, which was used for other purposes besides religious worship, was not exempt. *Young Men's Christian Assoc. v. Mayor etc. of N. Y.*, 113 N. Y. 187. See generally **RELIGIOUS SOCIETIES**.

Public Offense.—Within the meaning of a *Minnesota* statute authorizing a peace officer to arrest without a warrant, for a "public offense committed or attempted in his presence," the term "public offense" includes the violation of a city ordinance. In *State v. Cantieny*, 34 Minn. 1, the court by Dickinson, J., said: "The word 'public' was not intended to express an idea of a distinction between offenses made such by common law or by general statute, and those defined by a law having but a limited territorial operation. . . . It" (the term "public offense") "includes all such violations of municipal ordinances as are punishable by fine or imprisonment."

And see *Dyer v. Placer Co. (Cal.*

PUBLIC ADMINISTRATION—PUBLIC LANDS.

PUBLIC ADMINISTRATION—ADMINISTRATOR—(See also EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165; PROBATE).—Public administration is conducted by a special officer, or the guardians of the poor, where there is no relative entitled to apply for letters.¹ The officer conducting the administration is called a public administrator.

PUBLIC DOCUMENTS.—See BOOKS AS EVIDENCE, vol. 2, p. 467*j*; DOCUMENTS, vol. 5, p. 863; ELECTIONS, vol. 6, p. 435; JUDICIAL NOTICE, vol. 12, p. 151; RECORDS.

PUBLIC HOUSE—(See also INN AND INN KEEPERS, vol. 11, p. 3; HOTEL, vol. 9, p. 776).—Public house, in the sense of the law of inns, is one kept for the entertainment of all who come lawfully and pay regularly. The term does not include a boarding house kept for the accommodation only of those accepted as guests by the proprietor.²

PUBLIC LANDS—(See also GRANTS, vol. 9, p. 43; SPANISH LAND GRANTS.)

I Introduction—Congressional Control, 306.

II. General Method of Acquiring Public Lands as Private Property, 310.

1. *Pre-emption*, 312.

a. *Nature and Extent of the*

Right, 312.

b. *Lands Subject to Pre-emption*, 314.

c. *Persons Entitled to the Right*, 316.

d. *Proceedings*, 318.

(1) *Declaratory Statement*, 319.

1891), 27 Pac. Rep. 197, for the statutory definition of this term in *California*.

Public Assemblies.—Within the meaning of a Texas statute regulating the "keeping and bearing" of deadly weapons, a justice's court which was in session and engaged in the trial of a cause was held to be a "public assembly." *Summerlin v. State*, 3 Tex. App. 444.

Public Corporations.—See CORPORATIONS, vol. 4, p. 186; FRANCHISES, vol. 8, p. 587.

Public Buildings.—In addition to the cases under BUILDINGS, vol. 2, p. 603, see also *State v. Mayor etc. of Bayonne*, 49 N. J. L. 311.

Public Charities.—See CHARITIES, vol. 3 p. 123; TAXATION.

Public or Private Conveyance.—See CONVEYANCE, vol. 4, p. 138.

Public Enemy.—See BILL OF LADING, vol. 2, p. 232; CARRIERS OF GOODS, vol. 2, pp. 778, 847; ENEMY, vol. 6, p. 640; EXPRESS COMPANIES, vol. 7, p. 563; MARINE INSURANCE, vol. 14, p. 378.

Public Indecency.—In addition to the *Indiana* cases cited under EXPOSURE OF PERSON, vol. 7, p. 534, see *Jennings v. State*, 16 Ind. 333; *State v. Hevy*, 16 Ind. 338. See also LEWD AND LASCIVIOUS COHABITATION, vol. 13, p. 276, n; LIBEL AND SLANDER, vol. 13, p. 344.

Public Letting.—See LETTING, vol. 13, p. 268.

Public Performances, Exhibitions, Entertainments, etc. (within license laws). See LICENSE, vol. 13, p. 534.

Public Purposes.—See MUNICIPAL SECURITIES, vol. 15, p. 1240; DEDICATION, vol. 5, p. 395; CHARITIES, vol. 3, p. 131.

Public Use.—For an exhaustive treatment of this term in the two branches of the law to which a correct definition is of great importance, see EMINENT DOMAIN, vol. 6, p. 524; PATENTS, vol. 18, p. 60.

1. *Anderson's L. Dict.*

2. *Com. v. Cuncannon*, 3 Brewst. (Pa.) 334. See further *Pease v. Coates*, 36 L. J. Ch. 57; *Fielden v. Slater*, 38 L. J. Ch. 379. For the sense in which

- (2) *Proof*, 320.
- e. *Assignment of Pre-emption Right*, 322.
- 2. *Homestead*, 323.
 - a. *Proceedings*, 325.
- 3. *Public Sales and Private Entries*, 328.
- 4. *Bounty Lands*, 330.
- 5. *Timber Culture*, 331.
- III. *Alienation of Land Prior to Issue of the Patent*, 332.
- IV. *Mineral Lands and Mining Resources*, 335.
- V. *Land Grants to Railroads*, 336.
- VI. *The General Land Office*, 340.
- 1. *Constitution of*, 340.
- 2. *Powers and Duties of Land Officers, Generally*, 342.
- 3. *Compensation*, 343.
- 4. *Force and Effect of Decisions of the Land Office*, 343.
- VII. *Patents*, 347.
- VIII. *Cancellation of Patents*, 356.
- IX. *School Lands*, 360.
- X. *Town Sites*, 362.
- XI. *Miscellaneous Provisions Relating to Public Lands*, 364.
 - 1. *Timber Lands*, 364.
 - 2. *Swamp Land Grant*, 367.
 - 3. *Other Provisions*, 371.
- XII. *Miscellaneous Grants*, 373.

I. INTRODUCTION—Congressional Control.—The term public lands is habitually used in legislation to describe such lands as are subject to sale or other disposal by the government under general laws.¹ The general method and process whereby the *United States* has acquired possession of lands both by cession from the States and by treaties with foreign countries is a matter rather of history than of law, and has no place in this discussion. In order for a clearer comprehension of the whole subject, however, the general source of title may be hastily traced. The English possessions in America were not claimed by right of conquest but by right of discovery, and all discoveries made by persons acting under the authority of the government were for the benefit of the nation and not for such persons individually.² Upon the treaty of 1783 the

this term is used in the statutes against gaming, see *GAMING*, vol. 8, p. 1045, *et seq.* Compare *PUBLIC PLACE*.

1. The term public lands in its broadest sense comprehends all land in the possession or ownership of the government as distinguished from land possessed by private individuals, and therefore includes lands of the several States as well as those of the United States.

It is proposed in the present treatise, however, to consider chiefly only such lands as are the property of the United States, the principles governing the law relating to lands belonging to the States being virtually the same except where peculiar statutes exist.

The definition given is found in *Newhall v. Sanger*, 92 U. S. 761; *Wirth v. Branson*, 98 U. S. 118; *Heydenfeldt v. Daney Gold etc. Min. Co.*, 10 Nev. 290; *Anderson's Law Dict. (Land)*.

As to exactly what the term public lands includes when used in statutes depends upon the connection in which it is used.

Thus it is a settled principle that land once reserved or appropriated for any purpose ceases to be a part of the public land and in all grants or proclamations declaring public land open to settlement, etc., the portion already reserved is always excepted, though the exception is not specifically mentioned. *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Beecher v. Wetherly*, 95 U. S. 517; *Leavenworth etc. R. Co. v. U. S.*, 92 U. S. 733; *U. S. v. Stone*, 2 Wall. (U. S.) 525.

Yet in a statute (23 Stat. 321) forbidding the inclosure of any public land by one who has no claim or color of title thereto, sections 16 and 36 of each township in Montana is held to form a part of the public lands, though already reserved and appropriated for school purposes. *U. S. v. Bisel*, 8 Mont. 20; *Barkley v. U. S.*, 5 Wash. 522; *U. S. v. Flaherty*, 8 Mont. 31.

2. *Martin v. Waddell*, 16 Pet. (U. S.) 367; *Johnson v. M'Intosh*, 8 Wheat. (U. S.) 575.

In the *Florida* treaty the United States did not succeed to those rights

which the king of *Spain* held by virtue of his royal prerogative, but possessed the territory subject to the institution and laws of its own government. The same, it is presumed, is true of other treaties whereby the United States has acquired lands. *Pollard v. Hagan*, 3 How. (U. S.) 212.

According to the accepted principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in this new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were considered to belong to the European nations by which any portion of the country was first discovered. *Martin v. Waddell*, 16 Pet. (U. S.) 367. This case is one of unusual interest, being an important one as fixing the real source of title to lands in the United States. The defendants in the case claimed certain lands covered with water, by virtue of a title derived from the proprietors of East Jersey; the plaintiffs claimed as grantees of the State of New Jersey, under a law passed in that State in 1824, giving them the exclusive right to take oysters from the place in question. The court reviewed at length the history of the different grants made, and of the rights which were vested in the British crown according to the principles of the British constitution. It held that when the Revolution took place, the people of each State became themselves sovereigns, and in that character held the absolute right to all their navigable waters and soils under them for their own common use, subject only to the rights surrendered by the constitution to the general government, and in consideration of this principle, the plaintiff's right under the grant of the State of New Jersey was held superior to that of the defendant. *Martin v. Waddell*, 16 Pet. (U. S.) 367. See also *U. S. v. Kayama*, 118 U. S. 375; *U. S. v. Cook*, 19 Wall. (U. S.) 591; *Johnson v. M'Intosh*, 8 Wheat. (U. S.) 543; *Fletcher v. Peck*, 6 Cranch (U. S.) 77.

In 1 Kent's Commentaries 257, 258 the following is presented upon the subject of public lands: "Upon the doctrine of the Supreme Court in the cases of *Johnson v. M'Intosh*, 8 Wheat. (U. S.) 543, and in that of *Fletcher v. Peck*, 6 Cranch (U. S.) 142, the United States own the soil as well as the jurisdiction of the immense tracts of unpatented land included

within their territories and all productive funds which those lands may create. The title is in the United States by treaty of peace with Great Britain, and by subsequent cessions from Spain and France, and by cessions from the individual States; and the Indians have only a right of occupancy, and the United States possesses legal title subject to that occupancy with an absolute and exclusive right to extinguish the Indian title of occupancy either by conquest or purchase. The title of the European nations, and which passed to the United States, to this immense territory was founded on discovery and conquest; and by the European customary law of the nations, prior discovery gave this title to the soil, subject to the possessory right of the natives, and which occupancy was all the right of European conquerors and discoverers, and which the United States as succeeding to that title, would admit to reside in the native Indians. The principle is that the Indians are to be considered merely as occupants, to be protected while in peace in the possession of their lands, but to be deemed incapable of transferring the absolute title to any other than the sovereigns of the country." See 1 Kent's Commentaries 257, 259.

Right of Federal Government to Acquire Lands.—The constitutionality of the acquisition of foreign territory is vindicated by several decisions of the Supreme Court, as a necessary accompaniment of the power to make treaties. *American Ins. Co. v. 365 Bales of Cotton*, 1 Pet. (U. S.) 511; 3 Story's Commentaries 156, 161.

And it is upon this principle alone that the authority of the United States government to acquire the Louisiana lands rests.

It may be stated as a matter of history that in 1803 the United States minister to France conducted a treaty with Napoleon the First, whereby the immense territory of Louisiana was to be ceded to the United States upon the payment of \$15,000,000. The treaty was sent by Mr. Jefferson to the Senate for their ratification, he advising them in the message which accompanied it to adopt it without debate, clearly indicating that he considered that the Federal government possessed no power under the constitution to acquire land. He considered, however, that such an opportunity was not to be lost, and that the Senate should ratify the treaty and

English possessions in America became the property of the several States; and the United States now hold public land in States created out of territory ceded by the original States by force of deeds of cession, and the statutes enacted with them, and not by any municipal sovereignty or right of eminent domain which it may be supposed that they possessed, or have received by compact with such States for that particular purpose.¹ The land in the Territories has been acquired by treaty with other countries and is possessed by virtue of the powers vested by the constitution.

Complete control over all public lands of the United States is vested in Congress without limitation,² and this power cannot be interfered with or its exercise embarrassed by any State legislation.³ Therefore, Congress has sole power to declare the dignity

throw themselves upon the people to have their conduct approved. But this view of Mr. Jefferson's has been clearly shown to be erroneous, since the power to acquire land under treaty with foreign countries is one of the necessary and essential accompaniments of the power granted to the President to make treaties. Const. U. S., art. 2, § 2; *American Ins. Co. v. 365 Bales of Cotton*, 1 Pet. (U. S.) 511.

See also Bryce's *American Commonwealth*, vol. 2, p. 62; Cooley's "*Louisiana Purchase*."

1. *Pollard v. Hagan*, 3 How. (U. S.) 212; *Clark v. Smith*, 13 Pet. (U. S.) 195.

That part of the compact respecting public lands it is held would have been binding on the people of the new States whether they had consented to be bound or not. *Pollard v. Hagan*, 3 How. (U. S.) 212.

2. *U. S. v. Gratiot*, 14 Pet. (U. S.) 526; *Fort Leavenworth etc. R. Co. v. Lowe*, 114 U. S. 525; *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *U. S. v. Maxwell Land Grant Co.*, 121 U. S. 325; *Tameling v. U. S. etc. Co.*, 93 U. S. 644.

But the President is empowered to order, from time to time as the exigencies of the public service require, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. *Grisar v. McDowell*, 6 Wall. (U. S.) 363.

"Congress shall have power to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States." U. S. Const., art. 4, § 3, cl. 2.

Presumption of Possession by United

States—Office Found.—When Congress passes an act directing the appropriation and possession of land covered by an old French or Spanish grant after it has been forfeited for non-fulfillment of conditions as to improvement, occupation, etc., such an act is equivalent to an office found and re-unites the land to the public domain. *U. S. v. Repentnigny*, 5 Wall. (U. S.) 211; *McMicken v. U. S.*, 97 U. S. 204.

An actual entry or office found is therefore not necessary to restore possession to the government. *U. S. v. Repentnigny*, 5 Wall. (U. S.) 211; *McMicken v. U. S.*, 97 U. S. 204; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *Farnsworth v. Minnesota etc. R. Co.*, 92 U. S. 49.

3. *Gibson v. Chouteau*, 13 Wall. (U. S.) 92; *Jourdan v. Barrett*, 4 How. (U. S.) 169; *Union etc. Min. Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Vansickle v. Haines*, 7 Nev. 249.

Effect of State Legislation.—The case of *Wilcox v. Jackson*, 13 Pet. (U. S.) 498, contains the best exposition as to the law upon this subject. It is there laid down that a State has a perfect right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens by descent, devise, or alienation; but Congress is invested by the Constitution with the power of disposing of the public land, and making all needful rules and regulations respecting it.

Therefore, where a patent has not been issued for a part of the public land, a State has no power to declare any title less than a patent valid against the claim of the United States to the

and effect of titles emanating from the United States,¹ and no

land, or against a title held under a patent granted by the United States.

Whenever a question in any court, State or Federal, is whether the title to property which had belonged to the United States has passed, that question must be solved by the laws of the United States; but whenever the property has passed according to those laws, then, like all property in the State, it becomes subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States. See also *Elliott v. Peirsol*, 1 Pet. (U. S.) 340; *Boyce v. Danz*, 29 Mich. 146; *Leavenworth etc. R. Co. v. U. S.*, 92 U. S. 733; *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *Barnard v. Ashley*, 18 How. (U. S.) 43.

Jurisdiction Over Matters Relating to Public Lands.—By virtue of the provisions of article 3, § 2, of the constitution of the United States, jurisdiction of all such matters is vested in the Federal tribunals; thus, the judicial power of the United States extends to all cases in law or equity arising under the constitution or laws of the United States and treaties made under their authority, to cases between citizens of the same State claiming lands under grants of different States, and to cases in which the United States is a party; and in cases of crime it is provided that a trial shall be had in the State within which the crime was committed, but if not committed in the State, at such place as Congress may by law direct. It would seem, therefore, that in all cases which arise relative to the public lands—that is, as to their ownership prior to the issue of the patent, and as to crimes committed against the public lands, etc.—will be tried in the Federal courts; but in order to lessen the burden which would be imposed by compelling them to examine and decide upon all such cases, it is provided by several acts that the courts of the Territories and sometimes of the States are empowered to try certain cases; for example, in the act forbidding the inclosure of public lands by one who has no title thereto, territorial courts are empowered to try all cases arising within their territorial limits even though the cases must necessarily be those in which the United States is a party. See Const. of U. S., art. 3, § 2;

U. S. v. Douglas-Willan Sartoris Co. (Wyoming 1889), 22 Pac. Rep. 92; *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *U. S. v. Bisel*, 8 Mont. 20.

Congress and the Treaty Making Power.—A peculiar question arises here as to the relative extent of the power of Congress and of the treaty making power.

In the case of *Foster v. Neilson*, 2 Pet. (U. S.) 314, the court by Marshall, C. J., said: "Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision; but when the terms of a stipulation import a contract, and either of the parties engage to perform a particular act, the treaty then addresses itself to the political and not the judicial department, and the legislature must execute the contract before it can become a rule of court." This, then, would seem to define distinctly to what extent the treaty making power of the government can dispose of or control the public lands, and that such power cannot confer upon the land department authority, nor enjoin upon it any duty respecting the sale, conveyance or disposition of the public lands, except with the consent of Congress. *Parker v. Duff*, 47 Cal. 554; *Pugsley v. Brown*, 35 Fed. Rep. 688; *Easton v. Salisbury*, 21 How. (U. S.) 431; *Turner v. American Baptist etc. Union*, 5 McLean (U. S.) 344; *Stockton v. Williams*, 1 Mich. 546. This doctrine is opposed in one case, however, that of *Utah Min. etc. Co. v. Dickert etc. Sulphur Co.* (Utah, 1889), 21 Pac. Rep. 1002.

1. The whole legislation of the government in reference to the public lands declares the patent (which is the evidence of the conveyance from the government to the private person) to be the statutory and conclusive evidence of legal title. Until it issues the fee is in the government, which by the patent passed to the grantee, and he is entitled to recover the possession in ejectment. *Bagnell v. Broderick*, 13 Pet. (U. S.) 436. See also *Rector v. Gibbon*, 111 U. S. 276.

Conflict of Grants.—In the case of *Coffee v. Groover*, 123 U. S. 1, it appeared that the plaintiff in an ejectment suit claimed certain land under a grant from the State of Georgia, and

appropriation of public lands can be made for any purpose save by authority of an act of Congress.¹ After any portion of the public land has been acquired as private property, and a legal title vested in a private owner it becomes a part of the property of the State in which it is situated, subject to the laws of the State as to its alienation and transfer.²

II. GENERAL METHOD OF ACQUIRING PUBLIC LANDS AS PRIVATE PROPERTY.—There are five principal means by which private persons can acquire title to portions of the public land of the United States, namely: (1) by pre-emption; (2) homestead; (3) public auction or private sale; (4) bounty lands or military land warrants; (5) under the Timber Culture Act. The nature of each of these may be briefly described.³

defendant claimed under a grant of the United States and a subsequent grant to him from the State of Florida. When the grant by Georgia was made, that State claimed the land and exercised political jurisdiction *de facto* over it; the boundary between the States being then a subject of controversy. Some time after both grants had been made, it was decided that the land was within the State of Florida. It was held thereupon that the defendant's title must prevail, notwithstanding the Congressional confirmation of the Georgia grants, the principle being laid down that grants of land made by the government to territories over which it exercises political jurisdiction *de facto*, but which does not rightfully belong to it, are wholly invalid as against the government to which the territory rightfully belongs.

1. United States *v.* Fitzgerald, 15 Pet. (U. S.) 407.

This right of the United States to dispose of the fee simple of lands occupied by them has always been upheld in the Supreme Court from the very foundation of the government. *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55; *Beecher v. Wetherby*, 95 U. S. 517. This right is founded on discovery, and the grant of the United States is subject only to the Indian right of occupancy. A grant made before the extinguishment of the Indian right remains subject to that right, but the title becomes absolute in the grantee whenever the Indian right is extinguished. *Clark v. Smith*, 13 Pet. (U. S.) 105; *Johnson v. McIntosh*, 8 Wheat. (U. S.) 575; *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55; *Thompson v. Doaksum*, 68 Cal. 593.

Trespass on Public Lands.—The rights of the United States as to its

public lands are the same as those of any owner of private property, and therefore it may maintain trespass against any person trespassing upon such lands either by cutting and carrying away timber or otherwise. *Cotton v. U. S.*, 11 How. (U. S.) 229; *Jourdan v. Barrett*, 4 How. (U. S.) 169; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44. See also *U. S. v. Briggs*, 9 How. (U. S.) 351; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 60; *Wells v. Nickles*, 104 U. S. 444.

Lands Cannot be Acquired as Against the United States by Prescription.—It has been often held that mere occupancy and improvement of the public lands, no matter how long continued, gives no vested right in such lands as against the United States or any purchaser from them. *Sparks v. Pierce*, 115 U. S. 408; *Morrow v. Whitney*, 95 U. S. 559; *Oaksmith v. Johnston*, 92 U. S. 343; *Burgess v. Gray*, 16 How. (U. S.) 48; *Frisbie v. Whitney*, 9 Wall. (U. S.) 187; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92.

The weight of inference in favor of any claim of right to lands as against the United States, growing out of mere possession, is very slight indeed. *Simmons v. Ogle*, 105 U. S. 271.

2. It is a settled principle that the laws of the State in which the land is situated control exclusively its descent, devise, alienation, transfer, and the effect and construction of instrument intended to convey it. *U. S. v. Fox*, 94 U. S. 315; *McCormick v. Sullivan*, 10 Wheat. (U. S.) 202; *Brine v. Hartford F. Ins. Co.*, 96 U. S. 627; *McGould v. Scales*, 9 Wall. (U. S.) 32; *Watt v. Waddle*, 6 Pet. (U. S.) 389.

3. **Desert Lands.**—There is one other method of acquiring public lands

Land is acquired by preemption by the preemptor going upon the land subject to preemption, improving it, and residing there continuously six months; at the expiration of the required time, by making proof of such residence and improvement and of other minor facts, and paying \$1.25 per acre, he is entitled to a patent conveying him full title to the land.¹

Under the homestead laws a person enters upon the land subject to homestead, improves it, and resides there continuously for five years; at the expiration of such time, upon making proof of such residence and improvement, and of minor facts, he is entitled without the payment of any money, except a small amount as fees, to receive a patent conveying to him a fee simple of the land.²

Under the third head, land is acquired in the following way: By order or proclamation of the President it is declared that certain land will be open to sale at public auction at a specified time, and continue open to such sale for two weeks, during which time the land so advertised will be sold to the highest bidder; no credit being given, and the minimum price being \$1.25 per acre. Such land embraced in the proclamation as remains unsold at the expiration of two weeks will be subject to private sale and at the regular price of \$1.25 per acre.³

To certain soldiers, or to their widows or children, were issued what were known as military land warrants, entitling them to a certain amount of the public land, and upon presentation to the proper office of such warrants, the person was entitled to enter

private property; namely, that provided by act of March 3, 1877 (19 Stat. 377), where it is provided that a person of the requisite age, citizenship, etc., may, upon payment of twenty-five cents per acre, file a declaration under oath with the register and receiver of the district in which any desert land is situated that he intends to reclaim a tract of desert land not exceeding one section by conducting water upon the same within a period of three years thereafter, and upon proof of having reclaimed such land is entitled to receive a patent therefor, conveying to him the fee simple; but no entry under this act can be made of lands reclaimed before any entering. See 2 Copp's Land Laws, 888, 909.

See also *Gray v. Dixon*, 83 Cal. 33.

Entry, Meaning of.—The term entry being of frequent occurrence in this discussion, its meaning may be fully explained in the beginning. As applied to the appropriation of public lands, it is intended to mean that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his

claim in the office of an officer provided by law. When the expression "enter a certain tract of land" is used, it is intended to mean not that the person entered upon the lands and took possession, but that his claim to them was entered in the registers in the land office. In the old case of *Chotard v. Pope*, 12 Wheat. (U. S.) 586, it was considered that the words "enter, entry, etc.," were exclusively used with reference to the appropriation of lands hitherto unappropriated. The opinion in that case dwells at length upon the meaning of this word, particularly as applied to the act of 1800, providing for the sale of certain unappropriated lands in Virginia.

1. U. S. Rev. Stat., §§ 2257-88; *infra*, this title, *Preemption*; U. S. v. Fitzgerald, 15 Pet. (U. S.) 407, note.

2. U. S. Rev. Stat., §§ 2289-2317; *infra*, this title, *Homestead*; Newkirk v. Marshall, 35 Kan. 77.

3. U. S. Rev. Stat., §§ 2353-2379; *infra*, this title, *Public Entry*, etc.; Eldred v. Sexton, 19 Wall. (U. S.) 189.

No land of the United States is now subject to private entry except that in

so much of the public domain as the warrant provided for without payment of any price for the land, unless the land was held above the usual price, in which case he must pay the difference between the usual price and that at which it was held.¹

Lastly, by special act of Congress it was provided that a person might enter upon land, after making the proper application and upon proof three years after that he had planted a certain acreage of timber, he should be entitled to receive a patent for the land so occupied.²

It should be observed that in no case can more land be acquired by any single one of the means above mentioned, except the third, exceeding in amount one-quarter section, that is, one hundred and sixty acres;³ and in most cases, indeed, in all, it is required that the person attempting to claim the benefit of the above provisions must be a citizen of the United States, or one who has filed his declaration of intention to become such, and must be also either the head of a family, a widow, or a person above the age of twenty-one years.⁴

Having thus seen the general methods of acquiring public land, it will be well to proceed to a more extended discussion of each method.⁵

1. Preemption.—a. NATURE AND EXTENT OF THE RIGHT.—Preemption is the exercise of a right by a person, possessing the qualifications required by statute, who has made a settlement in person on public land subject to preemption, not exceeding one hundred and sixty acres, inhabited and improved it, and erected a dwelling thereon, and obtained a title in preference to any other, by entry and purchase at the price at which the land is held.⁶

Missouri. See Stat. March 2, 1889; Gould & Tucker's Notes on Rev. Stat., p. 522.

1. U. S. Rev. Stat., §§ 2414-46; *infra* this title, *Bounty Lands*.

2. U. S. Rev. Stat., §§ 2464-68 (superseceded by a later statute). See 20 U. S. Stat. 113; *infra*, this title, *Timber Culture*.

3. Copp's Pub. Land Laws 802-806; Gould & Tucker's Notes on Rev. Stat., § 2464 (in which latter authority the statute is set out in full).

4. U. S. Rev. Stat. §§ 2298, 2261, 2425; Gould & Tucker's Notes on Rev. Stat., pp. 560, 561; 2 Copps' Pub. Land Laws 802-3.

5. U. S. Rev. Stat., §§ 2259, 2289, 2418; Gould & Tucker's Notes on Rev. Stat., pp. 560-1.

6. Many of the principles applicable to preemption apply as well to homestead laws and other processes of acquiring public property. It is therefore dealt with much more at length.

6. 2 Copp's Public Land Laws (1890), p. 640; Dillingham v. Fisher, 5 Wis. 475; Bohall v. Dilla, 114 U. S. 47.

Six months' actual residence on the land is requisite in order to constitute a settlement as here intended. Dillingham v. Fisher, 5 Wis. 475; Bohall v. Dilla, 114 U. S. 417.

The right of preemption is in no case prejudiced by a refusal of the land officers, under a mistaken sense of their duty, to receive proof of settlement. Shepley v. Cowan, 91 U. S. 330; Cunningham v. Ashley, 14 How. (U. S.) 377; Lytle v. Arkansas, 9 How. (U. S.) 314.

It is another well settled principle that no right of preemption can be established by settlement and improvement on public land where the claimant forcibly intruded upon the possession of one who had already settled upon, improved, and inclosed such land. Such intrusion is but a naked unlawful trespass and cannot initiate a right of

By their preemption laws, the United States do not enter into any contract with the settler or incur any obligation that the land occupied by him shall ever be put up for sale;¹ therefore, a party by settlement upon the public lands, with a declared intention of obtaining a title to the same under the preemption laws, does not thereby acquire a vested interest in the premises sufficient to deprive Congress of its power over them. Under such circumstances the preemption laws give him simply a privilege that in case the lands are offered for sale he may purchase them in preference to others.² It is only when all the preliminary acts prescribed by statute, including the payment of the price of the land, have been performed by the settler that he acquires a full vested interest in the premises occupied by him, and is entitled to have his title consummated by a certificate of entry

preemption. *Atherton v. Fowler*, 96 U. S. 513; *Tremouth v. San Francisco*, 100 U. S. 251; *Wirth v. Branson*, 98 U. S. 118; *Quimby v. Conlan*, 114 U. S. 420; *Mower v. Fletcher*, 116 U. S. 380; *Weeks v. White*, 41 Kan. 572.

To create the right of preemption there must always be settlement, habitation, and improvement by the pre-emptor, and these are conditions which cannot be met when the land is in occupation of another. *Hosmer v. Wallace*, 97 U. S. 575; *Davis v. Scott*, 56 Cal. 165; *Hambleton v. Duhain*, 71 Cal. 136.

A preemption claim is not "an account or claim" within the meaning of U. S. Rev. Stat., § 5421, providing against forgery. *U. S. v. Spaulding*, 3 Dak. 85.

The right of preemption, although a gratuity, constitutes as valid a right in the settler as if it were based on a valuable consideration, and creates an equity in favor of the settler, which excludes the right of all others to purchase the land from the United States, for the time allowed by law for the settler to make his proof and entry; and this right can only be lost by a failure by the settler to complete his purchase within the time allowed. The right, however, is not a title. *McAfee v. Keirn*, 7 Smed. & M. (Miss.) 780; 45 Am. Dec. 331; *Grand Gulf R. etc. Co. v. Bryan*, 8 Smed. & M. (Miss.) 234; *Taylor v. Brown*, 5 Cranch (U. S.) 234.

Contract Not to Exercise Preemption Right.—In *Carr v. Allison*, 5 Black. (Ind.) 63, A agreed not to enter his claim on certain lands under the pre-emption laws, and to permit B to enter

them upon paying him (A) a certain sum. The contract was held void as against public policy.

So also of a contract to secure the withdrawal of opposition to a claim. *Snow v. Kimmer*, 52 Cal. 624; *Hoyt v. Macon*, 2 Colo. 502.

1. *Hutchins v. Lowe*, 15 Wall. (U. S.) 77; *Lamb v. Davenport*, 18 Wall. (U. S.) 313; *Lytle v. Arkansas*, 9 How. (U. S.) 314.

But compare *Coleman v. Allen*, 5 Mo. App. 127.

The same is true in case of settlement upon State lands, and an inchoate right by settlement and improvement, if the settler be otherwise qualified, gives to him a privilege or preference as against the purchase of land by others, but it confers upon him no legal or equitable right whatever as against the State. *State v. Budgett*, 35 Kan. 600.

2. *Frisbie v. Whitney*, 9 Wall. (U. S.) 187; *Hutchins v. Lowe*, 15 Wall. (U. S.) 77; *Campbell v. Wade*, 132 U. S. 34; *Shepley v. Cowan*, 91 U. S. 330; *Rector v. Gibbon*, 111 U. S. 276.

It has always been the policy of the government, however, to protect those who, in good faith, have settled upon and improved portions of the public lands. An illustrative case is seen in *Lamb v. Davenport*, 18 Wall. (U. S.) 313; *Rector v. Gibbon*, 111 U. S. 276.

Yet it is said in *Simmons v. Ogle*, 105 U. S. 271, that the inference in favor of the right of one in possession merely, of public land is but very slight. He can base no equity on his possession nor on the failure of the United States to assert title as against him. But this is to be taken as true

from the local land officer and later by a patent for the lands from the United States.¹

b. LAND SUBJECT TO PREEMPTION.—All lands belonging to the United States to which the Indian title has been, or may be extinguished, is subject to the right of preemption under the conditions, restrictions, and stipulations provided by law.² To this general provision there are four classes of exceptions provided by the statutes:

(1) Lands included in any reservation by any treaty, law, or proclamation of the President for any purpose.³

only as regards a conflict of his right with that of the United States.

1. *Wirth v. Branson*, 98 U. S. 118; *Hutchins v. Low*, 15 Wall. (U. S.) 77.

2. U. S. Rev. Stat. § 2258; *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Turner v. American Baptist etc. Union*, 5 McLean (U. S.) 344.

That a preemption right to public lands cannot be initiated so long as the Indian title remains unextinguished, see *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55; *Dubuque etc. R. Co. v. Des Moines Valley R. Co.*, 109 U. S. 329; *Russell v. Beebe, Hempst.* (U. S.) 704.

But the mere fact that the legal title to land is in the United States does not necessarily make it such a part of the public domain as is subject to settlement under the preemption laws. Thus, land in possession of another who has settled upon it as a preemptor or homesteader still belongs to the United States, and is in one sense a part of the public land; yet it is by no means subject to entry by another under the preemption laws. *Atherton v. Fowler*, 96 U. S. 513; *U. S. v. Payne*, 8 Fed. Rep. 883; *Hosmer v. Wallace*, 97 U. S. 575; *Hambleton v. Duhain*, 71 Cal. 136.

For it is a settled principle, as clearly and distinctly laid down in the case of *Wilcox v. Jackson*, 13 Pet. (U. S.) 498, that when a tract of land is once appropriated to any purpose, though it may still remain a part of the public domain, no subsequent law or proclamation can be construed to embrace it, or operate upon it, although no special exception is made of it. *Leavenworth etc. R. Co. v. U. S.*, 92 U. S. 733; *Beecher v. Weatherby*, 95 U. S. 517.

While a contest is pending in the general land office as to the rights of a State to select certain lands, such lands are to be considered as *sub judice*, and not within the terms of the preemption

statute. *U. S. v. Williams*, 30 Fed. Rep. 309.

Prior to the Donation Act of Sept. 27, 1850, no person could by entry or preemption settlement acquire as against the United States any right or title to public land in Oregon. *Missionary Soc. v. Dalles City*, 107 U. S. 336.

Between March 1, 1856 and May 30, 1862, unsurveyed public lands in California were not subject to settlement under preemption laws. Since that time, however, they as well as surveyed lands, have been so subject. 10 Stat. at L., U. S. 246; 12 Stat. at L., U. S. 409; *Hosmer v. Wallace*, 97 U. S. 575.

A qualified preemptor can acquire no right by entry and settlement on land embraced within a tract which for twenty years had been fenced by another, who had erected thereon a dwelling house and other buildings, and who with his tenants, had occupied the same as a dairy farm and for grazing purposes. *McBrown v. Morris*, 59 Cal. 64.

3. U. S. Rev. St., § 2257; *Gould and Tucker's Notes on Rev. St.* 521; *Leavenworth etc. R. Co. v. U. S.*, 92 U. S. 733; *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Beecher v. Wetherby*, 95 U. S. 517.

The United States may properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued by itself, ignorantly or in mistake, for lands reserved from sale by law, and a grant of which by patent was, therefore, void. *U. S. v. Stone*, 2 Wall. (U. S.) 525.

An order of the Secretary of the Interior is equivalent to a "proclamation" by the President mentioned in the statute. *Wolsey v. Chapman*, 101 U. S. 755.

A patent issued for land withdrawn from appropriation by an Indian treaty is void. The entry was without right,

(2) Lands included within the limits of an incorporated town, or selected as the site of a city or town.¹

(3) Lands actually settled and occupied for purposes of trade and business and not for agriculture.²

(4) Lands on which are situated any known salines or mines.³

To constitute the exception contemplated here, there must be upon the land ascertained mineral deposits of such an extent and value as to make the land more valuable to be worked as a mine, under the conditions existing at the time, than to use it for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of mineral, or that a

and the patent should be vacated. *U. S. v. Carpenter*, 111 U. S. 347.

See as to lands under a particular act "to quiet land titles in California." *McCreery v. Haskill*, 119 U. S. 327.

It has already been noticed that when once land is withdrawn from the public domain, either for State school land or other purposes, it is no longer open to preempts. See *Durand v. Martin*, 120 U. S. 366.

1. U. S. Rev. St., § 2258; *Gould & Tucker's Note on Rev. St. 524, et seq.*; *Chotard v. Pope*, 12 Wheat. (U. S.) 586.

Lands Reserved as the Site for a City or Town.—This provision is not affected by the extent of territory which the State or territorial legislature may include in an incorporated town. Nor was it repealed, as to Nebraska, by the organic act of the Territory providing that the legislature should not interfere with the primary disposal of the soil; the power of States to incorporate towns on the public domain is well acknowledged. Moreover the land is withdrawn from operation of the preemption law by the act of Congress, not by the act of incorporation. *Root v. Shields*, 1 Woolw. (U. S.) 340; *Carroll v. Patrick*, 23 Neb. 834.

Where a company has made an effort to build a town upon certain land and afterwards abandons the project, such land cannot be considered as being withdrawn from preemption. *Smiley v. Sampson*, 1 Neb. 56.

Issue of a patent to the municipal authorities can pass no title as against one whose right to a patent was perfected previously to the act authorizing the issue to municipal authorities. *Starks v. Starrs*, 6 Wall. (U. S.) 402.

Where the title to a town lot is confirmed by Congress and such lot is a portion of a claimant's land upon which

his house stood, his title to the remainder of the claim is not affected thereby. *O'Brien v. Perry*, 1 Black (U. S.) 132.

2. U. S. Rev. St., § 2258. See also *Surgett v. Lapice*, 8 How. (U. S.) 48.

3. U. S. Rev. St., § 2558; *Gould & Tucker's Notes on Rev. St. p. 525.*

Therefore a patent will be canceled if it appears that the person who obtained it knew that there were mines on the land covered by it at the time he made the application. In the case of *McLaughlin v. U. S.*, 107 U. S. 526, it appeared that cinnabar, a mineral which carries quicksilver, was found on the land in 1863; that a man resided on the land and mined cinnabar at that time, and in 1866 established some form of reduction works there; that these were on the ground when application for the patent was made by the agent of the patentee, and that these facts were known to him. The patent was therefore canceled. See also *Mullen v. U. S.*, 118 U. S. 271; *Morton v. Nebraska*, 21 Wall. (U. S.) 674; *Deffeback v. Hawke*, 115 U. S. 392.

The Act of July 1st, 1864, gave a legislative construction to the word "mines," by which it is made to include all coal-beds or coal-fields, in which no interest had become vested. *U. S. v. Mullan*, 10 Fed. Rep. 785; 118 U. S. 271.

The grant to the Central Pacific Railroad Company (12 U. S. St. at L. 492, § 3)—excepting all mineral lands—imports a duty of officers issuing patents to ascertain whether the lands are mineral or not. Issuance of a patent is a determination of the officers that the land therein conveyed is not mineral; and this, even though the patent contains an exception of mineral land. And an occupant thereunder will be protected against in-

change in the conditions has occurred subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work such lands as mines, does not in the least affect the title as it passed at the time of the sale.¹

It has always been the policy of the government since the acquisition of the Northwest Territory, and the inauguration of its land system, to reserve salt springs from sale, and this policy has been applied, at least so far as to render void an entry where salines at the time had been noted on the field book, were palpable to the eye, and were discovered prior to the entry.²

c. PERSONS ENTITLED TO RIGHT.—Every person being the head of a family, or widow, or single person, over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such as required by the naturalization laws, who may hereafter make a settlement in person on the public lands, subject to preemption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter a claim for land, subject to the general provisions with regard to preemption.³ No person, how-

trusion of any stranger claiming to have discovered minerals thereon. *Cowell v. Lammers*, 21 Fed. Rep. 200.

1. The question is to be determined according to the facts in existence at the time. If upon the premises at the time there were not actual "known mines" capable of being profitably worked for their mineral products, the title to them acquired under the preemption act cannot be successfully assailed. *Colorado Coal etc. Co. v. U. S.*, 123 U. S. 307, 328; *U. S. v. Reed*, 28 Fed. Rep. 482; *Mullan v. U. S.*, 118 U. S. 270 (coal lands).

2. **Salines.**—*Morton v. Nebraska*, 21 Wall. (U. S.) 660; *Deffebach v. Hawke*, 115 U. S. 392; *U. S. v. Gear*, 3 How. (U. S.) 120.

3. U. S. Rev. St., § 2259; Gould & Tucker's Notes on Rev. St., p. 526-8. An officer of the United States has the same right to acquire a portion of the public lands by any mode or purchase authorized by law, as any other citizen. *U. S. v. Fitzgerald*, 15 Pet. (U. S.) 407.

The applicant for preemption under the statute of May 30, 1862, authorizing settlements upon California lands, must have all the qualifications prescribed under the general preemption law. *Gimmy v. Culverston*, 5 Sawy. (U. S.) 605.

The settlement upon the land required by the preemption laws is that of a qualified person, and the fact that

one of foreign birth has been in possession prior to the date of declaring his intention to become a citizen, will not preclude him from preempting the land of which he continued in possession, and his settlement would be considered as commencing with the date of such declaration of intention. *Boyce v. Dautz*, 29 Mich. 146.

Testimony that a person has been accepted by the United States land officers, as entitled to enter public lands, is *prima facie* proof of such qualification. *Barnhart v. Ford*, 41 Kan. 341.

But the tenant of a preemptor cannot himself preempt the same land upon hearing that his landlord's entry has been canceled and vacated by the land office, when it afterwards turns out that such cancellation was void and was vacated by the Commissioner of the General Land Office. *Potter v. Tibbetts*, 43 Fed. Rep. 505.

Entry in Trust for Another.—A party cannot enter public lands under the preemption laws in trust for the use and benefit of another, and the court will not decree that an entry was so made, or that the title acquired thereunder by the preemptor from the government inured to the benefit of any other person. *Robinson v. Jones* (Neb. 1890), 47 N. W. Rep. 480; *Warren v. Van Brunt*, 19 Wall. (U. S.) 646.

A "Bona Fide Preemption Claimant" as used in § 8 of the act of Congress of July 23, 1866 (14 Stat. at L. 220), and

ever, who is proprietor of three hundred and twenty acres of land in any State or Territory, or who quits or abandons his residence on his own land, to reside on the public lands in the same State or Territory, is to be entitled to the right in question.¹ Nor can any person be entitled to more than one preemptive right by virtue of the provisions just set forth; and where a party qualified has filed his declaration of intention to claim the benefit of such

generally, is one who has settled upon lands subject to preemption, with the intention to acquire them, and who, in order to perfect his right to them, has complied, or is proceeding to comply, in good faith with the requirements of the preemption laws. *Hosmer v. Wallace*, 97 U. S. 575; *Ferguson v. McLaughlin*, 96 U. S. 174.

A person who settles on a quarter-section of land within the exterior limits of a Mexican grant, a portion of which is occupied by a *bona fide* purchaser for value from the Mexican grantee does not, if upon the final survey of the grant, the land is excluded from the grant, become a *bona fide* preemptor, within the meaning of the eighth section of the act of Congress of July 23, 1866, to quiet land-titles in California, as against the purchaser from the Mexican grantee; and such purchaser, under the seventh section of said act, is entitled to enter the land of which he is in possession at the minimum price. *Rutledge v. Murphy*, 51 Cal. 388.

Aliens.—Aliens are qualified to make entry under homestead or preemption laws upon the following conditions:

1st. Where they have declared their intentions to become citizens of the United States under § 2165 of the U. S. Rev. Stat.

2nd. It is equivalent to a declaration by the widow or minor children, where the father makes his declaration of intention and dies before having taken out full papers.

3rd. When an alien comes to this country during his minority, and remains until after he reaches his majority he must file his declaration under § 2165, or comply with the requirements of § 2167 before he is qualified to make entry.

4th. An honorable discharge from the United States armies, either the regular or volunteer force, is equivalent to a declaration of naturalization. See NATURALIZATION, vol. 16, p. 223;

Hutchinson v. Donaldson, 9 Copp. 150; *The Jackson Case*, 10 Copp. 19; 2 Copp. Pub. Land Laws 1279.

Citizens.—All persons born or naturalized within the United States, and subject to the jurisdiction thereof, and none others, are citizens of the United States. Const. of U. S. amendments, art. 14; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. Rep. 527; 6 Sawy. (U. S.) 299; CITIZENSHIP, vol. 3, p. 242.

A corporation organized and existing under the laws of the State is to be considered a citizen within the meaning of these provisions. *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. Rep. 527; 6 Sawy. (U. S.) 299. But in a later case *McKinley v. Wheeler*, 130 U. S. 630, Mr. Justice Field adds these restrictive words: "All of whose members are citizens of the United States," and it seems that it must be also shown that the corporation was organized under the laws of the United States, or some State or Territory thereof, and that the members are citizens and severally and individually qualified and competent under the homestead or preemption laws. *Thomas v. Chisholm*, 13 Colo. 105; CORPORATIONS, vol. 4, p. 185.

1. U. S. Rev. St., § 2260; *Gould & Tucker's Notes on Rev. St. 529*; *Myers v. Croft*, 3 Wall. (U. S.) 296.

A person does not become a proprietor within the meaning of the law by holding land in trust for others, or by entering at the land office; the proprietorship contemplated is a legal and absolute one. *Aiken v. Ferry*, 6 Sawy. (U. S.) 79.

Indians.—The preemption laws do not apply to Indians. Half-breeds are to be considered Indians so long as they retain their tribal relations; and neither Indians nor half breeds become citizens of the United States by being made electors under State laws. 7 A. G. Op. 746.

Otherwise as to homestead laws, see INDIANS, vol. 10, p. 447.

provisions for one tract of land, he cannot file at a future time a second declaration for another tract.¹

d. PROCEEDINGS.—A party desiring to acquire land under the preemption laws, must himself carefully examine the land, assure himself of its true description according to the public surveys, and of its character and desirability for purposes of residence and cultivation, and that there is no other valid claim to it. He is bound to know personally the land he claims, and any mistakes which he might have avoided by the exercise of proper diligence are made at his own risk. The land, having been selected, he must move upon it and make an actual *bona fide* settlement thereupon, since no rights as a preemptor can be acquired until substantial acts of settlement have been made.²

1. U. S. Rev. Stat., § 2261.

The second filing of a declaratory statement by any preemptor who was qualified at the date of the first filing, is illegal, and the party acquires no rights whatever under it; but where the first filing was illegal from any cause not the willful act of the party, he may make a second and legal filing. *Baldwin v. Stark*, 107 U. S. 463; *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Nix v. Allen*, 112 U. S. 129; *Goist v. Bottum*, 5 L. D. 643; *In re Raymond*, 10 Cowp. 394; 2 Copp's Pub. Land Laws (1890) 642.

In the case of *Cornelius v. Kessel*, 128 U. S. 456, the defendant had entered two tracts of land as being subject to entry as public lands of the United States, paid the full purchase price, and received a receipt from the receiver of the land office. On discovering that one tract was not subject to entry, the Commissioner of the General Land Office canceled the entry as to both tracts, without notice to defendant and without returning or offering to return the purchase money. It was held that the cancellation was invalid as to the tract subject to entry, and that defendant could rely on the original entry, and was entitled to have conveyed to him the legal title held by one who had received a patent for said tract after the order of cancellation.

But the statute does not prohibit a preemptor from filing a second declaration of intention to preempt the same tract of land described in a former declaration, when from defect or otherwise the first statement has become unavailing, and rights of third persons have not intervened. *Cumens v. Cyphers*, 56 Cal. 383.

Plaintiff and defendant filed on sepa-

rate and adjoining tracts of land, and made improvements thereon. Defendant, without the knowledge of plaintiff, obtained permission to amend his declaratory statement so as to include the tract on which plaintiff had settled, and thus bought that tract and had it included in his patent. Held, that this amendment was in violation of U. S. Rev. Stat., § 2261, which prohibits a preemptor from filing at a future time a second declaration for another tract, and the patent thereon issued could not defeat plaintiff's rights. *Sanford v. Sanford*, 139 U. S. 642.

In the case of *Mix v. Allen*, 112 U. S. 129, it is held that one who under the act of Sept. 4, 1841, providing that no person should be entitled to more than one preemptive right by virtue of the act, entered a quarter of a quarter section, must be deemed to have abandoned his right to enter the whole quarter section, notwithstanding he cultivated parts of the other quarters of the quarter section.

Filing by a Minor.—It must be observed that in order to make a second filing illegal, the person filing must have been fully qualified at the date of the first filing, therefore the filing of a declaratory statement for a preemption right by a minor will not prevent him, on attaining majority, from obtaining a preemption right to the same or another tract of land. *Tatro v. French*, 33 Kan. 49.

2. 2 Copp's Pub. Land Laws (1890), 641, *et seq.*; U. S. Rev. Stat., § 2259; *Tyler v. Green*, 28 Cal. 406; 87 Am. Dec. 130, note (in this note is contained an admirable synopsis of proceedings in preemption). *Grimmy v. Culverson*, 5 Sawy. (U. S.) 605.

A settlement upon a portion of a

(1) *Declaratory Statement*.—After the claimant has made his settlement, and not before, he is to file a declaratory statement in the district land office, either in person or through the mails.¹ Filing his declaration without an actual settlement having been made is illegal and no rights are acquired thereby, although a subsequent *bona fide* settlement may be recognized if made before the intervention of any valid adverse claim, and if followed up by the proper inhabitaney and improvement.² The statement must identify by description the land settled upon, state the date of settlement, and declare the intention of the party to claim the same under the preemption laws. It must be in writing or printed, according to the forms prescribed, and be attested by

quarter section, and making the improvements required by law, is sufficient to sustain a preemptive claim to the whole quarter-section as against subsequent settlers, even though the latter may have purchased from earlier occupants. *Quinby v. Conlan*, 104 U. S. 420.

But an actual settler's right cannot extend beyond the quarter-section upon a part of which his improvements are made, in order to make up an entire quarter-section of one hundred and sixty acres. *Lytle v. Arkansas*, 9 How. (U. S.) 314.

Settlement.—What constitutes an actual settlement as required by preemption laws, is usually a question of fact upon which the decision of the Land Office is conclusive. See *infra*, this title, *The General Land Office*. In the case of *Lindsey v. Hawes*, 2 Black. (U. S.) 554, it appeared that the claimant's stable or blacksmith shop was on the land, and there was evidence of his inclosure and cultivation of the ground or a part of it and that a considerable part of the house in which he and his family lived was also on the ground. These facts were considered sufficient evidence of *bona fide* settlement.

See also *Harkness v. Underhill*, 1 Black. (U. S.) 317, where an affidavit of actual settlement to sustain a claim was set aside when it was shown that claimant went on the land into a log pen without a roof, and remained only one night. *Ferguson v. McLaughlin*, 96 U. S. 174.

It is evident that inhabitation and improvement, essential requisites of a proper settlement, cannot be accomplished while the land is in the occupation of another. *Hosmer v. Wallace*, 97 U. S. 575; *Bohall v. Dilla*, 114 U. S. 47.

The claimant's dwelling-house must be on some portion of the land (*Ferguson v. McLaughlin*, 96 U. S. 174), and if the house is bisected by the line between two quarter sections he may be considered as residing on either. *Silver v. Ladd*, 7 Wall. (U. S.) 219.

It does not constitute a settlement where the claimant forcibly intrudes upon the possession of another who has actually settled on the land, improved and inclosed it, though the title is still in the United States. Such an act is not a settlement but a mere naked trespass. *Hambleton v. Duhain*, 71 Cal. 136; *Davis v. Scott*, 56 Cal. 165; *Hosmer v. Wallace*, 97 U. S. 575.

1. U. S. Rev. Stat., § 2264; 2 Copp's Pub. Land Laws 641.

When a settler enters in person on land open to preemption with the intention of availing himself of the provisions of the law concerning such land and does any act in execution of that intention, *e. g.*, by cutting logs to build a house, he is a settler and must give the required notice within thirty days. 4 A. G. Op. 493.

Where one has a right to make a preemption of public lands, the Land Department is not justified in refusing to permit him to file his declaratory statement, on account of a rule of its own establishment forbidding the filing of a declaratory statement subsequent to the commencement of a contest between other parties for the same land. *Quinn v. Chapman*, 111 U. S. 445.

2. 2 Copp's Pub. Land Laws 641.

A failure by any claimant to make the declaratory statement within the time prescribed, renders his claim liable to be forfeited and the tract to be awarded to the next settler in order of time, who has given proper notice, etc. U. S. Rev. Stat., § 2264-5.

not less than two witnesses living in the neighborhood of the land. It should also contain the residence and post-office address of the claimant and his witnesses.¹

As to the time in which the declaratory statement must be filed, there is a difference as to whether (1) the land has been offered for sale, or (2) has been surveyed and is unoffered, or (3) has never been surveyed at all. In the first case the claimant is allowed thirty days after he has become a settler on the land in which to file the statement. In the second he is allowed three months after becoming a settler, and in the last case the declaration must be filed three months after the plat of the township survey is filed in the district land office.²

(2) *Proof*.—The statutes require the preemptor before entering the lands, to make oath that he has not previously exercised his preemption right; that he does not come within the exceptions named by statute; that he has not settled upon and improved the land, intending to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; that he has not made any contract or agreement directly or otherwise, in any way with any person whomsoever, by which the title he may acquire from the United States shall inure in anywise to the benefit of any person except himself.³

1. 2 Copp's Pub. Land Laws 642-3.
2. U. S. Rev. Stat., §§ 2264-65; *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Lansdale v. Daniels*, 100 U. S. 113.

The claim, however, will not be forfeited for failure to make the declaration within three months, if it is made before any adverse claim accrues. *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Moore v. Robbins*, 96 U. S. 530.

A declaratory statement, or notice of claim, filed before the proper time (*e. g.*, before the plats of survey are returned to the land office), is a nullity. *Lansdale v. Daniels*, 100 U. S. 113.

3. U. S. Rev. Stat., § 2262.

By virtue of this statute a contract by which one party agrees to furnish half the government price of land, and of improving the same, in consideration of the other party preempting and conveying half the land to him after title acquired, is void. *Marshall v. Cowles*, 48 Ark. 362.

Likewise an agreement with a preemptor that, if his application for a patent is not opposed in the United States Land Office, he will convey to the other contracting party an interest in the land patented, is contrary to the statute, and therefore void. *Snow v. Kimmer*, 52 Cal. 624.

Therefore an agreement between set-

tlers upon unsurveyed public land of the United States that after their respective lands should be surveyed and patents obtained therefor each would convey to the other such land embraced in the patent to him as was in the possession of the other at the time of the agreement, is void, unless the parties are settlers on, and have their improvements on the same legal subdivision. *Turner v. Donnelly*, 70 Cal. 597; *Damrell v. Meyer*, 40 Cal. 170; *Hudson v. Johnson*, 45 Cal. 21.

A party, A, holding a preemption claim, agreed to convey a portion of the land to the state if it would erect the capitol in the town. The capitol was so erected, and A afterwards obtained his patent but refused to convey the portion promised. The promise was held void, and a bill for its specific performance was therefore dismissed. *Dawson v. Merrille*, 2 Neb. 179; 3 Neb. 458. See also *Brisbois v. Robert*, 1 Minn. 230.

Agreement to secure cancellation of an entry by a third party who has surrendered the same is not void as against public policy, and may constitute a valid consideration. *Thompson v. Hanson*, 28 Minn. 484.

In Texas.—The laws of Texas forbade any person to sell lands obtained by

Any person swearing falsely forfeits all right to the land and to the purchase money paid, besides making himself liable to prosecution under criminal laws for perjury.¹

In addition to the oath, proof must be made by the testimony of the claimant, corroborated by that of at least two witnesses, examined separately, of the facts constituting his qualifications and his compliance with the law as to settlement, inhabitancy, improvement, non-alienation, etc. In making such proof the claimant must appear in person with his witnesses at the district land office.² The affidavit of the claimant, his testimony, as well as that of his witnesses, must be made at the same time and place and before the same officer. The officer prescribed in such case is the register or receiver, or the clerk of the court of record of the county in which the land is situated.³ As to the time of making proof, it must be made within twelve months from the date of settlement in the case of lands which have been offered for sale. If the land is unoffered, proof must be made within thirty-three months from the date of settlement, or in case of unsurveyed lands, from the date of filing plat of survey in the district office.⁴ Payment is to be made at the time of making proof.⁵

A failure to make proof and payment as prescribed by law, renders the land subject to appropriation by the first legal applicant,

him as a colonist within five years after entry. An agreement, therefore, to sell before such time is void. *Deamuke v. Griffin*, 10 Tex. 113; *Clay v. Cook*, 16 Tex. 70; *Soye v. McCallister*, 18 Tex. 80; *Cook v. Lindsay*, 57 Tex. 67.

The law has since been repealed. See as to the effect of such repeal upon prior purchasers, *Clay v. Clay*, 35 Tex. 509.

1. U. S. Rev. Stat., § 2262.

The United States may maintain a suit in equity to vacate a patent obtained by false swearing in *ex parte* proceedings; nor is the right vacated by the indictment or conviction of the patentee or by the forfeiture of the money paid. *U. S. v. Minor*, 114 U. S. 233; reversing 10 Sawy. (U. S.) 155.

The General Land Office has authority to set aside an entry by preemption obtained by false and fraudulent affidavits of occupation. *Harkness v. Underhill*, 1 Black (U. S.) 316; *Garland v. Wynn*, 20 How. (U. S.) 6.

2. U. S. Rev. Stat., § 2263; 2 Copp's Public Land Laws 643.

U. S. Rev. Stat., § 2263, requires proof to be made before the register and receiver agreeably to such rules as the Secretary of the Interior may require. The instructions issued (see 2 Copp's Pub. Land Laws, 643) re-

quire claimant's testimony to be corroborated by that of at least two witnesses.

3. U. S. Rev. Stat., § 2262, Act of June 9, 1880 (21 Stat. 169).

The oath, etc., may be made before either the register or receiver. *Potter v. U. S.*, 107 U. S. 126.

Proof taken in the presence of the register only, but both officers deciding in favor of the claim, is a sufficient compliance even where the Commissioner has instructed that proof must be made before both officers. *Lytle v. Arkansas*, 9 How. (U. S.) 314.

The Act of Congress of June 9, 1880, providing that the affidavit may be made before the clerk of the county court or of any court of record of the county in the State or Territory where the lands are situated, does not authorize the oath to be administered before the clerk of the probate court. *U. S. v. Hall* (N. Mex., 1889), 21 Pac. Rep. 85.

4. U. S. Rev. Stat., § 2264; 2 Copp's Pub. Land Laws (1890) 642-3. See also *Huff v. Doyle*, 93 U. S. 558.

The act of 1870 allows a preemptor eighteen months from the time limited for his declaratory statement to make payment and proof. *Morrison v. Stalnaker*, 104 U. S. 213.

5. U. S. Rev. Stat., § 2267.

but in the absence of an adverse claim, proof and payment may be made after the expiration of the twelve or thirty-three months allowed.¹ A failure to inhabit and improve the land in good faith as required by law renders the claim subject to contest and the entry subject to investigation and cancellation.²

Where a party entitled to claim the benefits of the preemption laws, dies before consummating his claim by filing in due time all the papers essential to its establishment, the executor or administrator of his estate, or one of the heirs, is competent to file the necessary papers to complete the establishment of his claim; but the entry in such case is made in favor of the heirs of the deceased preceptor, and the patent thereon must cause the title to inure to such heirs as if their names had been specially mentioned.³ This provision, however, does not apply where unsurveyed public land has been occupied by a settler with the intention to preempt it, but who dies before the survey is made. In such case the settler has no vested interest which can pass to his heirs.⁴

e. ASSIGNMENT OF PREEMPTION OF RIGHT.—It is provided by statute that all assignments and transfers of the right of preemption prior to the issue of the patent shall be null and void;⁵ but the words "right of preemption," as here used, must be considered as relating only to the right of the preceptor before payment of the purchase money and the issue of the register's certificate of purchase to him.⁶

Military bounty land warrants and agricultural college scrip are to be received from actual settlers in payment of preemption claims. U. S. Rev. Stat., §§ 2277-78.

1. 2 Copp's Pub. Land Laws 642; U. S. Rev. Stat., § 2264. See also *Lansdale v. Daniels*, 100 U. S. 113; *Johnson v. Towsley*, 13 Wall. (U. S.) 72.

2. 2 Copp's Pub. Land Laws 642.

The preemption laws are intended for the benefit of persons making settlement upon the public lands, followed by residence and improvement, and the erection of a dwelling house thereon. It is essential that the preceptor prove that he occupied the premises continuously after filing his declaratory statement. *Bohall v. Dilla*, 114 U. S. 51.

3. U. S. Rev. Stat., § 2269; *Gould & Tucker's Notes on Rev. St.*, p. 531; *Morehouse v. Phelps*, 21 How. (U. S.) 294. An administrator or executor cannot complete the entry unless it appears that they are heirs. *Elliott v. Figg*, 59 Cal. 117.

Lands acquired by the heirs under this provision are not subject to the debts of the ancestor. *Rogers v. Clemmans*, 26 Kan. 522.

See also similar statutes construed in *Galloway v. Finley*, 12 Pet. (U. S.) 264; *Davenport v. Lamb*, 13 Wall. (U. S.) 418.

Where the land so patented is in Kansas (or in any other State having similar laws) the grant will inure to illegitimate children of the preceptor who were notoriously recognized by him in his lifetime, as they inherit from their father under Gen. St. *Kansas* 1889, ch. 33, § 23. *Caldwell v. Miller*, 44 Kan. 12.

4. *Buxton v. Traver*, 67 Cal. 172; affirmed 130 U. S. 575; *Elliott v. Figg*, 59 Cal. 117; *Grand Gulf R. etc. Co. v. Bryan*, 8 Smed. & M. (Miss.) 268.

5. U. S. Rev. Stat., § 2263; *Gould & Tucker's Notes on Rev. St.*, § 2263; *Olson v. Orton*, 28 Minn. 36; *Kellom v. Easley*, 2 Abb. (U. S.) 559; compare *Thredgill v. Pintard*, 12 How. (U. S.) 24; decided prior to the above statute.

6. *Dillingham v. Fisher*, 5 Wis. 475; *Thredgill v. Pintard*, 12 How. (U. S.) 24.

Therefore, a preceptor who has entered the land and who at the time is the owner in good faith, and has done nothing inconsistent with the provisions of the law on the subject, may

Nor is this requirement to be construed to prevent any pre-emptor from making a valid assignment of his possessory right.¹

2. **Homestead.**—The second method, by means of which public land may be acquired as private property, is under the homestead laws. This method of acquiring land should be considered in connection with the previous title of preemptions, since the persons who may exercise the right and the land subject to acquirement are virtually the same under both.² And in the beginning the distinction must be observed between homestead as used in this connection, and the same word as used in connection with homestead exemption laws. The meaning of the same word in the two connections is entirely different, though they have sometimes been confused.³

sell, even though he has not yet obtained a patent. Disability extends only to the assignment of the preemption right. *Myers v. Croft*, 13 Wall. (U. S.) 291; *Thurston v. Alva*, 45 Cal. 16. See also *Robbins v. Bunn*, 54 Ill. 48; *McKean v. Crawford*, 6 Kan. 112; *McKean v. Massey*, 6 Kan. 122; *Camp v. Smith*, 2 Minn. 155; *Thredgill v. Pintard*, 12 How. (U. S.) 24; *Goodlet v. Smithson*, 5 Port. (Ala.) 245; 30 Am. Dec. 561; *Masters v. Eastis*, 3 Port. (Ala.) 368.

See also *infra*, this title, *Alienation of Land Prior to Issue of Patent*.

By the act of June 19, 1834 (4 Stat. 678), it was specially provided that a pre-emptor might assign his certificate of preemption and location at any time after entry at the land office. See *Marks v. Dickson*, 20 How. (U. S.) 501.

Who May Take Advantage of a Violation of This Provision.—Where plaintiff preempts land and obtains a patent therefor, a subsequent contract entered into by him for the conveyance of the land is not invalidated, as between the parties, by the fact that before plaintiff acquired his title, or filed his declaratory statement, a parol contract had been entered into by the same parties to the same effect, in violation of U. S. Rev. Stat., § 2262. A question of forfeiture under said section can only be raised by the United States. *Larison v. Wilbur* (N. Dak. 1890), 47 N. W. Rep. 381.

1. **Relinquishment of Possessory Right.**—That is, that while one cannot before the completion of his title assign his right of preemption, so as to place another in his situation, yet he may enter into an agreement to abandon the land he occupies so that another may

enter upon it, and initiate a right of preemption for himself. *O'Hanlon v. Denver*, 81 Cal. 63. The cases of *Damrell v. Meyer*, 40 Cal. 166, and *Huston v. Walker*, 47 Cal. 484, do not oppose this doctrine; they merely sustain the idea that there can be no valid assignment of the preemption right.

See also, as sustaining the proposition in the text, *Olson v. Orton*, 28 Minn. 36; *Washington etc. R. Co. v. Osborne* (Idaho, 1889), 24 Pac. Rep. 421; *Pelham v. Service* (Kan. 1891), 26 Pac. Rep. 29.

2. U. S. Rev. St., §§ 2257, 2289-2317; *Gould & Tucker's Notes on Rev. St.* 536-540; 21 U. S. Stat. L. 141, § 3, provides that whoever settles on land with the intention of claiming it under the homestead laws shall be allowed the same time to file his homestead application and perfect his original entry as is allowed to settlers under the preemption laws to put their claims on record, and that his right shall relate back to the date of settlement. *Sturr v. Beck*, 133 U. S. 541.

It is undoubted that no rights can be based on a pretended settlement, which is nothing more than a naked trespass. *Hambleton v. Duhain*, 71 Cal. 136; *Hosmer v. Wallace*, 97 U. S. 575; *Atherton v. Fowler*, 96 U. S. 513. Therefore an unauthorized inclosure of public land by a mere trespasser cannot prevent a homestead entry of the land by a citizen of the United States who goes properly upon the land and complies with the requirements of the homestead laws. *Whittaker v. Pendola*, 78 Cal. 296; *Haven v. Hawes*, 63 Cal. 514.

3. See HOMESTEADS, vol 9, p. 424. This confusion seems to have been

Every person who is either the head of a family, or has arrived at the age of twenty-one years, and who is a citizen of the United States, or has filed his declaration of his intention to become such as is required by the naturalization laws, is entitled to exercise the right of acquiring lands under the homestead laws.¹ There are, however, as in the case of preemption, two well-defined exceptions; in the case of those who have already exercised the homestead right, or who are already possessed of three hundred and twenty acres of land in any State or Territory.²

The lands subject to homestead are the same as those which are subject to preemption, as set forth in the previous section. The amount of land which may be acquired cannot exceed one hundred and sixty acres, but any person who owns and resides on certain land may enter other land lying contiguous to his, provided the aggregate shall not exceed one hundred and sixty acres.³

No lands acquired under the provisions of this homestead law can in any event become liable to the satisfaction of a debt contracted prior to the issuing of the patent therefor.⁴

made in some of the law dictionaries extant.

The homestead here treated of and as acquired under the United States statutes, carries with it no exemption whatever, except what is provided by § 2296 of U. S. Rev. Stat., where it is declared that "no lands acquired under the provisions of this chapter, shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

1. Who May Exercise Homestead Right.—U. S. Rev. Stat., § 2289.

One who is a tenant in common cannot acquire a right of homestead to government land of which he is in possession for himself and his cotenants. *Reinhardt v. Bradshaw*, 19 Nev. 255. See also *Nickals v. Winn*, 17 Nev. 188; *Atherton v. Fowler*, 96 U. S. 513.

Compare *Emerson v. Sansome*, 41 Cal. 552 (decided before *Atherton v. Fowler*, 96 U. S. 513).

Enlisted Soldiers Residing on Lands.

—U. S. Rev. St., § 2308, provides that where a party, at the date of his entry under the homestead law, was actually enlisted and employed in the army of the United States, his services therein shall, in the administration of such homestead laws, be construed to be equivalent, to all intents and purposes, to a residence for the same length of time upon the tract so entered. *Hastings etc. R. Co. v. Whitney*, 132 U. S.

357. See also U. S. Rev. Stat., § 2293.

2. U. S. Rev. Stat., §§ 2260, 2289.

3. The U. S. Rev. Stat. (§ 2289) provide that every person . . . shall be entitled to enter a quarter section or a less quantity of unappropriated public lands upon which the person may have filed a preemption claim, or which may at the time the application is made be subject to preemption at a dollar and twenty-five cents per acre.

See also *supra*, this title, *Preemption*; *U. S. v. Reed*, 28 Fed. Rep. 482; *McLaughlin v. U. S.*, 107 U. S. 526; *Ard v. Brandon*, 43 Kan. 425.

4. U. S. Rev. St., § 2296; *Gould & Tucker's on Rev. St.*, p. 537.

This section has been held valid and binding upon the States in many cases. *Seymour v. Sanders*, 3 Dill. (U. S.) 437; *Baldwin v. Boyd*, 18 Neb. 444; *Sorrels v. Self*, 43 Ark. 451, 453; *Gile v. Hallock*, 33 Wis. 523; *Nycorn v. McAllister*, 33 Iowa 374; *Webster v. Bowman*, 25 Fed. Rep. 889; *Cheney v. White*, 5 Neb. 261; 25 Am. Rep. 487; *Miller v. Little*, 47 Cal. 348; *Russell v. Lowth*, 21 Minn. 167; *Shorman v. Eakin*, 47 Ark. 351.

In the case of *Union Pac. R. Co. v. Kennedy* (Colo. 1889), 20 Pac. Rep. 696, it appeared that *Kennedy* and one *McMonagle* were the claimants of a stone quarry on the government land. They put one *Brown* in possession and procured him to file on the land as a

In the case of the death of both father and mother, leaving an infant child or children under age, the right in fee inures to the benefit of such children, and the executor or guardian may in accordance with the laws of his State at any time within two years sell the land for the benefit of such infant, but for no other purpose.¹

a. PROCEEDINGS.—In order to obtain the benefit of the homestead laws, the person applying, after having filed his application stating his name, residence, and address,² must make affidavit before the register or receiver, that he is a person properly qualified, that his entry is made in good faith, for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and the filing

preemptor for their benefit, they paying the expenses of the filing and agreeing to furnish the price of the land and to take the title. Kennedy afterwards bought out his associate, made a written agreement with Brown reciting the facts as above stated, stipulating that Brown should work the quarry and pay him (K) a certain sum, and thereafter should be the half owner. Kennedy to make the sales and collections. It was held that the first arrangement was unlawful, and therefore the written agreement being entirely based upon it and so interwoven with it could not be enforced. After Kennedy had resigned possession to Brown he could have no right to transfer it to the latter except under the illegal contract. It was further held that Brown, having changed his claim from a preemption to a homestead, it would be a violation of the statute above mentioned (§ 2296) to allow Kennedy any lien on the land for what he had expended.

This section (2296) does not prevent the settler from making a valid mortgage on the land after receiving his certificate of entry, but before he receives a patent. *Boggan v. Reid* (Wash. 1889), 20 Pac. Rep. 425; *Lang v. Morey*, 40 Minn. 396.

1. U. S. Rev. Stat., § 2292.

The children who are of age at the time of the claimant's death acquire no interest as against the minor heirs. *Bernier v. Bernier*, 72 Mich. 43.

A patent issued under this section granting the land so entered to the "minor heirs" of the father, passes the title to the persons described in the above section (§ 2292), i. e., to children under the age of twenty-one years of age, though by the law of the State in

which they resided, some of them were not minors. *Anderson v. Peterson*, 36 Minn. 547.

The right of the children of a deceased soldier to locate an additional homestead is personal property and may be sold or assigned by their guardian. *Mullen v. Wine*, 26 Fed. Rep. 206.

Proof.—The recitation in a patent issued by the United States to one as heir of a homestead claimant, that such person is the heir of the homestead claimant and has performed the necessary conditions to perfect the homestead claim, is sufficient proof of the facts recited, in an action of ejectment brought by the patentee. *Chant v. Reynolds*, 49 Cal. 213.

The Rights of Wife of Homesteader.—

In the case of *Michaelis v. Michaelis*, 43 Minn. 123, it appeared that the husband relinquished his homestead claim previously entered by him, and deserted his wife, leaving her in possession. The defendant, having notice of these facts, afterward entered the same land, took possession, and destroyed certain improvements upon the premises, claiming such improvements by a sale from the husband. It was held that though it was error to charge that the homestead cannot be relinquished without consent of the wife (the State law applicable to that subject having no application to homestead entries on United States lands), yet the wife might recover possession from the defendant pending the inquest; together with damages for his dispossessing her and destroying the improvements, the sale of improvements having been shown to be collusive.

2. 1 Copp's Pub. Land Laws (1890) 339; *Gallagher v. Cadwell*, 3 Wash. 501.

of such affidavit must be accompanied by the proper fees provided.¹

1. U. S. Rev. Stat., §§ 2290-91.

The fees provided in such case are \$5 when the entry is not more than eighty acres, and \$10 when it is more than eighty. U. S. Rev. Stat., § 2290.

Compliance with these requirements is essential to initiate any right whatsoever in the public lands under the homestead laws; therefore where the settler applies to the local land office to enter certain land under the homestead act, but neither presents nor files the affidavit prescribed by the statute, nor pays nor tenders the fee required in such cases, and the land officers inform him that the land has been withdrawn from the market for the benefit of a railroad company, and no appeal is taken by him from the refusal of these local land officers to allow his entry, his action and his failure to appeal conclude all rights which he might otherwise have acquired. The refusal of the officers to allow his claim to be entered would not have prejudiced his right in the least had he been really entitled to the land. *Burnham v. Starkey*, 41 Kan. 604.

Affidavit in Homestead Proceedings.—

The affidavit that his entry is not made directly or indirectly for any other person is not violated by an agreement having been made between the homesteader and his neighbor that the latter shall have a roadway over the former's homestead. *U. S. v. Reed*, 28 Fed. Rep. 482; *Union Pac. R. Co. v. Watts*, 2 Dill. (U. S.) 310.

By virtue of §§ 2290-91, above cited, a contract, the consideration for which is money due for improvements, to convey land, the title to which is at the time in the United States, by a person who contemplates and afterwards does take it as a homestead, is against public policy, and cannot be enforced in a court of equity. *Anderson v. Carkins*, 135 U. S. 483 (reversing 21 Neb. 364).

For the same reason a note given for the land on purchase before entry is without consideration and invalid. *Shorman v. Eakin*, 47 Ark. 351.

See *Hastings etc. R. Co. v. Whitney*, 132 U. S. 357, as to a failure to state in the affidavit that the claimant, or some member of his family, had resided continuously on the land. The entry was made under § 2293,

providing specially for entries by soldiers in service, and not being void on its face was considered to be cured by § 2308.

In *Sweeney v. Sparling* (Iowa, 1890), 46 N. W. Rep. 1068, the plaintiff and defendant occupied and improved adjoining claims on public land before the government survey. They went together to the land office to enter their claims under the homestead law, when it was discovered that all the land occupied by both had to be homesteaded by one person. It was then agreed that defendant should enter the whole tract, and, when he procured a patent, he should convey plaintiff's claim to him. It was held the agreement might be enforced, although the homestead act of 1862 requires that the entry shall be for the exclusive use of the person in whose name it is made, and that transfers made before the patent issues shall be void.

The requirements of this affidavit, together with the provision of § 2296, that land cannot be made liable to any debt contracted prior to the issue of a patent, preclude the sale or any contract for the sale of land held under the homestead entry until title thereto is acquired by the homesteader. *Brake v. Ballou*, 19 Kan. 397; *Mellison v. Allen*, 30 Kan. 382; *Weeks v. White*, 41 Kan. 569; *Shorman v. Eakin*, 47 Ark. 351; *Whittaker v. Pendola*, 78 Cal. 296; *Union Pac. R. Co. v. Kennedy* (Colo., 1889). 20 Pac. Rep. 696.

This principle being fixed, the question arises, When does the homesteader acquire such title as he may alienate? This has been fully discussed in another portion of the article. See *infra*, this title, *Alienation of Land Prior to Issue of Patent*.

Section 2288 of Rev. Stat. provides that a preemption or homestead settler may transfer by warranty against his own acts any portion of his preemption or homestead for church, cemetery, or school purposes, or for the right of way for railroads across such preemption or homestead, and a transfer for such public purpose shall in no way vitiate the right to complete and effect the title to their preemptions or homesteads. *Rube v.*

The certificate or patent for lands under the homestead law cannot be issued until the expiration of five years from the date of entry, and at the expiration of such time, or within two years thereafter, the person making such entry, or his widow, or his heirs or devisees in case of the death of himself and wife, must prove by two credible witnesses that he, she, or they have resided upon and cultivated the same for the term of five years immediately succeeding the filing of the affidavit,¹ and also make additional affidavit that no part of the land has been alienated except as allowed by law, and that he, she, or they will bear true allegiance to the government of the United States.²

Any person having a homestead on the public domain may at any time, by paying the minimum price of the land entered upon, obtain a patent therefor under the preemption law. Likewise, a person having entered on a preemption claim may "homestead his preemption."³

Sullivan, 23 Neb. 779; Burlington etc. R. Co. v. Johnson, 38 Kan. 142; Hays v. Steiger, 76 Cal. 555.

An agreement with another to use the land jointly and to divide the profits arising from its use is not contrary to the spirit of the statute requiring affidavit to be made that no part of the land has been alienated. Hot Springs R. Co. v. Tyler, 36 Ark. 205; Hays v. Steiger, 76 Cal. 555.

The relinquishment of a homestead entry, and the withdrawal of a protest against the final proof of another, is a sufficient consideration for a promise, and the contract is not illegal, though the party making the relinquishment had made no settlement on the land, had not improved it, and had, in fact, no interest in it. Pelham v. Service (Kan.), 26 Pac. Rep. 29.

In any case in which the applicant for the benefit of a homestead has complied with all the other requirements, and is prevented by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, he may make the affidavit required before the clerk of the court for the county in which he is an actual resident, and transmit the same with the fee and commissions to the register and receiver. U. S. Rev. Stat., § 2294.

But, if any applicant makes affidavit to these excusatory facts willfully and contrary to his oath, not believing them to be true, his land is not only forfeited but he is also liable to an indictment and conviction for perjury. U. S. v. Hearing, 26 Fed. Rep. 744.

Settlement Must Have Been Made in

Good Faith.—In the case of *U. S. v. Norris*, 41 Fed. Rep. 424, one G made the application and paid the fee required by the homestead laws to enter public land. He made the application in bad faith, however, and only for the purpose of appropriating the timber on the land, and never complied with his obligations as a homesteader. He was afterwards allowed to become a beneficiary under the act of Congress of 1880 providing that those who had entered lands under the homestead laws might become entitled thereto by paying the government price and a patent was issued to him. In an action brought by the United States, it was held that G, by his application, had obtained neither a legal nor an equitable title to the land; that whatever title he may have obtained by his patent did not relate back to the application; and that the defendant who had purchased lumber in good faith before the issuance of the patent, from one to whom G had conveyed the right to cut timber on the land, was liable to the government for the value of the timber purchased.

1. U. S. Rev. Stat., § 2291; *Newkirk v. Marshal*, 35 Kan. 77.

2. U. S. Rev. Stat., § 2291.

As to the matter of alienation of land before title is perfected, see *infra*, this title, *Alienation of Land Prior to Issue of Patent*.

3. U. S. Rev. Stat., § 2301; *Timber Cases*, 11 Fed. Rep. 81 (case where a settler "homesteaded" his preemption); *U. S. v. Freyberg*, 32 Fed. Rep. 195 (case where a homestead right was changed to a preemption).

3. Public Sales and Private Entries.—Congress may authorize the President to issue an order exposing to public sale certain of the public lands. Such sale is required to be advertised for a period of not less than three nor more than six months prior to the day of sale.¹ The land so advertised is to be held at public auction for a period of two weeks, after which time such portions of it as remain unsold are to be held subject to private entry and sale.² Persons making application for the purchase at private sale of any tract of land must produce to the register a memorandum in writing describing the tract which he shall enter, by the proper number of the section, or subordinate division, and of the township and range, subscribing his name thereto, such memorandum to be preserved in the office of the register.³

In no case can credit be allowed for the purchase money on the sale of any such lands, but every purchaser must make on the day of purchase complete payment therefor, and each purchaser at private sale must produce to the register of the land office a receipt from the treasurer, or other officer, for the amount of the purchase money, before he enters his tract at the land office.⁴ The lands placed at public auction are to be sold to the

Where a preemption filing is canceled on account of the preemptor's failure to comply with the law in regard to residence and improvements, he cannot afterwards claim the land as a settler under the homestead law, where the land in the meantime has been patented to another person. *Ard v. Pratt*, 43 Kan. 419.

Doctrine of This Section Restated.—To sum up the whole law of homesteads briefly, the Revised Statutes of the U. S. (§§ 2260-91-96-97) require a settler—

1. To make application at the land office, and file his affidavit that the application is for his exclusive use and benefit, and not for that of another. This forbids the sale or agreement to sell before the right is perfected.

2. To settle upon the land in good faith, and reside there continuously for five years.

3. The land cannot be subject to any debt contracted prior to the issuance of the patent.

See *Shorman v. Eakin*, 47 Ark. 351; *U. S. v. Norris*, 41 Fed. Rep. 424 (settlement not in good faith).

1. U. S. Rev. Stat., §§ 2353-5459. The lands are required to be offered at public sale in half quarter sections. The public lands when offered at private sale, however, may be purchased at the option of the purchaser, either in entire sections, half sections, quarter sec-

tions, half quarter sections, or quarter quarter sections. U. S. Rev. Stat., § 2354.

It is a fundamental principle underlying the land system of this country that private entries are never permitted until after the lands have been exposed at public auction at the price for which they are afterwards subject to private entry. Therefore, where land offered at public sale at \$2.50 per acre is afterwards ordered by Congress to be sold at \$1.25, a private entry at \$1.25 made before the land is offered at public sale at the reduced price is invalid. *Eldred v. Sexton*, 19 Wall. (U. S.) 189; 30 Wis. 193; *Johnson v. Towsley*, 13 Wall. (U. S.) 88; *Chotard v. Pope*, 12 Wheat. (U. S.) 588.

By statute of March 2, 1889, all lands of the United States were withdrawn from being subject to private entry except those in Missouri. See *Gould & Tucker's Notes on Rev. Stat.*, p. 522.

2. U. S. Rev. Stat., § 2360.

3. U. S. Rev. Stat., § 2355.

4. U. S. Rev. Stat., § 2356; *Gould & Tucker's Notes on Rev. Stat.* 552; *Matthews v. Zane*, 7 Wheat. (U. S.) 205.

And if any person being the highest bidder at a public auction for a tract of land fails to make payment therefor on the day of purchase, the tract must be again offered at public sale on the next day of sale, and such per-

highest bidder, but in no case is the price to be less than \$1.25 per acre.¹

Special provision is made in the statutes in case any tract of land has been erroneously sold, so that the sale cannot be confirmed,² or where any purchaser at private sale has entered a tract different from that he intended to purchase, or where any mistake has been made in the true number of the tract intended to be entered.³

Every person, who before or at the time of the public sale contracts or attempts to contract with any person, that such person shall not bid upon or purchase the land so offered, or any part thereof, or who in any way attempts to hinder or prevent any person from bidding at a sale is subject by the statute to a fine or imprisonment, or both.⁴ So, also, in case any person enters into any contract or secret understanding with any other person proposing to purchase such land to pay or to give to such purchaser for the land a sum of money over and above the price at which the land is bid off by such purchasers.⁵

son is not capable of becoming a purchaser of that or any other tract offered at such public sale. U. S. Rev. Stat., § 2356.

In case of purchase by a receiver he must place the required amount of his own money with the moneys which he holds in trust for the government. U. S. v. Boyd, 5 How. (U. S.) 29.

Lands sold at the last day of public sale and not paid for cannot be entered until they have again been offered for sale, such lands being not unsold lands but reverted lands. 2 A. G. Op. 200; 3 A. G. Op. 448.

1. U. S. Rev. Stat. 2357.

The minimum price to be paid for reserved lands along the railroads within the limits granted by any act of Congress, in this case as in all others is \$2.50 per acre. U. S. Rev. Stat. 2357.

2. U. S. Rev. Stat. 2362, 2363.

It is provided that the Secretary of the Interior upon proof being made to his satisfaction that land has been erroneously sold may repay to the purchaser, or his legal representatives, the sum of money which was paid therefor.

3. U. S. Rev. Stat., §§ 2369-2372.

4. The punishment provided is a fine of not more than \$1,000, or imprisonment for not more than two years, or both. U. S. Rev. Stat., § 2373. This section is intended to protect the government and to punish all persons who enter into a combination or conspiracy

to prevent others from bidding at the sale, either by agreement not to do so, or by intimidation, threats, or violence. Fackler v. Ford, 24 How. (U. S.) 322.

Any agreement of the kind above mentioned intending to prevent competition in bidding for lands offered for sale, being intended to protect the government, can be taken advantage of only by the government itself. Easley v. Kellom, 14 Wall. (U. S.) 279; Fackler v. Ford, 24 How. (U. S.) 322. Therefore, one who is not injured thereby cannot defeat the title of a purchaser at a sale of public lands at public auction by showing that a combination to prevent bidding was formed. Root v. Shields, 1 Woolw. (U. S.) 340.

5. And every bond, obligation, or writing of any kind whatsoever, founded upon or growing out of such contract, bargain, agreement, or secret understanding, is declared by statute to be utterly null and void. U. S. Rev. Stat., § 2374.

This section and the two immediately following are intended for the protection of those who purchase lands at public sales from the extortions of those who have formed the combinations mentioned in § 2373 (that is, those who combine to prevent competition in the purchase of the land offered). Fackler v. Ford, 24 How. (U. S.) 322. But an agreement among settlers on unsurveyed public lands to purchase them as soon as they are surveyed and offered for sale, and then to mortgage them to

4. Bounty Lands.—Any person holding military warrants for bounty lands, which have been issued by any law of the United States, may enter upon the quantity of public land subject to private entry to which he is entitled under such warrants, and upon the return of the warrants with evidence of the location thereof having been legally made at the General Land Office, is entitled to have a patent for such land issued to him.¹ Such warrants are made by statute assignable by deed, or instrument of writing, made and executed according to the form and regulations prescribed by the General Land Office, so as to vest in the

a creditor to secure a debt, is not in contravention of the sections. *Wright v. Shumway*, 1 Biss. (U. S.) 23. Nor is there any principle of law which forbids persons from associating together to purchase lands of the United States on joint account at public sale. *Oliver v. Piatt*, 3 How. (U. S.) 333. If the party aggrieved have no legal evidence of the contract, agreement, or secret understanding, provided against in the section under consideration, he may by bill in equity compel the other party to make discovery thereof. U. S. Rev. Stat., § 2376; but a bill brought pursuant to this section must allege and show that the contract sought to be rescinded is within the statute and that the party who brought it has no legal evidence of the contract. *Gale v. Cutler*, 1 Pin. (Wis.) 253.

1. See U. S. Rev. Stat., §§ 2414, 2423; Gould & Tucker's Notes on Rev. Stat., p. 556.

A certificate of entry or location under a military land warrant vests in the holder an equitable title to the land and gives him a right to the patent when issued; and if he conveys the land or assigns the certificate, and afterwards obtains a patent, he becomes under the statute (§ 2414), as well as upon plainest principles of equity, a trustee for the person to whom he had previously sold or his assignee. *Gray v. Jones*, 14 Fed. Rep. 83; *Key v. Jennings*, 66 Mo. 356; *Wirth v. Branson*, 98 U. S. 118; *Stinson v. Geer*, 42 Kan. 520.

Act of Congress of 1850 granting swamp lands to the various States did not affect any such land on which before the passage of the act a military land warrant had been located. *Culver v. Uthe*, 133 U. S. 655.

Where, in ejectment it appeared that a location of a military bounty land warrant, duly made by A on the demanded premises, the same being a

part of the surveyed public land of the United States, had not been vacated or set aside, a subsequent entry of them by B was without authority of law, and a patent issued to him therefor was void. *Wirth v. Branson*, 98 U. S. 118.

Location of Land Under Warrant Not a Sale.—The disposal of land by the United States by allowing persons to locate certain sections under military land warrants is not considered a "sale" within the meaning of an act providing that a State shall be entitled to five per cent. of the proceeds arising from the sale of certain public lands. *Five Per Cent. Cases*, 110 U. S. 471. But the term "all lands remaining unsold" is considered to except lands located under land warrants. *Gormley v. Uthe*, 116 Ill. 643; 133 U. S. 655.

Virginia Military District.—Much is found in the digests concerning bounty warrants for land in the Virginia Military District. This district was a reservation made in 1784, at the time of the cession by Virginia to the Continental Congress of all her lands lying northwest of the Ohio river. The reservation was made for the purpose of allowing military land warrants issued by the State to be located upon it. Several acts of Congress were made with respect to it, the first being in 1794, then in 1804, when a period of limitation was prescribed for making locations and return surveys. This period of limitation was extended by numerous Acts, 1814, 1815, 1818, 1821, and others down to as late as 1850. Most of the law, if not all, applicable to this reservation is now practically obsolete, the land having been long since taken up and the titles virtually settled, so that it is needless to enter into a discussion, or a setting forth of the numerous cases which have been decided upon it. It will be seen fully discussed in the case of *Fussell v. Gregg*, 113 U. S. 550.

assignee all the rights of the original owner.¹ But all sales, mortgages, letters of attorney, or other instruments of writing affecting the title or claim to any warrant issued or to be issued under the provisions of the statutes concerning military land warrants, which are made or executed prior to the issue of such warrant, are void to all intents and purposes whatsoever.²

5. Timber Culture.—By the Act of 1878 provision is made allowing persons to enter upon public land subject to private entry, and for the issuing of a patent to such person for the land entered, upon proof of his having complied with certain requirements in the statute as to the planting of timber.³

Other leading cases upon the subject are *Doddridge v. Thompson*, 9 Wheat. (U. S.) 469; *Reynolds v. M'Arthur*, 2 Pet. (U. S.) 417; *Taylor v. Myers*, 7 Wheat. (U. S.) 23; *Jackson v. Clark*, 1 Pet. (U. S.) 628; *M'Arthur v. Browder*, 4 Wheat. (U. S.) 488; *Bouldin v. Massie*, 7 Wheat. (U. S.) 122; *Watts v. Lindsey*, 7 Wheat. (U. S.) 158; *Maxwell v. Moore*, 22 How. (U. S.) 185; *Walker v. Smith*, 21 How. (U. S.) 579.

1. U. S. Rev. Stat., § 2414.

In all cases the assignee for value takes no better right as against the United States than his assignor himself had. *Bronson v. Kukuk*, 3 Dill. (U. S.) 490; 5 A. G. Op. 237, 387, 509.

These warrants are assignable in blank and therefore there is no presumption arising from an assignment on the face of the land warrants that the persons to whom they were assigned received them from those to whom they were originally issued. *Reynolds v. Sumner*, 126 Ill. 58.

In the case of *Reynolds v. Sumner*, 126 Ill. 58, a person under a written contract undertook to enter land with military warrants furnished by another, taking title in their joint names, and paying half the cost after one year. One month he had the precise amount of warrants agreed upon which he entered in his own name. He paid the note of half the cost of the warrants and often admitted the other's interest in the land. It was held that a trust resulted for a half interest in favor of the other party, and that this trust was not affected by the Statute of Frauds. See also *Hellman v. Messmer*, 75 Cal. 166; *Thomas v. Jameson*, 77 Cal. 91.

2. U. S. Rev. Stat., § 2436; *Week v. Bosworth*, 61 Wis. 78; *White v. Taylor*, 2 Dill. (U. S.) 23.

3. See *Gould & Tucker's Notes on U. S. Rev. Stat.*, pp. 560, 561; 2 *Copp's Public Land Laws* 802, 803.

This statute is considered* to supersede all other provisions concerning the acquirement of land under what is known as the timber culture provisions.

It is needless to give in detail the requirements of the statute; in brief, a person is required to have the qualifications already prescribed, as to citizenship, etc., and to make proof of having cultivated the land in the manner prescribed by the statute, and planted a certain quantity of timber, as is also there provided. As in other cases, only one quarter section of land may be acquired by the same person under this act, and land can only be acquired under it for the personal use and benefit of the person entering, and not for that of any other. See also U. S. v. *Shinn*, 14 Fed. Rep. 448, where portions of this statute are discussed.

No land acquired under the provisions of this act can become liable to the satisfaction of any debt contracted prior to the issuing of the final certificate therefor. Act of June 14, 1878, 20 Stat. at L. 113.

No final certificate can be given or patent issued for the land entered upon under this act until after the expiration of eight years from the date of entry. Act of June 14, 1870, 20 Stat. at L. 113.

One entering land under the provisions of this act, and having complied with its conditions, is, during the term required to perfect his right to a patent, the owner of agricultural products grown on the land, and the trees standing thereon; therefore, he may recover for the destruction of either caused by the negligence of a railway

III. ALIENATION OF LAND PRIOR TO ISSUE OF THE PATENT.—As to when the title of a claimant under the public land laws reaches such a state as that he has a vested interest which he may convey to another is a question upon which there is some doubt. The general rule, however, appears to be that it is not necessary that a patent shall have issued, but a conveyance made at any time after the right to a patent is perfected is valid and binding, though not if made before such right is perfected.¹ The true

company in allowing fire to escape from their locomotives, and the fact that after the destruction of the trees he surrendered his claim does not at all affect his right to recover. *Carner v. Chicago etc. R. Co.*, 43 Minn. 375.

1. *Knight v. Leary*, 54 Wis. 459; *Newkirk v. Marshall*, 35 Kan. 77; *Gould & Tucker's Notes on Rev. Stat.*, § 2291, *et seq.* See also *Lamb v. Davenport*, 18 Wall. (U. S.) 307; *Myers v. Croft*, 13 Wall. (U. S.) 291; *Cox v. McGarrahan*, 9 Wall. (U. S.) 298; *Bush v. Marshall*, 6 How. (U. S.) 284; *Thredgill v. Pintard*, 12 How. U. S.) 24; *Marks v. Dickson*, 20 How. (U. S.) 501; *Quinby v. Conlan*, 104 U. S. 420; *Camp v. Smith*, 2 Minn. 155; *Thurston v. Alva*, 45 Cal. 16; *Robbins v. Bunn*, 54 Ill. 48; 5 Am. Rep. 75; *McKean v. Crawford*, 6 Kan. 112.

In the case of *Lamb v. Davenport*, 18 Wall. (U. S.) 307, it appeared that several years before the act of Congress was passed by which title to the land in question could be acquired, settlement on and cultivation of a large tract of land, including the lands in controversy, was made; a town was laid off into lots and sold, which are now a part of the city of Portland, Oregon. Justice Miller, in delivering the opinion of the court in this case observes: "Of course no legal title vested in any one by these proceedings, for that remained in the United States. . . . but it was equally well known that these possessory rights and improvements placed on the soil were by the policy of the government generally protected, so far at least as to give priority of the right of purchase when the land was offered for sale. They (these rights) were the subjects of bargain and sale and as among the parties to such contracts were valid. . . . Parties in possession of the soil might make valid contracts even concerning the title, predicated upon the hypothesis that they might thereafter acquire the title except in cases where Congress had im-

posed restrictions upon such contracts. *Sparrow v. Strong*, 3 Wall. (U. S.) 97; *Myers v. Croft*, 13 Wall. (U. S.) 291; *Davenport v. Lamb*, 13 Wall. (U. S.) 418; *Thredgill v. Pintard*, 12 How. (U. S.) 24." The act of Congress passed afterwards, which forbade the future sale of a settler's interest until the patent should issue, is a strong implication in favor of the validity of such sales made before its passage. *Lamb v. Davenport*, 18 Wall. (U. S.) 307.

The act of 1834 in regard to preemption rights of settlers allows the assignment of preemption rights to pass an equitable title. *Marks v. Dickson*, 20 How. (U. S.) 501; *Bush v. Marshall*, 6 How. (U. S.) 284. But the act of 1841 forbade the sale of all preemptive rights to public lands acquired by mere settlement and improvement. *Quinby v. Conlan*, 104 U. S. 420; *Myers v. Croft*, 13 Wall. (U. S.) 291.

Mortgage of Homestead or Preemption Right.—A mortgage of lands sought to be acquired under the homestead or preemption laws, if executed after the right to a patent is perfected, is valid, no matter whether the patent has been secured or not; but if executed before such right has been perfected, it is invalid. *Webster v. Bowman*, 25 Fed. Rep. 889; *Cheney v. White*, 5 Neb. 261; 25 Am. Rep. 487.

See also *Wright v. Shumway*, 1 Biss. (U. S.) 23.

In the case of *McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100, a note and mortgage made by a preemptor upon the preempted premises after the issuance of the proofs of certificate of preemption to secure money loaned to pay for the land preempted, and executed pursuant to an agreement made prior to the preemption, was held illegal and void, and this decision seems consonant with reason, since it is contrary to the spirit and policy of the law to allow the title to preempted lands to come to the preemptor already burdened. And it is held by a number of

doctrine, it seems, may be arrived at by a consideration of the following principle, which though stated as peculiarly applicable to preemptors may still be made to apply to claimants under homestead or similar laws:

The right of a preemptor may be said to have three different stages or phases, namely:

1. One may comply with the provisions of the acts of Congress by settlement or cultivation, etc., not yet having paid his money or obtained a certificate of purchase from the Register of the Land Office. The rights of the preemptor in this stage are inchoate and personal, and therefore cannot be conveyed or assigned to others.¹

cases that any agreement to convey the land made before final proof by a homesteader or preemptor is in violation of the law and void, and cannot be enforced at law or in equity. *Gould & Tucker's Notes on Rev. Stat.*, § 2296; *Shorman v. Eakin*, 47 Ark. 351; *Cox v. Donnelly*, 34 Ark. 762; *Thompson v. Doaksum*, 68 Cal. 593; *Oaks v. Heaton*, 55 Iowa 116.

But in a later case (*Jones v. Tainter*, 15 Minn. 512), the case of *McCue v. Smith* was overruled, and it was held that a mortgage by a preemptor upon the land preempted, executed after the proofs were made, and pursuant to an agreement made before proofs to secure the price of the land warrants used in paying for the land, is valid. This latter case is sustained by a decision in the Land Department. *Larsen v. Weisbecker*, 1 Land Dep., Dec. 1883, 422.

Where a person residing on public land subject to preemption executes a mortgage thereon and then sells the land to another, who takes possession and afterwards preempts the land and obtains a title from the United States, the mortgage cannot be enforced against the title thus acquired from the United States, because the preemptor does not derange his title from the United States through the person who executed the mortgage. *Burr v. Shaw*, 48 Cal. 455; *Kirkaldie v. Larrabee*, 31 Cal. 455.

In the case of *Green v. Houston*, 22 Kan. 35, a preemptor of land in the Osage Indian Trust borrowed \$220 with which to enter his claim; later he executed his note therefor and at the same time executed a mortgage on the land to secure the note. After entering the tract of land he conveyed it to one M, subject to the mortgage. This deed was duly recorded; M agreed to pay the mortgage debt as a part of the pur-

chase price; then M conveyed to G, covenanting that the premises were free and clear of all incumbrances except as shown by the records of Cowley county, and G assumed and agreed with M to pay the mortgage as part payment of the land. In an action by the mortgagee to foreclose the mortgage, it was held that although the mortgage might have been void under the laws of Congress, yet G was estopped from showing that it was void. See also *Brewster v. Madden*, 15 Kan. 249; *Drury v. Tremont Improvement Co.*, 13 Allen (Mass.) 168. Compare *Calkins v. Copley*, 29 Minn. 471; *Lang v. Morey*, 40 Minn. 396.

1. *Dillingham v. Fisher*, 5 Wis. 475; *McLane v. Bovee*, 35 Wis. 27; *Trulock v. Taylor*, 26 Ark. 54; 10 A. G. Op. 56; *Busch v. Donohue*, 31 Mich. 482; *Frislie v. Whitney*, 9 Wall. (U. S.) 187; *Aiken v. Ferry*, 6 Sawy. (U. S.) 79; *Lamb v. Davenport*, 18 Wall. (U. S.) 307; *Schoolfield v. Houle*, 13 Colo. 394.

The right of a preemptor at this stage is, however, sufficient to constitute a good defense to an action of trespass. *U. S. v. Brown*, 4 McLean (U. S.) 378.

In the case of *Washington etc. R. Co. v. Osborne* (Idaho 1889), 21 Pac. Rep. 421, it appeared that a tract of unsurveyed land of the United States was located and settled, and buildings erected on it. The defendant who was qualified to take proceedings to obtain title under the preemption laws, bought the right of possession and improvements, took possession and continuously resided thereon, made improvements, located the section, filed his declaration to hold it under the preemption laws, and intended to obtain title thereunder as soon as the land should be surveyed. The act of Con-

2. Where he has paid his money and obtained the register's certificate of purchase. Here the "right of preemption" has been merged in emption. The strict legal title is still in the government, but the entire equitable title and interest are in the purchaser, which he may transfer or assign at pleasure. He may convey by deed and the legal title will vest in the grantee upon the issuing of the patent.¹

gress March 3, 1875, made provision for the condemnation of possessory claims in order for a right of way for railroads; but it was held that the defendant had such a right of private entry in his possessory claim that it could not be taken from him for a right of way except by the exercise of the right of eminent domain, and, therefore, he was entitled to compensation. *Washington etc. R. Co. v. Osborne* (Idaho 1889), 21 Pac. Rep. 421.

But although the owner of this inchoate title may not assign or convey it to others, it is not to be understood that he cannot make a valid agreement to abandon the land and relinquish his entry so that another may enter it—a contract having this agreement to relinquish as a consideration is valid and binding. *Pelham v. Service* (Kan. 1891), 26 Pac. Rep. 29 (relinquishment of homestead entry); *Olson v. Orton*, 28 Minn. 36 (of preemption entry); *Lapham v. Head*, 21 Kan. 332; *Kennedy v. Shaw*, 43 Mich. 359; *Moore v. McIntosh*, 6 Kan. 39; *Thompson v. Hanson*, 28 Minn. 484; *Lamb v. Davenport*, 18 Wall. (U. S.) 307; *Myers v. Croft*, 13 Wall. (U. S.) 291.

1. *Henry v. Welsh*, 4 La. 547; 20 Am. Dec. 490, note; *Dillingham v. Fisher*, 5 Wis. 475; *Red River etc. R. Co. v. Sture*, 32 Minn. 95; *Hutchins v. Low*, 15 Wall. (U. S.) 77; *Lytle v. Arkansas*, 9 How. (U. S.) 328; *Grand Gulf R. etc. Co. v. Bryan*, 8 Smed. & M. (Miss.) 368; *Hyde v. Holland*, 18 Oregon 331; *Goodlet v. Smithson*, 5 Port. (Ala.) 245; 30 Am. Dec. 561. The whole principle is that as between the United States and the owner of the certificate of purchase, the certificate is as valid and binding as a patent; but the right of other parties as against him is not concluded until the issue of the patent. *Aström v. Hammond*, 3 McLean (U. S.) 107; *Carroll v. Safford*, 3 How. (U. S.) 441; *Hutchins v. Lowe*, 15 Wall. (U. S.) 77; *Deffebach v. Hawke*, 115 U. S. 392; *Coleman v. Allen*, 5 Mo. App. 127.

It is at this stage that the right to a

patent for the land has become vested in the purchaser, and that the government holds the legal title in trust for him until the patent is issued. *U. S. v. Freyberg*, 32 Fed. Rep. 195; *Deffebach v. Hawke*, 115 U. S. 392; *Simmons v. Wagner*, 101 U. S. 260; *Pacific Coast Min. Co. v. Spargo*, 16 Fed. Rep. 348; *Starks v. Starrs*, 6 Wall. (U. S.) 402.

It is at this stage also, that the land ceases to be the property of the United States and becomes that of the pre-emptor to such an extent that it is liable to taxation by the State in which it lies. *Carroll v. Safford*, 3 How. (U. S.) 441; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210; and to execution from a State court. *Goodlet v. Smithson*, 5 Port. (Ala.) 245; 30 Am. Dec. 561; but it has not so far passed into the hands of the purchaser as to deprive the United States of any equities to which it may have been entitled. *Bronson v. Kukuk*, 3 Dill. (U. S.) 490; *Litchfield v. Webster Co.*, 101 U. S. 773; *Northern Pac. R. Co. v. Traill Co.*, 115 U. S. 600; *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.) 444.

The grantee or assignee of a certificate of entry of land at the government land office has a valid subsisting interest in the land to which the right of possession is incident, and upon which he may maintain ejectment, but his estate is at most a determinable fee, such inchoate legal title being liable to revert in the government upon cancellation of the certificate for cause, and the patent to be issued to another party. *McLane v. Bovee*, 35 Wis. 27.

This case seems to state the doctrine correctly, except as to the assertion of an equitable title in an ejectment suit. For the rule in this regard, see *infra*, this title, *Patent*.

In the case of *Raisback v. Carson* (Wash.), 13 Pac. Rep. 618, a deed from a pre-emptor bore the same date as the pre-emptor's certificate of purchase. It was held that there was no presumption that the deed was executed before

3. Upon the issue of the patent by the United States, the perfected legal title combined with the equitable interest in the preemptor, completes his right and renders it absolute.¹

IV. MINERAL LANDS AND MINING RESOURCES.—This subject has already been fully treated elsewhere and nothing more than a reference is needed here.²

the certificate, and that in the absence of evidence that it was then executed it would not be declared void.

It is said, however, that one who has proved up under the preemption laws and obtained the receiver's final certificate therefor does not acquire such a title as will support an action to quiet title against one claiming under a similar right. *Vantongren v. Hefferman*, 5 Dak. 180.

1. See *infra*, this title, *Patents*, and authorities cited. See also *U. S. v. Stone*, 2 Wall. (U. S.) 525; *Hooper v. Scheimer*, 23 How. (U. S.) 235; *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Hutchins v. Low*, 15 Wall. (U. S.) 77; *Green v. Watkins*, 7 Wheat. (U. S.) 28; *Astrom v. Hammond*, 3 McLean (U. S.) 107.

And the patent when issued relates back to the inception of the right of the patentee. *Flint etc. R. Co. v. Gordon*, 41 Mich. 420; *Astrom v. Hammond*, 3 McLean (U. S.) 107; *Starks v. Starrs*, 6 Wall. (U. S.) 402.

In the case of *Grand Gulf R. etc. Co. v. Bryan*, 8 Smed. & M. (Miss.) 268, the court has to say: "A mere right of preemption is not a title, but only a proffer to a certain class of persons that they may become purchasers if they will; but without payment or an offer to pay, it confers no equity and only confers a right where the party has accepted the offer by payment or by claiming the benefit of the statute in the proper manner within the required time." See also *Phelps v. Kellogg*, 15 Ill. 135; *Lytle v. Arkansas*, 9 How. (U. S.) 328.

This whole question is well presented in the opinion of Justice Field in *Hutchins v. Low*, 15 Wall. (U. S.) 77. In which case he observes: "The question here presented was before this court and was carefully considered in the case of *Frisbie v. Whitney*, reported in 9 Wall. (U. S.) 189, and it was there held that under the preemption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to preemption, do not confer upon the settler any right in the

land occupied as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper, and that the power of regulation and disposition conferred upon Congress by the Constitution only ceases when all the preliminary acts prescribed by those laws for the acquisition of title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with, the settler for the first time acquires a vested right in the premises occupied by him, of which he cannot subsequently be deprived. He is then entitled to a certificate of entry from the local land office, and ultimately to a patent from the United States. Until such payment and entry the acts of Congress give to the settler only a privilege of preemption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others." See also *Dillingham v. Fisher*, 5 Wis. 475.

This principle is asserted by Attorney-General Speed, 11 A. G. Op. 462, where he says: "It is not to be doubted that settlement on the public lands of the United States, no matter how long continued, confers no right against the government. . . . The land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase money." The principle involved in this opinion has been received and acquiesced in by the Secretaries of the Interior, and has come to be the recognized rule of action in that Department. This construction of the law has also been asserted by the courts of last resort in several States. *Frisbie v. Whitney*, 9 Wall. (U. S.) 187; *Bower v. Higbee*, 9 Mo. 261; *Phelps v. Kellogg*, 15 Ill. 135; *Grand Gulf R. etc. Co. v. Bryan*, 8 Smed. & M. (Miss.) 268; *People v. Shearer*, 30 Cal. 650; *Hutton v. Frisbie*, 37 Cal. 475.

2. See U. S. Rev. Stat., §§ 2318-2352;

V. LAND GRANTS TO RAILROADS—(See also GRANTS, vol. 9, pp. 46, *et seq.*).—Numerous acts have been passed by Congress granting to certain railroads a moiety of the sections of public lands lying contiguous to its track.¹ The sections granted are usually, though not always, the odd numbered sections, the United States reserving for its own the other alternate sections.² In the construction of such grants made to take effect as soon as the road is definitely located, the grant is to be held as one *in presenti*, and upon the definite location of the road the title relates back to the date of the grant.³ So that the construction and completion of the road

MINES AND MINING CLAIMS, vol. 15, p. 512.

1. Such was the case in the grant by Act of 1862, amended by Act of 1864, of lands to the Union Pacific Railroad Company. See *U. S. v. Burlington etc. R. Co.*, 98 U. S. 334. Instances of other grants are seen in *U. S. v. Curtner*, 38 Fed. Rep. 1; *Platt v. Union Pac. R. Co.*, 99 U. S. 48; *Denver etc. R. Co. v. Alling*, 99 U. S. 463; *Central Pac. R. Co. v. Gallatin*, 99 U. S. 727; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *Baker v. Gee*, 1 Wall. (U. S.) 333; *New Orleans Pac. R. Co. v. U. S.*, 124 U. S. 124; *U. S. v. McLaughlin*, 127 U. S. 428.

Grant of Right of Way to Railroads.—See *infra*, this title, *Other Provisions*.

2. See *Van Wyck v. Knevals*, 106 U. S. 360; *Eldred v. Sexton*, 30 Wis. 189; 19 Wall. (U. S.) 193; *Leavenworth etc. R. Co. v. U. S.*, 92 U. S. 733.

In all grants which are to be satisfied out of sections along the line of a railroad, it is necessarily implied, in the absence of a specific designation otherwise, that the land is to be taken from the nearest sections of the character mentioned which are undisposed of. *Wood v. Burlington etc. R. Co.*, 104 U. S. 329; *Ryan v. Central Pac. R. Co.*, 99 U. S. 382.

3. *Van Wyck v. Knevals*, 106 U. S. 360; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *St. Joseph etc. R. Co. v. Baldwin*, 103 U. S. 426; *Broder v. Natoma Water etc. Co.*, 101 U. S. 274; *St. Paul etc. R. Co. v. Winona etc. R. Co.*, 112 U. S. 720; *Winona etc. R. Co. v. Barney*, 113 U. S. 618.

Upon the location of the road the title relates back to the date of the grant irrespective of the time of the location, and in case of two roads claiming under the same grant, they take in undivided moieties where there is a conflict. *St. Paul etc. R. Co. v. Winona etc. R. Co.*, 112 U. S. 720.

So also where two roads cross one another, they take in equal moieties; but the title to indemnity or lieu lands outside that limit is acquired by priority of selection approved by the Secretary of the Interior. *Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 117 U. S. 406; *St. Paul etc. R. Co. v. Winona etc. R. Co.*, 112 U. S. 720; *Western Land Co. v. Hamblin*, 79 Iowa 539.

The road becomes definitely fixed or located as soon as a map of the route is filed with the Secretary of the Interior, and no subsequent neglect of the Secretary could affect the rights of the company. *Van Wyck v. Knevals*, 106 U. S. 360; *Kansas Pac. R. Co. v. Atchison etc. R. Co.*, 112 U. S. 414; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *Baker v. Gee*, 1 Wall. (U. S.) 333; *Walden v. Knevals*, 114 U. S. 373; *U. S. v. Northern Pac. R. Co.*, 41 Fed. Rep. 842.

Compare *Western Land Co. v. Hamblin*, 79 Iowa 539.

Where, by various acts of Congress, land is granted generally to different railroad corporations before the roads in question have been located, the specific lots to be ascertained, and the title thereto perfected only upon the location and construction of the roads, the rights of contesting corporations to disputed tracts are determined by the dates of their respective grants, and not by the dates of the location of their respective roads. *Missouri etc. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491.

Whether a grant to a railroad is one *in presenti*, so that the building and completion of the road are conditions subsequent, or otherwise so that the building, etc., is made a condition precedent, depends, of course, upon the language in each particular grant, to be construed according to well fixed rules of interpretation. The words "shall be and are hereby granted" always import a grant *in presenti*.

are not conditions precedent to the grant, but conditions subsequent, the non-performance of which will defeat the grant.¹

But Congress in making grants in aid of railroads cannot be supposed to exercise its liberality to the prejudice of pre-existing rights, which, though imperfect, are meritorious and entitled to just legislative protection;² and therefore where any homestead, preemption, or other similar rights have attached, they will be

Wright v. Roseberry, 121 U. S. 488; Martin v. Marks, 97 U. S. 345; Hannibal R. Co. v. Smith, 9 Wall. (U. S.) 95; Winona etc. R. Co. v. Barney, 113 U. S. 618.

1. **Conditions Subsequent.**—Thus in the case of Act of Congress, May 15th, 1856, granting lands to Iowa for railroad purposes, and which authorized a sale of one hundred and twenty sections of land in advance of the construction of any part of the road, it was held that purchasers thereof took a good title although no part of the road was constructed when the same was made, the conditions as to the completion of the road imposed by statute being conditions subsequent. Cedar Rapids etc. R. Co. v. Courtwright, 21 Wall. (U. S.) 310.

So also the provision in Act of 1856 that lands remaining unsold after ten years shall revert to the United States if the road be not then completed, is a condition subsequent. Schulenberg v. Harriman, 21 Wall. (U. S.) 44.

Likewise the grant to the Northern Pacific Railroad of July 2, 1854, was a grant *in presenti*, and only to be defeated by a failure to perform the conditions subsequent, and then only by appropriate judicial proceedings to declare a forfeiture. Francoeur v. Newhouse, 40 Fed. Rep. 618; U. S. v. Northern Pac. R. Co., 41 Fed. Rep. 842; Washington etc. R. Co. v. Northern Pac. R. Co. (Idaho, 1889), 21 Pac. Rep. 658; U. S. v. Curtner, 38 Fed. Rep. 1.

Conditions Precedent.—In the case of Shepard v. Northwestern L. Ins. Co., 40 Fed. Rep. 341, it was held that while the Act of Congress, June 3d, 1856, granting certain public lands to the State of Michigan for railroad purposes was intended as a present grant of the lands included in its terms, and no further conveyance by the government was necessary, yet the grant did not become operative or divest the title in the United States to any

particular land until it had been earned by the building of a certain number of miles of the road and selected by the railroad company.

By Act of March 3d, 1871, certain surveyed lands were granted to a railway company, provided its line should be completed within five years, and if the company should fail to complete the road within the time prescribed, Congress might secure its speedy completion. The latter act of July 31, 1876, provided that before any land granted to any railway should be conveyed the cost of survey should be paid by the party in interest. The line was not completed within the time stipulated. It was therefore held that Congress had a right to impose a new condition on this grant, and that the company was not entitled to recover the money paid by it for surveys under protest, and that the right of Congress to impose such condition was not affected by the authority given it to complete the road. New Orleans Pac. R. Co. v. U. S., 124 U. S., 124. Other instances of cases in which the construction of a certain portion of a railroad was made a condition precedent to the grant are seen in Farnsworth v. Minnesota etc. R. Co., 92 U. S. 49; Chamberlain v. St. Paul etc. R. Co., 92 U. S. 299; Cedar Rapids etc. R. Co. v. Herring, 110 U. S. 27; Vicksburg etc. R. Co. v. Sledge, 41 La. Ann. 896; U. S. v. Southern Pac. R. Co., 39 Fed. Rep. 132.

2. Broder v. Natoma Water etc. Co., 101 U. S. 274; Atchison v. Peterson, 20 Wall. (U. S.) 507; Basey v. Gallagher, 26 Wall. (U. S.) 670; Forbes v. Gracey, 94 U. S. 762; Wolcott v. Des Moines Co., 5 Wall. (U. S.) 681; Williams v. Baker, 17 Wall. (U. S.) 144.

Therefore, in the grant of lands to the Pacific Railroad Company, by 13 U. S. Stat. at L. 356, § 4, the provision that "the same shall not defeat or impair any preemption, homestead, swamp land or other lawful claim," includes a water company's right to use their

recognized and protected in pursuance of the constant policy of the government to protect those who have in good faith settled upon and improved any portion of the public land.¹

It is generally provided that where lands along the line of a proposed railway are already taken up, a railroad company may take indemnity lands from other portions of the public domain.²

canal constructed years before over public land in California. *Broder v. Natoma Water etc. Co.*, 50 Cal. 621; affirmed 101 U. S. 274.

Although, as previously stated, a grant of alternate sections of public land to a railroad, when its road shall have been definitely located, is to be construed as a grant *in presenti* a clause providing for indemnity for lands within the alternate sections to which preemption rights have attached may be construed to embrace lands to which such rights attached before the definite location of the road, yet after the grant. *Winona etc. R. Co. v. Barney*, 113 U. S. 618; *Kansas Pac. R. Co. v. Denmeyer*, 113 U. S. 629.

It is apprehended that the above principle applies as well to homestead, timber culture or other similar rights as to preemption rights. See *Kansas Pac. R. Co. v. Denmeyer*, 113 U. S. 629.

1. *Broder v. Natoma Water etc. Co.*, 101 U. S. 274; 50 Cal. 621; *Winona etc. R. Co. v. Barney*, 113 U. S. 618; *St. Joseph etc. R. Co. v. Baldwin*, 103 U. S. 426; *Burnham v. Starkey*, 41 Kan. 604; *Burlington etc. R. Co. v. Johnson*, 38 Kan. 142; 33 Am. & Eng. R. Cas. 215.

"It has always been the policy of the government to protect those who in good faith have settled upon and improved portions of the public lands." *Lamb v. Davenport*, 18 Wall. (U. S.) 313; *Rector v. Gibbon*, 111 U. S. 276.

Persons claiming particular tracts of these (*i. e.*, land granted to the Missouri etc. Railroad Co.) lands by virtue of prior homestead or preemption settlements, can under the State practice obtain, by action at law, full protection of their rights without the interference of the United States. *U. S. v. Missouri etc. R. Co.*, 37 Fed. Rep. 68.

It must be remembered that most railroad grants are *in presenti*, and therefore take effect on the passage of the act making the grant, so that in order to claim a prior homestead or preemption right, such right must have

been initiated before the act took effect. *Winona etc. R. Co. v. Barney*, 113 U. S. 618.

2. **Indemnity Lands.**—In *Kansas Pac. R. Co. v. Atchison etc. R. Co.*, 112 U. S. 414, it is held that the indemnity clause in the Minnesota grant of 1857 covers losses from the grant by reason of sale and the attachment of preemption rights previous to the date of the act. *Winona etc. R. Co. v. Barney*, 113 U. S. 618; *Barney v. Winona etc. R. Co.*, 117 U. S. 228.

The same is held as to the act of May 5, 1864, granting lands to the State of Wisconsin. *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496.

The United States act of March 3, 1863, granting lands to Kansas to aid in the construction of the Atchison, Topeka and Santa Fe Railroad, provided that if it should appear, when the lines of the road should be definitely fixed, that the alternate sections granted were sold, reserved, or otherwise appropriated, indemnity lands should be selected. Held, that the withdrawal by the land office, before the lines were definitely fixed, of lands along the "probable line" of the road affected no rights of another railroad company which, but for such withdrawal, could maintain a claim to a part of these lands by reason of a compliance with the provisions of the Pacific Railroad acts. *Kansas Pacific R. Co. v. Atchison etc. R. Co.*, 112 U. S. 414.

Act of Congress May 5th, 1864, granted land to the State of Wisconsin to aid in the construction of a railroad, and provided for indemnity in case portions of the land granted had been already taken up. It was held that this indemnity clause covers losses from the grant by reason of sale and attachment of homestead and preemption right previous to the date of the grant, as well as between such date and the date of the location of the railroad. *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496. See also concerning indemnities, *Southern Pac. R. Co. v. Tilley*, 41 Fed. Rep. 729.

It is to be borne in mind that such grants, like all other grants of Congress, are not only conveyances from the government to such railroads, but are also laws of the United States, and therefore any common law principle in conflict with them must be subordinated to them.¹

In other cases grants are made to a State in aid of a railroad, and where this is the case the State acquires nothing under the act of Congress more than a mere naked trust, or power to dispose of the lands therein specified, and to apply them to the use and purpose prescribed in the act.²

In addition to the rules already stated, the general rules applicable to the construction of legislative acts in general apply to cases of land grants by Congress in aid of railroads, and it is scarcely necessary to detail here the constructions which have been placed upon the various acts which have been made at different times for the benefit of railroad companies.³

1. Congressional Grant Has the Force of Law.—*Missouri Pac. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *St. Paul etc. R. Co. v. Greenhalgh*, 26 Fed. Rep. 563.

"It is always to be borne in mind in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance and that such effect must be given to it as will carry out the intent of Congress." *Justice Field in Missouri etc. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491; quoted and approved in *Hall v. Russell*, 101 U. S. 503.

2. Rice v. Minnesota etc. R. Co., 1 Black (U. S.) 360; *Wolsey v. Chapman*, 101 U. S. 755; *Van Wyck v. Knevals*, 106 U. S. 360; *Hannibal etc. R. Co. v. Smith*, 9 Wall. (U. S.) 95; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 60; *Grinnell v. Chicago etc. R. Co.*, 103 U. S. 739; *Cedar Rapids etc. R. Co. v. Courtwright*, 21 Wall. (U. S.) 310; *Williams v. Baker*, 17 Wall. (U. S.) 144; *Kansas City, etc. R. Co. v. Attorney-General*, 118 U. S. 682; *Leavenworth etc. R. Co. v. U. S.*, 92 U. S. 733; *Litchfield v. Webster Co.*, 101 U. S. 773; *Miller v. Swann*, 89 Ala. 631.

3. In the construction of all land grant acts made in aid of railroads "granted lands" are those falling within the limits specially designated, while indemnity lands are those selected in lieu of parcels previously disposed of or reserved, the title to which accrues only from their selection. *Barney v. Winona etc. R. Co.*, 117 U. S. 228;

Leavenworth etc. R. Co. v. U. S., 92 U. S. 760.

The grants of land in aid of railroads are to receive such construction as will best carry out the intent of Congress to ascertain which the condition of the country as well as the purpose declared will be considered by the court and all parts of the act will be read together. *Winona etc. R. Co. v. Barney*, 113 U. S. 618.

Where a grant of land and the franchises for the construction of a railroad provide for their forfeiture upon failure to begin work within a prescribed time, the forfeiture may be by legislative act without any judicial proceedings. *Farnsworth v. Minnesota etc. R. Co.*, 92 U. S. 49.

Construction of Other Grants.—Grants immediately or indirectly to railway companies have received judicial construction in the following cases besides those already mentioned: *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *Ryan v. Central Pac. R. Co.*, 99 U. S. 382; *Cedar Rapids etc. R. Co. v. Herring*, 110 U. S. 27; *St. Louis etc. R. Co. v. McGee*, 115 U. S. 469; *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496; *Wood v. Burlington etc. R. Co.*, 104 U. S. 329; *Bullard v. Des Moines etc. R. Co.*, 122 U. S. 167; *Northern Pac. R. Co. v. Rockne*, 115 U. S. 600; *Rice v. Minnesota etc. R. Co.*, 1 Black (U. S.) 360; *Platt v. Union Pac. R. Co.*, 99 U. S. 48; *Denver etc. R. Co. v. Alling*, 99 U. S. 463; *St. Paul etc. R. Co. v. Winona etc. R. Co.*, 112 U. S. 720; *Eldred v. Sexton*, 30 Wis. 193; 19 Wall. (U. S.) 189; *Ver-*

VI. THE GENERAL LAND OFFICE—1. Constitution of.—The head of the Land Office is the Commissioner of the General Land Office, who is appointed by the President by and with the advice and consent of the Senate. His duty is to perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands, and also such as relate to private claims for lands, and the issuing of patents for all grants of land under the authority of the government.¹ The Commissioner exercises a general superintendence over the subordinate officers of this department, and is clothed with liberal powers of control for the protection of the rights of all parties claiming lands from the government.²

Subordinate land offices are established by provisions of the statutes in various land districts over the country,³ and for each

dier v. Port Royal R. Co., 15 S. Car. 476; Sams v. Port Royal etc. R. Co., 15 S. Car. 484; Barney v. Winona etc. R. Co., 117 U. S. 228; New Orleans etc. R. Co. v. U. S., 124 U. S. 124; U. S. v. Union Pac. R. Co., 37 Fed. Rep. 551; Southern Pac. R. Co. v. Esquibel, 4 N. Mex. 337; U. S. v. Southern Pac. R. Co., 39 Fed. Rep. 132; Farmers' Loan etc. Co. v. Chicago etc. R. Co., 39 Fed. Rep. 143.

Indian Lands.—Where the right of an Indian tribe to the possession and use of certain lands, as long as it may choose to occupy the same, is assured by treaty, a grant in general terms of "land" cannot be construed to embrace them. And a proviso that any and all lands heretofore reserved to the United States, for any purpose whatever, are reserved from the operation of the grant to which it is annexed, applies to lands so set apart for the use of an Indian tribe. Leavenworth etc. R. Co. v. U. S., 92 U. S. 733.

1. U. S. Rev. Stat., § 446, 453; Cahn v. Barnes, 5 Fed. Rep. 331.

The ultimate head of the Land Department is, of course, the Secretary of the Interior. The land office was originally a Bureau of the Treasury Department under the statute of April 25, 1812, but upon the creation in 1849 of the Department of the Interior the Land Office was transferred to that department. Gould & Tucker's Notes on Rev. Stat., p. 52, § 446.

In proceedings before the Land Department if it appears that the claim of the moving party is against public policy, or against the law, it must be disregarded, although such objection was not raised by the allegation of the parties. Therefore, in a contest before the

department, involving the question of the abandonment of a homestead, where it appeared that the complainant was not a *bona fide* homestead claimant, the Secretary of the Interior did not exceed his jurisdiction in directing a cancellation of the entry. Lee v. Johnson, 116 U. S. 48.

But no officer of the Land Department has authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law. Deffebach v. Hawke, 115 U. S. 392.

2. Bell v. Hearne, 19 How. (U. S.) 252, where the court observes: "The Commissioner is clothed with liberal powers of control, to be exercised for the purposes of justice and to prevent the consequences of inadvertence, irregularity, mistake or fraud in the important and extensive operations of that office for the disposal of the public domain."

This general power of superintendence gives the Commissioner of the General Land Office direct supervision over registers and receivers, whose decisions on all questions he is authorized to review. Barnard v. Ashley, 18 How. (U. S.) 45. See also U. S. v. Chaplin, 31 Fed. Rep. 894; U. S. v. Barnhart, 33 Fed. Rep. 459; Darcy v. McCarthy, 35 Kan. 722.

The Commissioner is charged with the keeping and charge of the seal of the office, and of the records and other books and papers of the office. U. S. Rev. Stat., § 454; Bullion etc. Min. Co. v. Eureka Hill Min. Co. (Utah, 1886), 11 Pac. Rep. 536.

3. U. S. Rev. Stat., § 2248.

Whenever the quantity of public land remaining unsold in any land dis-

office there is appointed a register and a receiver, whose duty it is to transact all the business appertaining to the public lands in the district for which their office is established. Registers and receivers are appointed by the President, by and with the advice and consent of the Senate, to hold office for four years. They are required to reside at the place where the land office to which they are appointed is, and to execute before entering upon their office a bond in the sum of \$10,000.¹ All proceedings for the acquirement of public land, either under the homestead, pre-emption, or other laws, are to be made before such registers and receivers, and they are empowered to pass upon all claims relating to lands within their districts,² their judgment to be subject to a review by the Commissioner of the General Land Office.³

The statutes also provide for the appointment of a surveyor-general for certain States and Territories, and prescribe his duties.⁴ Being a disbursing officer and in some cases being authorized to act as register and receiver, he is required to give bond in a certain sum for the faithful discharge of all his duties.⁵

tract is reduced to less than 100,000 acres, it is made the duty of the Secretary of the Interior to discontinue the land office of such district, and transfer the land remaining unsold to the district most convenient to it. U. S. Rev. Stat., § 2248.

1. U. S. Rev. Stat., §§ 2234-2237.

2. U. S. Rev. Stat., §§ 2262, 2290, 2355. Potter v. U. S., 107 U. S. 126; Wilcox v. Jackson, 13 Pet. (U. S.) 498.

Under the Act of 1882 for adjusting land claims, the register and receiver are empowered to decide on the true location of grants or confirmations, but not upon legal questions of title. Tate v. Carney, 24 How. (U. S.) 357; Doe v. Eslava, 9 How. (U. S.) 421; Cousin v. Labatut, 19 How. (U. S.) 203.

A receiver acting also as register by authority of an order from the Land Department, is a *de facto* officer and his official acts are valid even though it be unlawful for him to hold the office. Jeffords v. Hine, (Arizona 1886), 11 Pac. Rep. 351.

3. Harkness v. Underhill, 1 Black (U. S.) 316; U. S. Rev. Stat., § 2273; Barnard v. Ashley, 18 How. (U. S.) 45; Haydel v. Dufresne, 17 How. (U. S.) 23.

4. U. S. Rev. Stat., § 2207, *et seq.*

In case any surveyor-general is suspended by the President, the suspension takes effect upon due notice, but if the officer acts subsequently, his acts being the acts of an officer *de facto* are valid and binding as such. 15 A. G. Op. 62.

5. That surveyors of public lands are disbursing officers, see Farrar v. U. S., 5 Pet. (U. S.) 373.

By U. S. Rev. Stat., § 2228, the President is authorized in any case where he thinks the public interest may require it, to transfer the duties of register and receiver in any district to the surveyor-general of the surveying district in which such land district is located.

Every surveyor-general is required by the statutes before entering upon the duties of his office to execute and deliver to the Secretary of the Interior a bond with good and sufficient security in the penal sum of \$30,000 conditioned for the faithful disbursement according to law, of all public money placed in his hands, and for the faithful performance of the duties of the office, and the President is authorized whenever he may deem it expedient, to require any surveyor-general to give a new bond with additional security. U. S. Rev. Stat., §§ 2215-16.

Where a surveyor-general, receiver or register of a land office is in default in the discharge of his official duties, after his commission has expired but before his successor has entered upon the duties of the office, the sureties on the bond of such surveyor-general or receiver, or register, are liable for all defaults of their principal. U. S. v. Jameson, 16 Fed. Rep. 331; U. S. v. Linn, 2 McLean (U. S.) 501; Bryan v. U. S., 1 Black (U. S.) 140.

2. Powers and Duties of Land Officers Generally.—In the discharge of their duties the land officers act as agents for the Secretary of the Interior in the execution of powers conferred upon him, and therefore the courts will not interfere with such officers while in the discharge of their duties either by injunction or *mandamus*.¹

The register and the receiver are empowered to pass upon the sufficiency of proof of settlement and improvement by preemptions, homesteaders, or others.² They are not required to do so concurrently; all that the law requires being that they shall both be satisfied.³ They have no power, however, to overthrow the decision of a prior register and receiver made sometime before and which had been followed by possession, and as to which there had intervened the claims of *bona fide* purchasers;⁴

1. *Marquez v. Frisbie*, 101 U. S. 473; *Litchfield v. Richards*, 9 Wall. (U. S.) 575; *Cox v. McGarrahan*, 9 Wall. (U. S.) 298; *Gaines v. Thompson*, 7 Wall. (U. S.) 347.

Mandamus.—For this reason the Supreme Court has no power to issue a writ of *mandamus* to the register of the Land Office of the United States commanding him to enter the application of a party for certain tracts of land, even though such writ had been refused by the highest court of law or equity in a State. *McClurny v. Silliman*, 2 Wheat. (U. S.) 369.

So also the cancellation of an entry of land by the Commissioner of the Land Office, which the Secretary of the Interior has directed him to make is not a ministerial act which may be enjoined by the court. *Gaines v. Thompson*, 7 Wall. (U. S.) 347.

For the same reason *mandamus* will not be issued to command the Commissioner of the Land Office to have a patent prepared, signed, recorded and issued, where the merits of the case cannot then be determined upon the record. The duty in this case is not merely ministerial, but involves the exercise of judgment and discretion which cannot be controlled or influenced by *mandamus*. If the relator entitled under a certificate presents an equity superior to the opposing title, the appropriate remedy is by bill in equity. *U. S. v. Edmunds*, 5 Wall. (U. S.) 563.

The issue of a final certificate of purchase or of a patent since this also involves the exercise of discretion, cannot be interfered with by a *mandamus* from the courts. *McIntire v. Woods*, 7 Cranch (U. S.) 504; *U. S. v. Commissioner*, 5 Wall. (U. S.) 563; *Cox v. McGarrahan*, 9 Wall. (U. S.) 298.

Whether certain land is open to preemption and settlement and should therefore be surveyed, is a matter of doubt and within executive judgment or discretion; consequently a *mandamus* directing a survey cannot be granted. *U. S. v. Lamar*, 116 U. S. 423.

2. U. S. Rev. Stat. §§ 2273, 2262, 2290, 2355; *Tate v. Carney*, 24 How. (U. S.) 357; *Wilcox v. Johnson*, 13 Pet. (U. S.) 498.

Thus the decision by the Land Department, rejecting a person's claim to preempt on evidence that he had previously exercised the "preemptive right," is conclusive. *Baldwin v. Stark*, 107 U. S. 463.

"The officers of the Land Department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of preemption. If they are in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions. But, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the President." *Shepley v. Cowan*, 91 U. S. 330.

3. *Potter v. U. S.*, 107 U. S. 126.

4. *Tate v. Carney*, 24 How. (U. S.) 357; *Doe v. Eslava*, 9 How. (U. S.) 421; *Cousin v. Labatut*, 19 How. (U. S.) 203.

this is a judicial act and requires the judgment of a court.¹ An appeal lies from the decision of all subordinate officers to the Commissioner of the General Land Office, and from his decision to the Secretary of the Interior.²

In adjusting Congressional grants of land to a State, the only questions for consideration by the officers of the government are whether the State possesses the right to claim the land under her grant, and whether the land was subject to selection by her agents. Those officers have no jurisdiction to review transactions between the State and her purchasers or locating agents.³

3. Compensation.—The compensation of all officers in the Land Department is provided by statute, in most cases being a fixed amount, but in the case of registers and receivers being a fixed salary with the addition of certain fees.⁴ And all fees which are not authorized to be taken as compensation must be paid into the office of the Treasury Department.⁵

4. Force and Effect of the Decisions of the Land Office.—It is a general rule that authority to hear and determine certain matters having been vested by law exclusively in a special tribunal, the decisions of that tribunal upon all matters such as come properly within its jurisdiction are final and conclusive, and not subject to review in any other tribunal.⁶ The Land Office, therefore, being

1. U. S. *v.* Stone, 2 Wall. (U. S.) 525.

2. Haydel *v.* Dufresne, 17 How. (U. S.) 23. (In that case the ultimate appeal was to the Secretary of the Treasury, but this was owing to the fact that the Department of the Interior had not been established, and the land offices were a part of the Department of the Treasury). Harkness *v.* Underhill, 1 Black (U. S.) 316; U. S. Rev. Stat., § 2273.

Prior to the act of Congress of September 4, 1841, giving an appeal to the Secretary of the Treasury, no appeal could be taken from the decision of the register and receiver disallowing a preemption claim. Arnold *v.* Grimes, 2 Iowa 1.

3. Frasher *v.* O'Connor, 115 U. S. 102; Van Reynegan *v.* Bolton, 95 U. S. 36.

4. For the salaries of officers of the general land office, see U. S. Rev. Stat., §§ 446-450.

The salaries of the surveyor-generals in the different States vary. U. S. Rev. Stat., §§ 2207, 2211.

Registers and receivers each receive a salary of \$500 annually, and certain fees prescribed by statute. U. S. Rev. Stat., §§ 2237, 2238.

But in no case can the compensation of a register or receiver, includ-

ing salary, fees and commissions, exceed in the aggregate \$3,000 a year, nor can any register or receiver receive for any one quarter, or fraction of a quarter, more than a *pro rata* allowance of such maximum. U. S. Rev. Stat., § 2240.

A receiver, however, is entitled to commissions on the sales of Indian trust lands over and above his compensation as a receiver of public moneys, when appointed special receiver to assist in selling such trust lands. U. S. *v.* Brindle, 110 U. S. 688.

A neglect or refusal by the register or receiver to pay over to the United States the surplus beyond the commissions to which he is entitled by law, is a breach of his official bond, both as respects himself and his sureties, and the United States is not required to proceed against the principal for money had and received, but may proceed directly against his sureties. U. S. *v.* Babbitt, 95 U. S. 334.

5. U. S. *v.* Babbitt, 95 U. S. 334; 1 Black (U. S.) 55; U. S. *v.* Brindle, 110 U. S. 688; U. S. *v.* Dickson, 15 Pet. (U. S.) 141.

6. Boatner *v.* Ventris, 8 Mart., N. S. (La.) 644; 20 Am. Dec. 266, note. (In this note this subject is reviewed at

such a tribunal, its decisions upon all questions of fact coming properly within the scope of its jurisdiction, in the absence of fraud or mistake, are final and conclusive and cannot be reviewed by any other branch of the government.¹

length and a number of authorities collected). *Steel v. St. Louis Smelting etc. Co.*, 106 U. S. 447; *Sioux City etc. R. Co. v. U. S.*, 34 Fed. Rep. 835; *Warren v. Van Brunt*, 19 Wall. (U. S.) 646. JURISDICTION, vol. 12, p. 244, *et seq.*

In the case of *Moore v. Robbins*, 96 U. S. 535, the court by Miller, J., observes: "When the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority is conclusive upon all others. That the action of the land office in issuing a patent for any of the public land, subject to sale by preemption or otherwise, is conclusive of the legal title, must be admitted under the principles above stated, and in all courts and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. . . . It is fully conceded that where both officers decide controverted questions of fact in the absence of fraud, imposition, or mistake, their decisions on those questions are final, except as they may be reversed on appeal in that department."

1. *Wilcox v. Jackson*, 13 Pet. (U. S.) 511; *Boatner v. Ventris*, 8 Mart., N. S. (La.) 644; 20 Am. Dec. 266; *Lytle v. Arkansas*, 9 How. (U. S.) 333; *Quinby v. Conlan*, 104 U. S. 420; *Rector v. Gibbon*, 111 U. S. 276 (the famous Hot Springs reservation case); *Steel v. St. Louis Smelting etc. Co.*, 106 U. S. 447; *Lee v. Johnston*, 116 U. S. 48; *U. S. v. Marshall Sil. Min. Co.*, 129 U. S. 579; *Baldwimer v. Stark*, 107 U. S. 463; *Ehrhardt v. Hogaboom*, 115 U. S. 67; *Casey v. Vassor*, 4 McCrary (U. S.) 127; *Hosmer v. Wallace*, 47 Cal. 461; *Hess v. Bolinger*, 48 Cal. 349; *Dilla v. Bohall*, 53 Cal. 709; 114 U. S. 47; *Rutledge v. Murphy*, 51 Cal. 388; *Bracken v. Parkinson*, 1 Pin. (Wis.) 685; *Hill v. Miller*, 36 Mo. 182; *Stucker v. Duncan*, 37 Mo. 160; *Ard v. Pratt*,

43 Kan. 419; *Sioux City etc. R. Co. v. U. S.*, 34 Fed. Rep. 835; *Van Sant v. Butler*, 19 Neb. 351; *Kinney v. Degman*, 12 Neb. 237; *Rush v. Valentine*, 12 Neb. 513.

Thus the decision by the Land Department rejecting a person's claim to preempt certain land upon evidence that he had previously exercised the "preemptive right," is binding and conclusive. *Baldwin v. Stark*, 107 U. S. 463.

Likewise, the decision of the officers of the Land Department is final upon the question as to whether a claimant under the Donation Act, who had demanded his patent certificate as against other contesting claimants, had resided on and cultivated the lands in dispute for four consecutive years, and had otherwise conformed to the requirements of the act. *Vance v. Burbank*, 101 U. S. 514.

So also the action of the register and receiver of the United States Land Office in accepting the proofs furnished by a preceptor as satisfactory and receiving his money and issuing to him the usual duplicate is a judicial determination of his rights which is conclusive in all collateral proceedings. *Boyce v. Danz*, 29 Mich. 146.

Whether certain public land shall be surveyed and brought into market is a matter concerning which the courts will not interfere with the discretion of the Secretary of the Interior. *U. S. v. Lamar*, 116 U. S. 423.

The whole doctrine is summed up in the case of *Aurora Hill Min. Co. v. 85 Mining Co.*, 34 Fed. Rep. 515; the decisions of the department officers on question of law or of fact are not subject to collateral attack; on questions of fact their decisions are conclusive; on questions of law their decisions can only be reviewed under a direct proceeding for that purpose. Evidence is admissible in an action at law to show error in the decision of an officer of the Land Department on a matter submitted to him for decision. See also *Southern Pac. R. Co. v. Wiggs*, 43 Fed. Rep. 333.

In the case of *U. S. v. Throckmorton*, 98 U. S. 61, the character of the fraud for which a bill in chancery will

It is another rule equally as well settled as the preceding and applicable to all proceedings held before officers and tribunals vested by law with power to hear and determine certain matters that where upon an *ex parte* application, it has been determined that one of the parties is entitled to the property to the exclusion of the others, such determination is final only as between one party and the government, and any third party whose rights may have been prejudiced may litigate the conflicting claim in any court of justice and obtain relief therefor.¹ In granting this re-

be sustained to set aside a judgment or decree between parties rendered by a court of competent jurisdiction are stated to be frauds extrinsic or collateral to the matter tried by the first court and not a fraud which was in issue in that suit. The most usual cases in which such relief has been granted are those in which by fraud or deception practiced on the unsuccessful party he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court upon the subject-matter of the suit. The opinion of Justice Miller in this case (*U. S. v. Throckmorton*) contains a most excellent exposition of the whole doctrine of relief in equity against fraud or mistake, particularly as regards the subject in hand. See also *Wilcox v. Jackson*, 13 Pet. (U. S.) 511; *Minnesota v. Bachelder*, 1 Wall. (U. S.) 109; *Silver v. Ladd*, 7 Wall. (U. S.) 219; *Starks v. Starks*, 6 Wall. (U. S.) 402; *Johnson v. Towsley*, 13 Wall. (U. S.) 84; *Vance v. Burbank*, 101 U. S. 514.

It will be remembered, however, that the decisions which are final and conclusive are only those of officers from whom no appeal lies to a superior officer. Therefore, where by the Act of July 4, 1836 (5 Stat. at L. 137), the Commissioner of the General Land Office has power to supervise the decisions of the registers and receivers of the land districts, the decisions of these latter officers upon a claim brought before them after the passage of the statute is not final and conclusive. *Barnard v. Ashley*, 18 How. (U. S.) 43; *Rush v. Valentine*, 12 Neb. 513; *Johnson v. Towsley*, 13 Wall. (U. S.) 72.

It must be also noted that those decisions of the Land Department which enjoy immunity from review by courts are those which determine questions of fact. Decisions by the Land Office as to questions of law are in all cases reviewable in the courts. *Rector v.*

Gibbons, 111 U. S. 276; *Quinby v. Conlan*, 104 U. S. 120; *Hosmer v. Wallace*, 47 Cal. 461. For this reason the interpretation placed upon the Public Lands Act by the Secretary of the Interior is not binding upon the courts. *U. S. v. Murphy*, 32 Fed. Rep. 376; *U. S. v. Mann*, 32 Fed. Rep. 386.

Mixed Question of Law and Fact.—Where there is a mixed question of law and of fact and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive, but where it can be made entirely plain to a court of equity, that on facts concerning which there is no dispute or no reasonable doubt, the Land Department have by mistake of the law deprived the man of his right, it will give relief. *Marquez v. Frisbie*, 101 U. S. 473; *Ard v. Pratt*, 43 Kan. 419; *Jeffords v. Hine* (Arizona, 1886), 11 Pac. Rep. 351; *Porter v. Bishop*, 25 Fla. 749.

1. *Comegys v. Vasse*, 1 Pet. (U. S.) 212; *Lytle v. Arkansas*, 9 How. (U. S.) 333; *Garland v. Wynn*, 20 How. (U. S.) 7; *Johnson v. Towsley*, 13 Wall. (U. S.) 84; *Lindsey v. Hawes*, 2 Black (U. S.) 558; *Cunningham v. Ashley*, 14 How. (U. S.) 377; *Boatner v. Ventris*, 8 Mart., N. S. (La.) 644; 20 Am. Dec. 273, n.

This rule would seem, however, to be merely an extension of the principle above established, namely that in case of fraud or mistake, the courts may review the decision of the Land Office Department. See cases above cited; also *Wynn v. Garland*, 16 Ark. 440; *Moore v. Robbins*, 96 U. S. 535; *Fraser v. O'Connor*, 115 U. S. 102; *Warren v. Van Brunt*, 19 Wall. (U. S.) 646.

The Remedy for an Erroneous Decision of Land Officers.—If a register or receiver of a land office refuses to hear the evidence of a preemption claimant and allows another preemption claim-

lief the courts do not act as an appellate tribunal over the decisions of the Land Department or its officers, however, but in pursuance of the power always possessed by a court of equity to grant relief to parties whose rights are prejudiced.¹ It is believed that by the application of these principles every question arising as to the force and effect of the decisions of the Land Department may be determined.²

ant to land to introduce his testimony and enters the same, the remedy for the first party is by appeal to the Commissioner of the General Land Office. He cannot retain relief in equity. *Sacramento Sav. Bank v. Hynes*, 50 Cal. 195.

But where a preemption claimant is refused the right to file his declaratory statement on account of a rule existing in the office, it seems that this refusal would not prejudice the claimant's right if he were otherwise entitled to the land. *Quinn v. Chapman*, 111 U. S. 445.

Notwithstanding the general rule as to the effect of decisions rendered by the officers of the Land Department, it is well established that where there are several parties who set up conflicting claims to property, with which a special tribunal may deal as between one party and the government, regardless of the rights of others, these latter may come into the ordinary courts of justice and litigate the conflicting claims; nor do the regulations of the Commissioner of the General Land Office, whereby a party may be heard to prove his better claim to enter land, deprive courts of justice of this jurisdiction. Courts of justice have always power to examine a contested claim before entry under the preemption laws, and to overrule the decisions of the register and receiver confirmed by the Commissioner in cases where they have been imposed upon. *Garland v. Wynn*, 20 How. (U. S.) 6; *Barnard v. Ashley*, 18 How. (U. S.) 43; *Shelton v. Keirn*, 45 Miss. 106; *Comegys v. Vasse*, 1 Pet. (U. S.) 212; *Lytle v. Arkansas*, 9 How. (U. S.) 328; *Cunningham v. Ashley*, 14 How. (U. S.) 377.

Where preemption right to public lands is claimed against a subsequent title from public authorities, the register and receiver in deciding such cases do not so act in a judicial capacity that their judgment on the matter is conclusive, and the courts will examine the facts to ascertain which party has the better right. *Barnard v. Ashley*, 18 How. (U. S.) 43.

1. *Johnson v. Towsley*, 13 Wall. (U.

S.) 84. *EQUITY*, vol. 6, p. 717; *Bisson v. Curry*, 35 How. 72; *Garland v. Wynn*, 20 How. (U. S.) 7; *Lytle v. Arkansas*, 22 How. (U. S.) 203; *Chapman v. Quinn*, 56 Cal. 266.

2. In the case of *Garland v. Wynn*, 20 How. (U. S.) 6, this language was used: "The general rule is that where special parties set up conflicting claims to property, with which a special tribunal may deal as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate the conflicting claims. Such was the case in *Comegys v. Vasse*, 1 Pet. (U. S.) 212, and the case before us belongs to the same class of *ex parte* proceedings; nor do the regulations of the Commissioner of the General Land Office, whereby a party may be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court. It was in effect so held in the case of *Lytle v. Arkansas*, 9 How. (U. S.) 328; next in the case of *Cunningham v. Ashley*, 14 How. (U. S.) 377, and again in the case of *Barnard v. Ashley*, 18 How. (U. S.) 44."

In *Wilcox v. Jackson*, 13 Pet. (U. S.) 511, it was laid down in emphasizing this principle that where land officers in their department exceed the jurisdictions conferred upon them, although the same is not the result of any fraud or imposition, relief is nevertheless granted. Observe that the same rules apply to their determinations as to those of other tribunals exercising judicial functions. Their decisions are binding and conclusive when acting within their jurisdiction, but when acting without the pale of their authority they are to be regarded as mere nullities.

Equity will also grant relief notwithstanding the decision of the Land Office, where the claimant has done everything which the law requires in the prosecution of a right, and has failed to attain such right, owing to the misconduct or negligence of the land officers. *Lytle v. Arkansas*, 9 How. (U. S.) 333.

VII. PATENTS.—Any person having perfected his right to the ownership of any portion of the public lands, is entitled to have issued to him a patent, an instrument which is nothing more nor less than the evidence of the conveyance to him from the United States of the legal title to the lands in question.¹ The legal title remains in the United States until the issue of this patent, but before it is issued and after the perfection of the claimant's right,

In the case of *Lytle v. Arkansas*, 22 How. (U. S.) 203, a contest arose between plaintiffs and the State of Arkansas as to the ownership of a fractional section of land for which a patent had been granted to the State by the Land Department. The complainants maintained their claim by virtue of a preemption right of their ancestor Cloyes, who claimed to have settled upon the land as a *bona fide* preceptor. His claim was objected to by the State courts because he never had in good faith settled upon the land, and the Supreme Court of the United States affirmed the judgment because in their opinion the affidavits on which the occupant's entry was founded were untrue in fact and a fraud upon the register and receiver. See also for a similar case *Johnson v. Towseley*, 13 Wall. (U. S.) 84, in which case Mr. Justice Miller sets forth most clearly the whole doctrine as to the authority of courts of equity to grant relief in all such cases.

Doctrine of this Section Re-stated.—From what has been said before it will be seen therefore that in deciding upon questions of fact within the scope of its jurisdiction, and in the absence of fraud or mistake, the decisions of the Land Office are binding upon all the courts, and cannot be reviewed in them. The rule may, perhaps, be better stated thus: The courts have jurisdiction to review all decisions of the Land Department:

1. When the department has acted beyond the scope of its proper jurisdiction.
2. When, though acting within its jurisdiction, there has been fraud or mistake committed.
3. When the question is one of law and not of fact.
4. In all questions arising after the issue of the patent by the government, the courts have the same jurisdiction as in case of any other dispute concerning the right or title to property.

1. *Morrow v. Whitney*, 95 U. S. 551; *Whitney v. Morrow*, 112 U. S. 693;

McGarrahan v. New Idria Min. Co., 96 U. S. 316; *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *U. S. v. Stone*, 2 Wall. (U. S.) 525; *Brown v. Huger*, 21 How. (U. S.) 305; *Warren v. Van Brunt*, 19 Wall. (U. S.) 647; *Bryan v. Forsyth*, 19 How. (U. S.) 334; *Cowell v. Colorado Springs*, 100 U. S. 55; *Anderson's Law Dict.*, Patents.

The patent is the instrument which under the laws of Congress passes the title of the United States, and in an action of ejectment in the Federal courts for lands derived from the United States the patent, when regular on its face, is conclusive evidence of title in the patentee. *Gibson v. Chouteau*, 13 Wall. (U. S.) 92.

A patent for unimproved lands, no part of which was in the possession of any one at the time it issued, gives a legal seisin and constructive possession of all the lands within the survey. *Peyton v. Stith*, 5 Pet. (U. S.) 485.

Nothing passes a perfect title to public lands with the exception of a few cases, but a patent. Exceptions are where Congress grants land in words of present grant. This general rule applies as well to preemption as to other purchases of public lands. *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Leavenworth etc. R. Co. v. U. S.*, 92 U. S. 733.

In the case of *Langdeau v. Hanes*, 21 Wall. (U. S.) 521, the court observes in the course of its opinion: "In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence having the dignity of record, of the existence of that title, and of such equities respecting the claim as justify its recognition and confirmation. The instrument is none the less efficacious as evidence of previously existing rights, because it also embodies words of release or transfer from the government."

the United States holds the land in trust for such claimant.¹ Although before the issue of the patent the claimant may have such an interest in the land as will entitle him to enforce it in a court of equity, he has not the legal title, such as may be asserted in a court of law, as against one holding a patent, nor can he exercise any of the other rights incident to the legal title.²

Denny v. Dodson, 32 Fed. Rep. 904; 13 Sawy. (U. S.) 230.

Presumption of Issuance.—In the case of *Jenkins v. Trager*, 40 Fed. Rep. 726, it appeared that the plaintiff's father J purchased the land in controversy in 1831 and immediately went into actual possession under a deed from the original purchaser from the United States. He remained in possession until his death in 1855. His executors remained in possession until 1867, and the plaintiff had possession ever since. It was held that in such a length of time it must be presumed that a patent had issued.

1. *Bronson v. Kukuk*, 3 Dill. (U. S.) 490; *U. S. v. Freyberg*, 32 Fed. Rep. 195; *Astrom v. Hammond*, 4 McLean (U. S.) 107; *Cornelius v. Kessel*, 58 Wis. 237; affirmed 128 U. S. 456; *Lindsey v. Hawes*, 2 Black (U. S.) 554; *Starks v. Starrs*, 6 Wall. (U. S.) 402; *Carroll v. Safford*, 3 How. (U. S.) 441. The government stands in the same position as does any private party who is under a contract to convey. *Arnold v. Grimes*, 2 Iowa 1.

Until a patent issues, the legal title remains in the United States, and it will protect any equity the United States may have in the land from a sale for taxes by the State. *Bronson v. Kukuk*, 3 Dill. (U. S.) 490.

2. **Equitable Title as Against Patent.**—In the case of *Bagnell v. Broderick*, 13 Pet. (U. S.) 450, it was held that a patent for land carries the fee, and is the best title known to a court of law. "Such," it is said in the case of *Hooper v. Scheimer*, 23 How. (U. S.) 285, "is the settled doctrine of this court."

A patent cannot be collaterally avoided at law even for fraud. *Field v. Seabury*, 19 How. (U. S.) 324.

It is also settled that no equitable title can be set up in ejectment in opposition to the legal title, except where there is an express statutory provision. 4 Minor's Inst. 371; 2 Minor's Inst. 197-8; *Jackson v. Chase*, 2 Johns. (N. Y.) 84; *Jackson v. Pierce*, 2 Johns. (N. Y.) 222; *Davis v. Teays*, 3 Gratt. (Va.) 283.

For this reason a patent is conclusive in a court of law. *West v. Cochran*, 17 How. (U. S.) 403; *Balance v. Forsyth*, 13 How. (U. S.) 24; *Livingston v. Story*, 9 Pet. (U. S.) 632; *Willot v. Sanford*, 19 How. (U. S.) 82; *Gaines v. Hale*, 16 Ark. 25; *Dickinson v. Brown*, 9 Smed. & M. (Miss.) 130; *Bledsoe v. Well*, 4 Bibb (Ky.) 229; *Finley v. Williams*, 9 Cranch (U. S.) 167; *Jackson v. Marsh*, 6 Cow. (N. Y.) 282.

In the case of *Field v. Seabury*, 19 How. (U. S.) 323, the court said: "This case involves directly the point whether, when a grant or patent for land . . . has been given by the sovereignty or legislative authority only having the right to make it, without any provision having been made in the patent, or by the law to inquire into its fairness between the grantor and the grantee . . . the third party cannot raise in ejectment the question of fraud as between the grantor and the grantee, and thus look beyond the patent or grant. We are not aware that such a proceeding is permitted in any of the courts of law. In *England*, a bill in equity lies to set aside letters patent obtained from the king by fraud (*Attorney-Gen'l v. Vernon*, 1 Vern. 277, 370; 2 Ch. Rep. 523), and it would in the United States; but it is a question exclusively between the sovereignty making the grant and the grantee; but in neither could a patent be collaterally avoided at law for fraud. This court has never declared it could be done. *Stoddard v. Chambers*, 2 How. (U. S.) 284, does not do so as has been supposed." See also *Gregg v. Sayre*, 8 Pet. (U. S.) 244; *Swayze v. Burke*, 12 Pet. (U. S.) 11.

It seems clear, therefore, from the foregoing discussion, that the proposition stated in the text that the holder of an equitable title to land under a certificate of purchase duly issued cannot assert such title in a court of law as against the holder of a patent for the same land, since such patent can only be impeached in a court of equity, unless void on its face. See

Gregg v. Sayre, 8 Pet. (U. S.) 244; Swayse v. Burke, 12 Pet. (U. S.) 11.

In the case of *Simmons v. Wagner*, 101 U. S. 260, it is maintained, however, that a person in possession of public land under a certificate of the register that he had paid for the same, without a patent, can successfully defend against an action in ejectment to recover the possession by the holder of a patent issued upon a subsequent purchase of the land as a part of the public domain; the court basing its decision upon the ground that the patent was absolutely null and void, and therefore (following the decision in *Sherman v. Buick*, 93 U. S. 209, which holds that though where a patent is merely voidable it can only be set aside by a court of equity, yet that an absolute want of power to issue the patent might be shown in a court of law) might be defeated in a court of law. The court *citing*, to sustain this decision, *Wirth v. Branson*, 98 U. S. 118; *Frisbie v. Whitney*, 9 Wall. (U. S.) 187; *Lytle v. Arkansas*, 9 How. (U. S.) 314. It was said in the opinion of the court that "where the right to a patent has once become vested in a purchaser of public land, it is equivalent so far as the government is concerned to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty. *Barney v. Dolph*, 97 U. S. 652; *Starks v. Starrs*, 6 Wall. (U. S.) 402."

The apparent discrepancy existing between the case of *Simmons v. Wagner*, 101 U. S. 260, and the cases cited in the first part of this note may be obviated by the following considerations: namely, In the case of *Simmons v. Wagner*, the defendant was in possession under a certificate of purchase from the Land Department. The plaintiff brought an action of ejectment for the land, setting up in support of his claim a patent issued to him. It being a settled principle of law in actions of ejectment that the plaintiff must succeed, not by the weakness of the defendant's title, but by the strength of his own (*Wordworth v. Fulton*, 1 Cal. 295, 309; *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626), it devolved upon the plaintiff to establish his claim. And while the defendant could not set up in opposition his equitable title, yet he

might attack the plaintiff's and show that the conveyance to him was void, owing to a want of power in the parties issuing it to execute it. While a patent may not be attacked collaterally even for fraud in a court of law, still the defendant may set up as a defense that there was no power in the officers issuing the patent to execute it. *Sherman v. Buick*, 93 U. S. 210; *EJECTMENT*, vol. 6, pp. 245 k, 245 q; 4 Minor's Inst. 371; *Wordworth v. Fulton*, 1 Cal. 595.

In the consideration of this principle the rule is to be remembered that the practice of the Federal courts conforms as nearly as practicable to that of the courts of the State in which they sit. This rule cannot be held to apply to such an extent as to allow the holder of any equitable title to assert it in a court of law as against the holder of a patent. The language in the case of *Bagnell v. Broderick*, 13 Pet. (U. S.) 436, conclusively establishes this principle; there the court say: "Congress has the sole power to declare the effect and precedence of titles to the public lands emanating from the United States, and whatever may be the equities outstanding in third parties, the patentee has a legal title and the State law cannot confer upon the equitable owner the right to maintain ejectment against the patentee." See also *Wilcox v. Jackson*, 13 Pet. (U. S.) 498.

The case of *O'Brien v. Perry*, 1 Black (U. S.) 132, is apt to appear to militate against the principles announced in *Bagnell v. Broderick*, 13 Pet. (U. S.) 436, but a closer study will show that it does not. The case was an action at law by the patentee to recover possession, and it was held that according to the practice of the Supreme Court of Missouri, it was competent for the defendant to set up a prior equitable title in bar of the suit, in the State court.

In *Arkansas*, it has been held that an entry with the register of the United States Land Office in accordance with a law authorizing him to act, and a receipt of the purchase money by the proper officer, although no patent be issued, vests such title and legal interest as enables a purchaser to maintain ejectment. *Trulock v. Taylor*, 26 Ark. 54.

So also in *Wisconsin*, it is held that the grantee or assignee on a certifi-

A patent once issued, having been duly signed, countersigned, and delivered, cannot be recalled, nor can it be canceled by any act of the government officers, nor can it be collaterally impeached in an action at law. The only remedy where it has been fraudulently obtained is by bill in equity in the name of the United States.¹ Title by patent from the United States is title by record, and though it is usual to deliver a patent to the claimant, as in case of all other deeds, yet delivery of it is not necessary in order to give it effect.²

cate for entry of land at the government land office has a "valid subsisting interest" in the land to which the right in possession, is incident, and upon which he may maintain ejectment. *McLane v. Bovee*, 35 Wis. 22.

But in all cases the principle must be considered as established beyond controversy, for in no Federal court can an action of ejectment be maintained by the holder of the equitable title as against the holder of a patent from the United States.

1. *Moore v. Robbins*, 96 U. S. 530; *Hughes v. U. S.*, 4 Wall. (U. S.) 232; *Quinn v. Chapman*, 111 U. S. 445; *St. Louis Smelting etc. Co. v. Kemp*, 104 U. S. 636; *U. S. v. Marshall Silver Min. Co.*, 129 U. S. 579; *Gilmore v. Sapp*, 100 Ill. 297; *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626.

"A patent is the highest evidence of title and is conclusive until annulled by a judicial tribunal." *U. S. v. Stone*, 2 Wall. (U. S.) 535; *Bagnell v. Broderick*, 13 Pet. (U. S.) 450.

After a patent for public land is issued by the Land Department, delivered and accepted by the grantee, all control by the executive department of the government over the title ceases. *Moore v. Robbins*, 96 U. S. 530; *Warren v. Van Brunt*, 19 Wall. (U. S.) 646; *Bicknell v. Comstock*, 113 U. S. 149; and a subsequent destruction or mutilation of this record by such department does not in the least impair its validity. *Bicknell v. Comstock*, 113 U. S. 149.

Where a patent issued in the name of James B by a mistake on a purchase by John B, was never delivered to James B but was delivered to the true purchaser, the Commissioner of the General Land Office has power to cancel the patent and issue a new one in the name of John B, since the power to correct the clerical mistake is a necessary incident to the administration of the department. The latter

patent vested the title in John B superior to that of a prior purchaser on execution sale against James B. *Bell v. Hearne*, 19 How. (U. S.) 252 (reversing 10 La. Ann. 515). See also *Le Roy v. Clayton*, 2 Sawy. (U. S.) 502; *Marsh v. Nichols*, 128 U. S. 605, where the case of *Bell v. Hearne* is cited and approved.

A court of equity will vacate a patent of the United States for a tract of land, obtained by mistake of the officers of the land office, to the end that a clear title may be transferred to the previous purchaser, upon a bill filed for that purpose by the United States. *Hughes v. U. S.*, 4 Wall. (U. S.) 232.

A Seeming Exception.—"But it has always been held," says Justice Miller, in delivering the opinion of the court in the case of *Sherman v. Buick*, 93 U. S. 209, "that an absolute want of power to issue a patent can be shown in a court of law to defeat a title set up under it, though where it is merely voidable the party may be compelled to resort to a court of equity to have it so declared. *Stoddard v. Chambers*, 2 How. (U. S.) 317; *Easton v. Salisbury*, 21 How. (U. S.) 426; *Reichart v. Felps*, 6 Wall. (U. S.) 160." Therefore, testimony whether parol or documentary which shows a want of power in officers to issue a patent, is admissible at law to defeat a title set up under it, in which case his patent is not merely voidable but absolutely void, and the party is not obliged to resort to a court of equity to have it so declared. *Sherman v. Buick*, 93 U. S. 209; *Patterson v. Tatum*, 3 Sawy. (U. S.) 164.

2. *U. S. v. Schurz*, 102 U. S. 378; *Marbury v. Madison*, 1 Cranch (U. S.) 137. In this latter case the court in the course of its opinion has to say: "In all cases of letters patent certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal

A patent being the mere evidence of a grant, the officer who issues it acts ministerially and not judicially.¹ It would seem, therefore, that a *mandamus* would lie in favor of the party entitled to such patent to compel its issuance;² such, however, is not always the case. It is certain that since every patent is required to be signed by the President, no *mandamus* can issue to the Commissioner of the Land Office, or to the Secretary of the Interior, to cause either of them to issue such patent;³ though they may be required to prepare it and to lay it before the President for his signature.⁴ And in all cases a *mandamus* will lie to have a patent already issued delivered to the party entitled to it.⁵ The interest possessed by the holder of an equitable estate in public land is not such as will enable him to oust those who are in possession of the land, even though they be there without title, or in other words, are mere naked trespassers. The only course is for the complainant to perfect his title by obtaining a patent, after which he may proceed by an action at law to recover the possession.⁶

delivery to the person is not among them." See also *Green v. Liter*, 8 Cranch (U. S.) 229; *Ex parte Kuhtman*, 3 Rich. Eq. (S. Car.) 257; *Donner v. Palmer*, 31 Cal. 500; *LeRoy v. Jamison*, 3 Sawy. (U. S.) 369; *Gillmore v. Sapp*, 100 Ill. 297.

1. *U. S. v. Stone*, 2 Wall. (U. S.) 525.

2. This would follow from the general principle governing the issue of a writ of *mandamus*; namely, that wherever there is no other remedy for the injured party and no discretion vested in the officer as to the performance of a duty, but such duty is a purely ministerial one, he may be compelled to perform it by means of a *mandamus*. See *MANDAMUS*, vol. 14, pp. 98, 99; 4 *Minor's Insts.* 500.

3. *Cox v. McGarrahan*, 9 Wall. (U. S.) 298; *U. S. v. Commissioner*, 5 Wall. (U. S.) 563.

U. S. Rev. Stat., § 450 requires patents for lands to be signed by the President, either in person, or in his name by a secretary under his direction. *McGarrahan v. New Idria Min. Co.*, 96 U. S. 316.

By reason of such requirement it is plain therefore that no proceeding by *mandamus* or otherwise can be had to compel either the Commissioner of the General Land Office or the Secretary of the Interior to issue such a patent. *Cox v. McGarrahan*, 9 Wall. (U. S.) 298; *McCluny v. Silliman*, 2 Wheat. (U. S.) 369.

4. This has not been in terms decid-

ed. It would seem to follow, however, from the decision rendered in *Butterworth v. U. S.*, 112 U. S. 50, that a *mandamus* would issue to compel the Commissioner of Patents to prepare a patent, to countersign it, and to lay it before the Secretary of the Interior for his signature, the Commissioner having decided that the relator was entitled to it. It would seem also to follow from the decision mentioned above in the case of *U. S. v. Stone*, 2 Wall. (U. S.) 525, where it was said that the issuing of a patent was a ministerial and not a judicial duty.

Much confusion is apt to follow from a hasty examination of the cases, since in one the issuing of a patent is declared to be a ministerial duty and in another it is doubted whether such issuance can be enforced by *mandamus*; but the rules as above stated seem to involve the whole doctrine upon the subject.

5. *U. S. v. Schurz*, 102 U. S. 378; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Kendall v. U. S.*, 12 Pet. (U. S.) 524; *Decatur v. Paulding*, 14 Pet. (U. S.) 497; *Comm'rs of Patents v. Whiteley*, 4 Wall. (U. S.) 522; *McCluny v. Silliman*, 2 Wheat. (U. S.) 369; *U. S. v. Stone*, 2 Wall. (U. S.) 525; *MANDAMUS*, vol. 14, pp. 142, 143.

6. The case of *Fussell v. Gregg*, 113 U. S. 550, is the leading case upon the subject. It was there held that where the complainant has an equitable estate in fee in the premises in dispute, and the defendants are in possession

The patent for lands must be executed strictly in the manner provided by statute. Every integral part of the execution is essential to its perfection, and before it can operate as a grant, the last formalities of the law prescribed for its execution must be complied with.¹ Like other deeds, it is also necessary that it be

without title, in other words are mere naked trespassers, a court of equity has no jurisdiction to oust the defendants and put in possession the claimant, the relief being such as a court of law is competent to grant; the court urging the point that the complainant could turn the defendants out of possession only upon the strength of the legal title, and that, therefore, his only remedy was first to acquire the legal title, and having done this, to bring his action in a court of law. The opinion in this case is sustained by *Galt v. Galloway*, 4 Pet. (U. S.) 332; *Hipp v. Babin*, 19 How. (U. S.) 271; *Parker v. Winnipiseogee etc. Mfg. Co.*, 2 Black (U. S.) 545; *Grand-Chute v. Winnegar*, 15 Wall. (U. S.) 355; *Lewis v. Cocks*, 23 Wall. (U. S.) 466; *Killian v. Ebbinghaus*, 110 U. S. 568; *Fussell v. Hughes*, 113 U. S. 565.

In *Fussell v. Gregg*, 113 U. S. 550, the court by Woods, J., observed: "The case as alleged is that she had an equitable estate in fee in the premises and that the defendants . . . are in possession without title—in other words, are mere naked trespassers. The theory of her appeal seems to be that because she has an equitable title only, and for that reason could not recover in an action at law, a court of equity has jurisdiction of her case; but this is plainly an error. Mr. Justice Bradley in *Young v. Porter*, 3 Wood (U. S.) 342."

1. Form and Style of Patent.—*McGarrahan v. New Idria Min. Co.*, 96 U. S. 316.

Therefore, the record to prove a valid patent must show that all the provisions of the law were complied with. The patent must be signed in the name of the President, either by himself or his secretary, sealed with the seal of the General Land Office, and countersigned by the recorder. This countersigning by the recorder cannot be considered as merely directory; the record of a patent is not equivalent to its countersignature. *McGarrahan v. New Idria Min. Co.*, 96 U. S. 316. See also U. S. Rev. Stat., § 450, where the President is authorized to appoint, by and with the advice and consent of the Senate, a

special secretary whose duty it shall be to sign in his name and for him all patents for lands sold or granted under the authority of the United States.

Officers of the Land Department have no authority to insert in a patent any other terms than those of conveyance, with recitals to show compliance with the law, and every unauthorized insertion is void. *Deffebach v. Hawke*, 115 U. S. 392; *Francoeur v. Newhouse*, 40 Fed. Rep. 618.

The purchaser of a title under a patent is chargeable with notice of whatever the patent recites. *U. S. v. Maxwell Land-Grant Co.*, 21 Fed. Rep. 19.

In the case of *Hall v. Martin* (Ky. 1889), 11 S. W. Rep. 953, a patent described the specific boundaries of the land patented, as much so as the courses and distances in an ordinary deed, stated the number of acres, and excluded therefrom the number of acres contained in prior grants (being 210½ acres). It was claimed that because the exclusions were not described so as to be identified by boundary, etc., the patent was void for uncertainty. But it was held otherwise. See also *Hamilton v. Fugett*, 81 Ky. 366; *Hillman v. Hurley*, 82 Ky. 626.

State Patents.—The requirements of the various States as to the form and requisites of a patent vary. It is usually made necessary that the governor sign it, and that the great seal of the State be affixed.

A *Mississippi* statute required that the "patent shall be signed by the governor, and attested by the secretary of state, with the great seal of the State.

It was held that under this, a patent signed by the governor and sealed with the great seal was valid though not signed by the secretary of state. *Exum v. Brister*, 35 Miss. 391.

And in *New York* it was held that a patent without the governor's signature was valid if sealed with the great seal. The fact of the seal being attached was considered as evidence that the patent had been approved by the governor. *People v. Livingston*, 8 Barb. (N. Y.) 253.

In *Arkansas* patents are to be signed

recorded. A failure to record, however, does not defeat the grant, but only deprives the party of one of the means of making his proof; he can still maintain his rights under it by the production of the patent itself.¹

A patent for land is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles, until set aside or annulled, unless it be absolutely void upon its face;² and the presumption is always that it is valid and properly executed and passes a legal title.³

There is one case and only one in which it may be attacked collaterally in a court of law, and that is where it is absolutely void upon its face; as where the issuing of it was without authority of law, or in violation of law.⁴

The right to a patent once vested is treated by the government, when dealing with the land, as equivalent to a patent already issued, and when in fact it does issue it relates back to the incep-

by the governor and sealed with the great seal of the State. *State v. Morgan*, 52 Ark. 150.

1. *McGarrahan v. New Idria Min. Co.*, 96 U. S. 316.

2. It would seem, however, that this does not influence in the least the requirements in the several States that all deeds to real property of whatever character must be recorded in order to be binding against subsequent *bona fide* purchasers for value. The record spoken of is the record of the General Land Office. See *Love v. Simms*, 9 Wheat. (U. S.) 516.

3. *U. S. v. Stone*, 2 Wall. (U. S.) 525; *Bagnele v. Broderick*, 13 Pet. (U. S.) 450; *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92; *Warren v. Van Brunt*, 19 Wall. (U. S.) 646; *Hodper v. Scheimer*, 23 How. (U. S.) 235; *St. Louis Smelting etc. Co. v. Kemp*, 104 U. S. 636; *Wilcox v. Jackson*, 13 Pet. (U. S.) 498.

Confirmation of Grants by Congress.—If a tract confirmed by Congress has clearly defined boundaries or is capable of identification, the confirmation perfects the claimant's title, and a subsequent patent serves only as a documentary evidence of that title. *Morrow v. Whitney*, 95 U. S. 551; *Whitney v. Morrow*, 112 U. S. 693.

A patent once issued remains good as to all the world until canceled for fraud in an action brought by the United States government; and in a collateral proceeding cannot be attacked or assailed unless void on its face. *Turner v. Donnelly*, 70 Cal. 597; *Sanford*

v. Sanford (Oregon, 1887), 13 Pac. Rep. 602.

3. *Minter v. Crommelin*, 18 How. (U. S.) 87.

But in a suit brought by the United States to cancel a patent for fraud on the part of the government officials; for example, where they are charged with having procured its issue to a fictitious person, there is no presumption of the regularity of the proceedings preliminary to the issue of such patent. *Moffat v. U. S.*, 112 U. S. 24.

Compare U. S. v. Silver Min. Co. 128 U. S. 678.

And the presumptions which arise in support of a patent for public land, issued by a State, can have no force in face of the facts that the State selection of the same was originally void, and that the selection has been invalidated by Congress. *Chant v. Reynolds*, 49 Cal. 213.

4. *Rice v. Minnesota etc. R. Co.*, 1 Black (U. S.) 360; *Polk v. Wendal*, 9 Cranch (U. S.) 99; *Polk v. Wendell*, 5 Wheat. (U. S.) 303; *Doe v. Wynn*, 11 Wheat. (U. S.) 388.

It is sometimes said that there are additional cases in which a patent may be attacked collaterally in a court of law; for example, where it is prohibited by statute, or where the State had no title. *Rice v. Minnesota etc. R. Co.*, 1 Black (U. S.) 360; but these may be more properly considered as being but particular applications of the rule stated above. See also upon this subject, *Stoddard v. Chambers*, 2 How. (U. S.) 284; *U. S. v. Stone*, 2 Wall. (U. S.)

tion of the right of the patentee, so far as it may be necessary to cut off all intervening claimants.¹

All patents for lands which have been previously granted, reserved for sale, or appropriated, are void.² Likewise, patents issued to fictitious parties do not transfer the title, and no one, not even a subsequent *bona fide* purchaser for value, can derive any right under a conveyance to such fictitious patentee.³

As before stated, a patent is nothing more nor less than a deed in which the United States is the grantor and the patentee is the grantee, and therefore the rules applicable to the interpretation and construction of these generally are to govern also in the case of patents.⁴ In the exercise of equity jurisdiction courts may inquire into the allegations of fraud or mistake leading to the issue of a patent to one person when it should have been issued to another, and where it so appears may decree the legal title to be held in trust for the party equitably entitled to the land.⁵ A

525; *St. Louis Smelting etc. Co. v. Kemp*, 104 U. S. 636.

1. *Starks v. Starrs*, 6 Wall. (U. S.) 402; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92; *Shepley v. Cowan*, 91 U. S. 330; *Lessieur v. Price*, 12 How. (U. S.) 59; *Flint etc. R. Co. v. Gordon*, 41 Mich. 420; *Astrom v. Hamlin*, 3 McLean (U. S.) 107; *U. S. v. Freyberg*, 32 Fed. Rep. 195; *French v. Spencer*, 21 How. (U. S.) 228.

This rests partly upon the equitable maxim that "equity regards that as done which ought to have been done." See EQUITY, vol. 6, p. 705, and cases cited.

Therefore where a party aliened his equitable interest in the land after entry and prior to the issue of the patent, the issue of the patent to him vested in him the legal title to the land in trust for the other. The patent relates back to the act erecting the equitable title. *Callahan v. Davis*, 90 Mo. 78; *Landes v. Brant*, 10 How. (U. S.) 372; *Touchard v. Crow*, 20 Cal. 160; *Ford v. French*, 72 Mo. 250.

2. *Morton v. Nebraska*, 21 Wall. (U. S.) 660; *Relchert v. Felps*, 6 Wall. (U. S.) 160; *U. S. v. Stone*, 2 Wall. (U. S.) 525; *Polk v. Wendal*, 9 Cranch (U. S.) 87; *Polk v. Wendell*, 5 Wheat. (U. S.) 293; *Doe v. Winn*, 11 Wheat. (U. S.) 380; *Stoddard v. Chambers*, 2 How. (U. S.) 284; *Minter v. Crommelin*, 18 How. (U. S.) 87; *Rice v. Minnesota etc. R. Co.*, 1 Black (U. S.) 360; *Francoeur v. Newhouse*, 40 Fed. Rep. 618.

3. *Moffat v. U. S.*, 112 U. S. 24. And since such a patent conveys no title, one claiming under a purchase from the

pretended patentee can take none. *Moffat v. U. S.*, 112 U. S. 27.

4. Thus a patent is to be interpreted as a whole, and the various provisions in connection with each other, and the legal deductions drawn therefrom are to be conformable with the document. *Brown v. Huger*, 21 How. (U. S.) 305; *U. S. v. Stone*, 2 Wall. (U. S.) 525.

The court cannot go beyond the specific terms used in a patent for a grant of land and determine the tract and quantity of the land by a supposed equity arising out of the preemption laws. *Gazzam v. Phillips*, 20 How. (U. S.) 372 (disapproving *Brown v. Clements*, 3 How. (U. S.) 650).

All the presumptions which apply in favor of a deed or other sealed instrument apply also in the case of a patent. *Minter v. Crommelin*, 18 How. (U. S.) 87; *DEEDS*, vol. 5, p. 423.

5. *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Rose v. Richmond Min. Co.*, 17 Nev. 25; *Plummer v. Brown*, 70 Cal. 544.

Thus, the locator of an agricultural scrip on a certain quarter section knew that by mistake a prior purchaser's application had been misdescribed that certain correct entries had been changed to correspond with the misdescription, and that such prior purchaser had occupied the land in good faith for many years; it was held under these circumstances that the locator took his patent charged with trust in favor of such prior purchaser. *Widdicombe v. Childers*, 124 U. S. 400.

So also where one owning a government land warrant issued in the name

patent always issues in the name of the party who is originally entitled to it. In the case of the death of such person before the patent is issued, it issues in his name to his heirs who hold it as if the patent had been issued directly to them. A special provision is made for this in most cases, for it seems that the principle is otherwise where there is no statutory provision made for it.¹ At common law a grant to a deceased party is as ineffectual to pass the title of the grantor as if made to a fictitious person.² The doctrines laid down as to the validity, character of patents, and their cancellation, etc., are founded upon general principles of law and equity, and are not peculiarly applicable to the patents from the United States alone; they apply as well to patents and other evidences of title issued by the States, and, therefore, no special doctrine need be laid down for cases of patents issued by a State.³

of another, and not assigned by him, enters land under the warrant to himself, but owing to the want of assignment makes the entry in the name of the other, the latter takes the legal title to the land as trustee for the former. *Key v. Jennings*, 66 Mo. 356.

But to charge the holder of a patent as a trustee it is not sufficient to show that the patent should not have issued to him, but it must also appear that it should have been awarded to the party claiming the benefit of the trust. *Bohall v. Dilla*, 114 U. S. 47.

Where a party has acquired as a preemption claimant the legal title to land from the United States, another preemption claimant cannot prove him a trustee and compel him to make conveyance of such legal title, unless such other has complied with the provisions of the preemption law, or was prevented from so doing by some act, by means of which the holder of the legal title acquired an undue advantage in the proceedings. *Sacramento Sav. Bank v. Hynes*, 50 Cal. 195.

1. *Cox v. Prewitt* (Ky. 1889), 10 S. W. Rep. 432; *Briggs v. McClain*, 43 Kan. 652. Statutory provision is made by *Kentucky Gen. St.*, art. 1, ch. 50, by § U. S. Stat. at L. 31; 24 U. S. Stat. at L. 219, and by various other statutes.

5 U. S. Stat. at L. 31 (act of May 20, 1836), declares, "that in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who has died or who shall hereafter die, before the date of such patent,

the title to the land vested therein shall inure to and become vested in the heirs, devisees and assigns of such deceased patentee as if the patent had issued to deceased person during life." See this quoted and applied in *Davenport v. Lamb*, 13 Wall. (U. S.) 428.

2. *Davenport v. Lamb*, 13 Wall. (U. S.) 430; *Galt v. Galloway*, 4 Pet. (U. S.) 332; *McDonald v. Smalley*, 6 Pet. (U. S.) 261; *Galloway v. Finley*, 12 Pet. (U. S.) 298; *McCracken v. Beall*, 3 A. K. Marsh. (Ky.) 210; *Thomas v. Wyatt*, 25 Mo. 26; 31 Mo. 188; 69 Am. Dec. 446, note; *Lyles v. Lescher*, 108 Ind. 382; *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543; *Ready v. Kearsley*, 14 Mich. 225; GRANTOR AND GRANT-EE, vol. 9, p. 40.

3. In the case of *Com. v. Bowman*, (Ky. 1889), 11 S. W. Rep. 28, it appeared that in the settlement of the boundary line between Kentucky and Tennessee, a portion of land containing seven thousand eight hundred acres lying in Tennessee was left the property of, and subject to the disposition of Kentucky. In 1836 the State of Kentucky issued a patent to defendant's ancestors for seven thousand eight hundred acres, and nearly fifty years afterwards sued in a Kentucky court to have the patent corrected so as to convey only fourteen hundred acres, claiming that the first grant was obtained by fraudulent representations. It was held, however, that the jurisdiction of the State of Kentucky over the land was entirely exhausted by the first execution of the patent; and that the suit must be dismissed for want of jurisdiction.

VIII. CANCELLATION OF PATENTS.—In the exercise of that jurisdiction, which according to accepted principles is possessed by courts of equity, such courts have authority to examine into the validity of all patents where fraud is charged in the obtaining of them; and where it appears that in the issuing of such patents fraud or mistake was committed, a decree will be made setting them aside.¹ But while courts of equity have power to set aside, to cancel, or to correct patents or other evidences of title in cases of fraud or mistake, it can only be done upon specific averment, supported by clear and satisfactory proof.² Every intendment is to be made in favor of the patent and the general rule that

1. *U. S. v. Beebe*, 127 U. S. 338; *Moore v. Robbins*, 96 U. S. 530; *Miller v. Kerr*, 7 Wheat. (U. S.) 1; *Brush v. Ware*, 15 Pet. (U. S.) 93; *Bodley v. Taylor*, 5 Cranch (U. S.) 196; *Hoofnagle v. Anderson*, 7 Wheat. (U. S.) 212; *Attorney Genl. v. Vernon*, 1 Vern. 277.

U. S. v. Williams, 30 Fed. Rep. 309; *U. S. v. Pratt Coal etc. Co.*, 18 Fed. Rep. 708; *U. S. v. White*, 17 Fed. Rep. 561; *U. S. v. Throckmorton*, 98 U. S. 68; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273; *Colorado Coal etc. Co. v. U. S.*, 123 U. S. 307; *Vance v. Burbank*, 101 U. S. 514; *Smith v. Ewing*, 23 Fed. Rep. 741; *Garland v. Wynn*, 20 How. (U. S.) 6; *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Warren v. Van Brunt*, 19 Wall. (U. S.) 648; *Lee v. Johnson*, 116 U. S. 48; *U. S. v. Minor*, 114 U. S. 233; *Shepley v. Cowan*, 91 U. S. 330; *U. S. v. Maxwell Land-Grant Co.*, 121 U. S. 325; *Meador v. Norton*, 11 Wall. (U. S.) 442.

Also where a party claims that his title is superior to that of the patentee on account of fraud and deceit practiced by such patentee in obtaining it, his only remedy is by a bill in equity; he cannot set up such facts in an ejectment suit. *Steel v. St. Louis Smelting etc. Co.*, 106 U. S. 447; *Moore v. Robbins*, 96 U. S. 530.

A land patent fraudulently obtained from the government by one knowing that another person has a prior right to the land may be set aside by an information in the nature of a bill in equity filed by the attorney of the United States for the district in which the land lies, although a simple bill in equity by the United States would be a more proper remedy. *U. S. v. Hughes*, 11 How. (U. S.) 552.

In no case have the officers of the land department any power to cancel

or set aside a patent after it has once issued. Upon its issuance a patent passes completely beyond the scope of their jurisdiction. *Moore v. Robbins*, 96 U. S. 530; *Shepley v. Cowan*, 91 U. S. 340; *Field v. Seabury*, 19 How. (U. S.) 323.

The United States circuit court is without jurisdiction of a suit attacking for fraud the action of a patentee of public land and the officers of the land department, where the plaintiff does not claim an equitable interest in the land, but merely avers that such action has deprived him of an appeal from a decision of the Land Department touching his own claims. *Craig v. Leitensdorfer*, 123 U. S. 189. See also *Garland v. Wynn*, 20 How. (U. S.) 6.

2. A mere preponderance of evidence is not sufficient. *U. S. v. Maxwell Land-Grant Co.*, 121 U. S. 325; 122 U. S. 365; *Colorado Coal etc. Co. v. U. S.*, 123 U. S. 307; *U. S. v. Atherton*, 102 U. S. 372; *U. S. v. Wenz*, 34 Fed. Rep. 154; *Vance v. Burbank*, 101 U. S. 514; *U. S. v. Hancock*, 133 U. S. 193; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Story's Eq. Jur.*, § 157.

In the case of *Atlantic Delaine Co. v. James*, 94 U. S. 207, Mr. Justice Strong, in delivering the opinion of the court, observes: "Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a fair case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them." Quoted and approved in *U. S. v. Maxwell Land-Grant Co.*, 121 U. S. 380.

When a sale has been set aside and

fraud is never to be presumed, and that officers are to be presumed to have done their duty applies in all its force.¹

Where the government is under obligations to issue a patent to the rightful owner of the land, the Attorney-General may institute a suit in equity in the name of the United States to annul a patent obtained by fraud on the part of the patentee;² but such suit is brought only where the United States has an interest and not for the purpose of benefiting one of two rival claimants, to neither of whom the United States owes any obligation in the premises.³

The frauds for which a bill in equity will be sustained to set aside a patent are frauds extrinsic or collateral to the matter tried by the first tribunal, and not the fraud which was in issue in a previous suit; and it must also appear that such frauds affected the determination of the tribunal so that but for them the case would have been decided in the complainant's favor.⁴

the surrender of the patent required by the school land commissioners on account of fraud and deceit having been practiced; and the land has again been sold and a second patent issued, the latter patentee may sustain a bill in equity to have the first patent canceled if the holder of such patent refuse to give it up; and may enjoin him from asserting title to the land. *Burrows v. Rutledge*, 76 Wis. 22; *Putnam v. Rutledge*, 76 Wis. 29.

In the case of *Lyman v. U. S. Ins. Co.*, 2 Johns. Ch. (N. Y.) 632, the court by Kent, Ch., said: "The cases which treat of this head of equity jurisdiction all require a mistake to be made out in the most clear and decided manner and to the entire satisfaction of the court."

1. *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273; *Minter v. Crommelin*, 18 How. (U. S.) 87; *Colorado Coal etc. Co. v. U. S.*, 123 U. S. 307; *FRAUD*, vol. 8, p. 635; *U. S. v. Marshal Silver Min. Co.*, 129 U. S. 579.

Fraud on the part of officers of the Land Department and others is never to be presumed, but must be clearly proved, and it is a circumstance weighing strongly in favor of the validity of the patent that at every stage the survey was contested. *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273; *Stringer v. Young*, 3 Pet. (U. S.) 320; *Patterson v. Jenks*, 2 Pet. (U. S.) 216.

This rule applies as well in case of patents issued by a State as when issued by the United States. *Hebbron v. Graves*, 78 Cal. 380; *Fuller v. Codrington*, 74 Tex. 334.

2. *U. S. v. Beebe*, 17 Fed. Rep. 36;

affirmed 127 U. S. 338; *Moore v. Robbins*, 96 U. S. 535; *U. S. v. Pratt Coal etc. Co.*, 18 Fed. Rep. 708; *U. S. v. Williams*, 30 Fed. Rep. 309; *U. S. v. Throckmorton*, 98 U. S. 68.

The United States if not a real party in such actions is affected by the laches of those whose interests it asserts, and a neglect until forty-five years after the cause of action has accrued is a bar to the action. *U. S. v. Beebe*, 127 U. S. 338.

Such a bill in equity by the United States (*i. e.*, one to set aside a patent) is not to be treated as a writ of error or as a petition for a rehearing in chancery, or as if it were a mere re-trial of the case as it was before the land office, with such additional proof as the parties may be able to furnish. *U. S. v. Marshal Silver Min. Co.*, 129 U. S. 579.

Where the only objection to a patent is that it is void for excess, the question is one exclusively between the United States and the patentee, and in which no third party can interfere. *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626.

3. *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273.

4. *U. S. v. White*, 17 Fed. Rep. 561; *U. S. v. Throckmorton*, 98 U. S. 68; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273; *Steel v. St. Louis Smelting etc. Co.*, 106 U. S. 447; *Stringer v. Young*, 3 Pet. (U. S.) 320; *Craig v. Leitensdorfer*, 123 U. S. 189; *Patterson v. Jenks*, 2 Pet. (U. S.) 216.

To obtain relief upon the ground of fraud it must appear that a party was prevented thereby from exhibiting his

Where a patent has been wrongfully issued to one not entitled to it, the United States is not the only party who may file a bill to have such patent canceled; but any one claiming adversely as a purchaser or as a donee of the United States may maintain a suit for that purpose.¹

A patent can only be set aside in favor of those whose title was at the time such as to enable them to resist successfully any action of the government respecting it.² It will be observed that when a patent is merely voidable, which is the case when the land officers are guilty of fraud or mistake in issuing it, it is necessary to proceed by bill in equity in order to have it canceled; but where such patent is absolutely void, as, for example, through lack of authority in the officers to issue it, or when the defect is apparent on its face, it may be declared void in a court of law even in a collateral proceeding.³

case fully to the Department, so that it may properly be said that there was never a decision in a real contest about the subject-matter of inquiry. An allegation in a bill of equity that false testimony was submitted is not sufficient where the party had opportunity to meet it and took all the appeals which the law affords. *Vance v. Burbank*, 101 U. S. 514.

In the case of *Lee v. Johnson*, 116 U. S. 48, the doctrine is clearly and distinctly laid down that it is not enough that fraud and imposition have been practiced upon the Land Department, or that false testimony or fraudulent documents have been presented; it must appear that they affected its determination, which otherwise would have been in favor of the plaintiff. And this decision is also supported by the principle that to entitle a party to relief in equity against a patent, he must show a better right to the land than the patentee, and not merely prove that the patentee is not entitled to it. *Sparks v. Pierce*, 115 U. S. 408; *Bohall v. Dilla*, 114 U. S. 47; *U. S. v. Minor*, 114 U. S. 233; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92.

1. The language of Justice Miller in the case of *Moore v. Robbins*, 96 U. S. 530, is somewhat misleading where he observes, that in case a lawful reason exists why the patent should be canceled or rescinded, the appropriate and only remedy is by a bill in chancery brought by the government.

But it seems that any party who is a contestant claimant for the land may have appropriate relief in a court of equity, and may himself institute pro-

ceedings to obtain such relief. *Lee v. Summers*, 2 Oregon 268; *Moore v. Robbins*, 96 U. S. 530; *Doe v. Winn*, 11 Wheat. (U. S.) 380; *Bagnell v. Broderick*, 14 Pet. (U. S.) 436.

In the case of *Shepley v. Cowan*, 91 U. S. 340, the court by Field, J., observes: "If they (the land officers) err in the construction of law applicable to any case, or a fraud is practiced upon them . . . their rulings may be reversed and annulled by the courts when a controversy arises between private parties founded upon their decisions."

2. *Moore v. Wilkinson*, 13 Cal. 488; *Waterman v. Smith*, 13 Cal. 373; *Lee v. Summers*, 2 Oregon 260.

3. 2 *Minor's Inst.* 900; *Sherman v. Buick*, 93 U. S. 209; *Stoddard v. Chambers*, 2 How. (U. S.) 317; *Easton v. Salisbury*, 21 How. (U. S.) 426; *Reichart v. Phelps*, 33 Ill. 439; affirmed 6 Wall. (U. S.) 160; *Blankenpickler v. Anderson*, 16 Gratt. (Va.) 62; *Masters v. Eastis*, 3 Port. (Ala.) 368; 2 *Lom. Dig.* 514; *Simmons v. Wagner*, 101 U. S. 260; 3 *Washburne on Real Prop.* 175; *Cooper v. Roberts*, 6 McLean (U. S.) 93.

The doctrine is thus stated in 2 *Minor's Inst.* 897: "When a false suggestion, mistake, or irregularity appears on the face of the grant, it is absolutely void, and may be declared so to be in whatever court it is adduced as an evidence of title. So it seems that it may be impeached in a court of law for any matter which makes it absolutely void, as where the State has no title to the thing granted, where the officer had no authority to

It is a doctrine well established and grounded on accepted principles, that whenever a sovereign appears in a court as a suppliant for its aid, it becomes subject to all those rules of equity which govern in the case of private litigants.¹ So that when the United States or a State files a bill in equity to cancel a patent for fraud or mistake in its issuance, it must comply with the equitable maxim, "he who asks equity must do it" and offer a return of the purchase money.² Also, though it is a general rule that the Statute of Limitations does not run so as to bar the claims of the sovereign, still if in a particular case equitable principles forbid the granting of relief, not sought until years after

issue the grant, or where the grantee was dead at the time of the issuing of it. But for causes anterior to its being issued which render it voidable merely and which are not apparent on its face, it appears to be impeachable only by *scire facias* or bill in equity." *Hambleton v. Wells*, 4 Call (Va.) 213; *Stringer v. Young*, 3 Pet. (U. S.) 341; *White v. Jones*, 4 Call (Va.) 253; 2 Am. Dec. 564; *Alexander v. Greenup*, 1 Munf. (Va.) 134; 4 Am. Dec. 541; *Polk v. Wendal*, 9 Cranch (U. S.) 87; 5 Wheat. (U. S.) 293; *Doe v. Winn*, 11 Wheat. (U. S.) 380; *Witherington v. McDonald*, 1 Hen. & M. (Va.) 306.

A patent issued in violation of law is void and may be shown to be so in a court of law. *Hic-tuk-ho-mi v. Watts*, 7 Smed. & M. (Miss.) 363; *Dixon v. Porter*, 23 Miss. 84.

1. *U. S. v. Beebee*, 17 Fed. Rep. 36; 127 U. S. 338; *Mitchell v. U. S.*, 9 Pet. (U. S.) 711; *U. S. v. Smith*, 94 U. S. 217; *The Siren*, 7 Wall. (U. S.) 159; *Brent v. Bank of Washington*, 10 Pet. (U. S.) 615; *People v. Clark*, 10 Barb. (N. Y.) 120; 9 A. G. Op. 204; *Mayor of Hull v. Horner*, 1 Cowp. 110; *Pomeroy's Eq.*, § 388.

In the case of *U. S. v. Smith*, 94 U. S. 217, it is observed that "the principles which govern inquiries as to the conduct of individuals in respect to their contracts, are equally applicable where the United States is a party."

In *State v. Snyder*, 66 Tex. 687, it is said: "There are many authorities to the effect that a State or other sovereignty when it becomes a litigant in its own courts, must have its rights determined by the same principles applicable to other litigants. That such is the correct rule there can be no doubt.

... In no country governed by law could the right of the sovereign and the subject be determined by

diverse principles." *Citing U. S. v. MacDaniel*, 7 Pet. (U. S.) 1; *The Floyd Acceptances*, 7 Wall. (U. S.) 675; *State v. Kroner*, 2 Tex. 492; *State v. Purcell*, 16 Tex. 305.

2. "An individual . . . would be compelled to do equity before he could enforce his legal right; and we can perceive no reason why the United States should be exempted from the fundamental rule of equity, subject to which its courts administer their remedy." *Brent v. Bank of Washington*, 10 Pet. (U. S.) 615.

The most important rule derived from the application of this maxim is that

Upon Cancellation of Patent Purchase Money Must be Returned.—In the case of *State v. Morgan*, 52 Ark. 150, it was held that a complaint in equity by which the State seeks to cancel its own patent and recover possession of the land, covered by it, on the ground that fraud was used in its procurement, is insufficient, unless it offers to restore to the defendant the purchase money and taxes paid by him and to pay the value of his improvements less the rents and profits, with which he ought to be charged. All this on the ground that "he who asks equity must do it." See also *Baymore v. Mullins*, 52 Ark. 207, 211; *U. S. v. State Nat. Bank*, 96 U. S. 30; *Terrill v. Dewitt*, 20 Tex. 260; *U. S. v. Beebee*, 17 Fed. Rep. 36; 127 U. S. 338; *U. S. v. Smith*, 94 U. S. 217; *Mitchell v. U. S.*, 9 Pet. (U. S.) 711; *U. S. v. Budd*, 43 Fed. Rep. 630; *EQUITY*, vol. 6, p. 707; *Whelan v. Reilly*, 61 Mo. 656; *Stull v. Harris*, 51 Ark. 294; *Ellis v. Ellis*, 54 Ala. 348. And it seems that this case correctly states the doctrine, since as already shown, the same rules of equity are to govern a State or sovereignty which comes into a court of justice as a private party. *Pomeroy's Eq.*, § 388; *Terrill v. Dewitt*, 20 Texas 260; *U. S. v.*

the right to obtain such relief had accrued, a court of equity will refuse the application of the sovereign made under such conditions.¹

IX. SCHOOL LANDS.—By several acts, passed at various times, Congress has granted to each of certain Territories, usually those

Beebe, 17 Fed. Rep. 36, 41; 127 U. S. 338; U. S. v. Smith, 94 U. S. 217; Mitchel v. U. S., 9 Pet. (U. S.) 711; U. S. v. Budd, 43 Fed. Rep. 630; EQUITY, vol. 6, p. 707; Wheelan v. Reilly, 61 Mo. 565; Stull v. Harris, 51 Ark. 294; Ellis v. Ellis, 84 Ala. 348.

This principle was also maintained in the case of *People v. Bryan*, 73 Cal. 376. It was there declared that no suit could be maintained for the cancellation of a patent on account of an innocent mistake in the procedure, unless an offer was made to return the purchase money. It did not, however, necessarily, confine the rule to cases of innocent mistake. See also, *People v. Morris*, 77 Cal. 208; *U. S. v. White*, 9 Sawy. (U. S.) 131; 17 Fed. Rep. 561.

The case of *State v. Snyder*, 66 Tex. 687, does not, as is sometimes maintained, militate against this principle. The constitutional provision that no money shall be drawn from the Treasury but in pursuance of specific appropriations made by law," was held up as one reason why the purchase money could not in that case be returned; the language in *Treasurer v. Wygall* (46 Tex. 465) was cited: "The key that unlocks the State Treasury is an act of the legislature directing the thing to be done which is demanded and not the judgment of a court, founded on any equitable consideration.

This case (*Texas v. Snyder*) itself recognizes and approves the doctrine that a sovereign seeking remedies in a court of equity must be governed by the same rules as private parties, and cites many cases to sustain that view.

The case of the *United States v. Minor* is sometimes cited in opposition to the statement of the text. It was certainly decided in that case that in the particular instance involved no return or offer of return of the purchase money was necessary, but it was because the purchase money was, by virtue of § 2262 of Revised Statutes, forfeited as a penalty for false swearing. *U. S. v. Minor*, 114 U. S. 233; U. S. Rev Stat., § 2262.

1. U. S. v. Beebe, 17 Fed. Rep. 36; 127 U. S. 388; *Maxwell v. Kennedy*, 8 How. (U. S.) 221; *Clarke v. Boorman*, 18 Wall. (U. S.) 509; *Badger v. Badger*, 2 Wall. (U. S.) 94; *Boone v. Chiles*, 10 Pet. (U. S.) 248; *Wilson v. Anthony*, 19 Ark. 16 (cited and approved in *Sullivan v. Portland etc. R. Co.*, 94 U. S. 806); *Harwood v. Cincinnati etc. R. Co.*, 17 Wall. (U. S.) 78; 2 Story's Eq., § 1520.

The equity courts adopt their own rule rather than the statutory limitation in such cases. Thus it is said in *Badger v. Badger*, 2 Wall. (U. S.) 94: "But there is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no Statute of Limitation covers the case. In such cases courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights."

And this case has been cited and approved many times. *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 592.

Doctrine of This Section Restated.—The conclusions then, derived from the foregoing presentation seem to be—

1. Patents can be impeached only for fraud or mistake practiced in their issuance; or when issued without authority or in violation of law. *Moore v. Robbins*, 96 U. S. 530; *Rice v. Minnesota etc. R. Co.*, 1 Black (U. S.) 360; *U. S. v. Beebe*, 127 U. S. 338; *U. S. v. Throckmorton*, 98 U. S. 68.

2. Patents issued fraudulently or by mistake are voidable merely and can only be impeached by a direct proceeding in equity. *U. S. v. Beebe*, 127 U. S. 338; *Miller v. Kerr*, 7 Wheat. (U. S.) 1; *U. S. v. Maxwell Land-Grant Co.*, 121 U. S. 325.

3. Patents issued without authority or in violation of law being utterly void may be collaterally attacked in a court of law. 2 Minor's Insts. 800; *Sherman v. Buick*, 93 U. S. 209; *Simmons v. Wagener*, 101 U. S. 260; *Stringer v. Young*,

about to become States, a portion of the public lands within its boundaries for the use of the public schools. The portion granted has most often been the sixteenth section of each township, though in several cases both the sixteenth and thirty-sixth sections have been granted.¹ And it is always provided that in case such section or sections have already been taken up under pre-emption, homestead or other laws, other portions of the public land may be taken in lieu thereof.²

3 Pet. (U. S.) 341; *St. Louis etc. Smelting Co. v. Kemp*, 104 U. S. 636.

4. The bill in equity to set aside a patent issued by the United States is filed by the Attorney General in the name of the United States. U. S. v. *San Jacinto Tin Co.*, 125 U. S. 273; U. S. v. *Beebe*, 17 Fed. Rep. 36; affirmed 127 U. S. 338.

5. That the United States or a State appearing in a court of equity to have a patent canceled becomes subject to all rules which govern private litigants.

1. By § 1946 of the Revised Statutes it is provided that sections sixteen and thirty-six of each township in the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana and Wyoming are to be reserved for the purpose of being applied to the public schools of such Territories, or of the States to be created out of them. By § 1947 the same provision is made as to Washington Territory. U. S. Rev. Stat., §§ 1946-7; *Ferry v. Street*, 4 Utah 521.

Sections sixteen and thirty-six of each township were granted to California and Nevada. *Ivanhoe Min. Co. v. Keystone Consolidated Min. Co.*, 102 U. S. 167; *Natoma Water etc. Co. v. Bugbey*, 96 U. S. 165; *Heydenfeldt v. Daney Gold etc. Min. Co.*, 93 U. S. 634 (Nevada).

Upon their admission to the Union, Congress granted to each of the States of Indiana, Michigan, Missouri, Ohio, Wisconsin and others the sixteenth section of each township for school purposes. See *Springfield v. Quick*, 22 How. (U. S.) 56 (Indiana); *Vincennes University v. Indiana*, 14 How. (U. S.) 268; *Cooper v. Roberts*, 18 How. (U. S.) 173 (Michigan); *Hedrick v. Hughes*, 15 Wall. (U. S.) 123 (Missouri); *Ham v. Missouri*, 18 How. (U. S.) 126; *Dickins v. Mahana*, 21 How. (U. S.) 276 (Ohio); *Beecher v. Wetherby*, 95 U. S. 517 (Wisconsin).

See also *Kissell v. St. Louis Public Schools*, 18 How. (U. S.) 19; *St. Louis*

Public Schools v. Walker, 9 Wall. (U. S.) 282.

By act of March 3, 1803 (2 Stat. at L. 229), a grant of the sixteenth section in each township of the public land south of Tennessee was made for the benefit of the schools within such Territory. This included Mississippi. See *Gaines v. Nicholson*, 9 How. (U. S.) 356.

2. "In all cases where sections sixteen or thirty-six or either or any of them are occupied by actual settlers prior to the survey thereof, the commissioners of the counties in which the sections so occupied are situated, are authorized to locate other lands to an equal amount . . . within their respective counties in lieu of the sections so occupied." U. S. Rev. Stat., § 1947.

See also *Hedrick v. Hughes*, 15 Wall. (U. S.) 123; *Ham v. Missouri*, 18 How. (U. S.) 126; *Natoma Water etc. Co. v. Bugbey*, 96 U. S. 165; *Heydenfeldt v. Daney Gold etc. Min. Co.*, 93 U. S. 634; *Gaines v. Nicholson*, 9 How. (U. S.) 356; *Bullock v. Rouse*, 81 Cal. 590.

All selections of lieu lands made by a State upon unsurveyed public lands of the United States are utterly void. And all public land of the United States is considered unsurveyed until a certified copy of the official plat of the survey has been filed in the local land office. U. S. v. *Curtner*, 38 Fed. Rep. 1.

A list of lands selected by the State as indemnity for the loss of school lands, prepared and certified by the General Land Office of the United States, and transmitted by it to the local land office, vests the title to the lands in the State as effectually as a patent, and the title so transferred relates back to the date of the selection of the land by the State. A patent is unnecessary. *McCreery v. Haskell*, 119 U. S. 327; *Howell v. Slauson*, 83 Cal. 539.

California Lands—Booth Act.—By Act of Congress passed in 1877, com-

The legislation to which these grants have given rise has been almost exclusively of a local character, the questions usually being as to the rights of contesting claimants.¹

X. TOWN SITES.—There are three methods by means of which public lands may be acquired as private property for town-site purposes :

1. The President is authorized to reserve public lands for town-site purposes on the shores of harbors, at the junction of rivers, at important portages, or in natural or prospective centers of population. Provision is made for the survey of such reservation into lots, for the appraisalment of the same, and their sale at pub-

monly called the Booth Act, it was provided "that where indemnity school selections have been made and certified to the State and such selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey, or a Mexican grant, or are otherwise defective, the same are hereby confirmed, and the sixteenth or thirty-sixth sections, in lieu of which selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States." 19 U. S. Stat. at L. 268.

The use of the words "or are otherwise defective," shows that the intention of Congress in enacting the law was to cover any and all defects in indemnity school sections, which might have been made and certified to the State. And the act being a curative one, is, upon well settled principles of law, to receive a liberal construction. *Hambleton v. Duhain*, 71 Cal. 136; *Howell v. Slauson*, 83 Cal. 539; *McCreery v. Haskell*, 119 U. S. 327.

The listment to the State of a certain section in lieu of section sixteen, which was only partly within a private grant, is within the terms of the above statute, and confirmed by it; so that the subsequent cancellation of a part of the section by the Secretary of the Interior is void. *Cucamonga Fruit Land Co. v. Moir*, 83 Cal. 101.

Under this act, which confirms the selection of indemnity lands subject to the rights of previous *bona fide* settlers thereon, the question of the good faith of the previous settlers is one of fact, or one of law and fact combined, so that the decision of the Interior Department in any case involving the same is final. *Green v. Hayes*, 70 Cal. 276. See *supra*, this title, *Force and Effect of Decisions of the Land Office*.

1. It is held that the title to the lands granted vests in the State where the lands are surveyed, or where they are bounded or ascertained. *Ferry v. Street*, 4 Utah 521.

The Congressional Act making the grant in some cases provides that the reserved section shall be for the benefit of the schools in the township. This condition is not violated by a State law, apportioning its general school fund by equalizing the amount to be appropriated for the education of each pupil throughout the State, taking into the estimate the amount derived from the sixteenth section. *Springfield v. Quick*, 22 How. (U. S.) 56. See also *Vincennes University v. Indiana*, 14 How. (U. S.) 268.

Other cases which have arisen upon such grants are those previously cited under this division. See further *Sherman v. Buick*, 93 U. S. 209; *Aurrec Oechea v. Bangs*, 114 U. S. 381; *U. S. v. Bisel*, 8 Mont. 20.

Lands to which a preemption or homestead claim has attached are excepted from all grants, and a railroad company acquires no right in lands to which such claims have attached, even though they are afterwards abandoned. *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629.

This principle is well illustrated in the case of *Webster v. Newell*, 66 Mich. 503, where land had been granted to the State in aid of railroads, and the rights of those who had settled on the lands in good faith made improvements, etc., and the title of innocent purchasers from them were by the disposition of the land found to be nugatory. An Act was immediately passed for their relief. See also *Potter v. Land Commissioner*, 55 Mich. 490.

lic outcry; the lands remaining unsold to be disposed of at public sale or private entry at not less than their appraised value.¹

2. Where parties have already founded, or may desire to found, a city or town on public land, they may have filed with the recorder for the county a plat of the town not exceeding six hundred and forty acres, describing its exterior boundaries, giving the name of the town, and exhibiting its streets, etc., and the measurement and area of each municipal subdivision; also with a statement of the extent and general character of the improvements, this map to be verified under oath, and within a month after its filing the verified transcript of it must be transmitted to the General Land Office, accompanied by the testimony of two witnesses that the city or town has been established in good faith. The President is then authorized to cause the lots embraced within the limits of such city or town to be offered at public sale to the highest bidder, subject to a minimum of \$10 per lot; those lots remaining unsold to be subject to private entry.²

3. When any portion of the public land has been already settled upon and occupied as a town site, it is lawful for the corporate authorities, or if it be unincorporated, for the judge of the county court of the county to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests. The execution of this trust as to the disposal of lots and the proceeds of their sales is to be conducted under the regulations prescribed by the legislative authority of the State or Territory in which the town is situated.³

1. U. S. Rev. St., §§ 2380-81. Gould & Tucker's Notes on Rev. St. 557, 558; 2 Copp's Public Land Laws 1007, 1011.

2. U. S. Rev. Stat., §§ 2382-86; 2 Copp's Pub. Land Laws 1011.

3. U. S. Rev. St., §§ 2387-94; 2 Copp's Public Land Laws, 1012.

By virtue of these provisions, lands do not vest in municipal authorities as owners, but in conveying the lands to the individual owners, the authorities act in the execution of a power conferred by the statute. *Stringfellow v. Cain*, 99 U. S. 610; *Burbank v. Ellis*, 7 Neb. 156.

The provision that the execution of the trust is to be conducted under such rules as may be prescribed by the legislature of the State or Territory does not authorize the legislature of a Territory to change or close streets, alleys, or blocks of the town by a new survey, wherefore a lot owner who at the time of the entry has a right to ingress and egress by an alley cannot be deprived of his right by a subsequent

order and conveyance of the county court. *Ashby v. Hall*, 119 U. S. 526. Neither can a judge in the execution of this trust establish a street over lands actually occupied as a residence. *Helena v. Albertose*, 8 Mont. 499.

Whenever any public land has been settled upon and occupied as a town site under the above provisions, and the town is not incorporated, it is the duty of the probate judge (he being judge of the county court in Kansas) upon being furnished with the entrance money to enter lands for the benefit of the occupants of the town site according to their respective interests. Any contract made by one of the occupants of a town site with a third person that the judge shall not so enter the land, is illegal and void. *McTaggart v. Harrison*, 12 Kan. 62.

When a town site is entered by the probate judge, he takes the title in trust for the occupants, and one in actual possession of a lot cannot be deprived of his right thereto by an

In no case, however, may town sites be located upon mineral lands; and if there be an entry on a town site within whose limits mineral lands are found, the entry and patent will be inoperative as to lands known at the time to be valuable for their minerals, or discovered to be such before their occupation and improvement for residence or business under the town site title.¹ Lands embraced within a town site are exempt from settlement and sale under the preemption laws but not otherwise, and if unoccupied may be located for mining or other similar purposes.²

XI. MISCELLANEOUS PROVISIONS RELATING TO PUBLIC LANDS.—In addition to what has already been stated, there are certain miscellaneous provisions in the statutes relative to public lands which may be noticed *seriatim*.

1. Timber Lands.—In order to preserve for the use of the navy timber peculiarly useful for naval purposes, the Secretary of the Navy is authorized under direction of the President to cause such vacant and unappropriated lands of the United States, as produce live oak and red cedar timbers, to be explored and selections to be made of such tracts as in his judgment may be necessary to furnish the navy with a sufficient supply.³ It is made a crime

award of commissioners and a subsequent deed from the probate judge to another. *Rathbone v. Sterling*, 25 Kan. 444. See generally *Marysville Invest. Co. v. Munson*, 44 Kan. 491. By the laws of *Utah* (and probably of other States and Territories) the inchoate right of the *cestui que trust* is descendible to his heirs, or which might be conveyed or assigned. *Stringfellow v. Cain*, 99 U. S. 610; *Hussey v. Smith*, 99 U. S. 20. See also generally *Townsend v. Little*, 109 U. S. 504; *Ming v. Foote*, 9 Mont. 201; *Clark v. Titus* (Arizona, 1886), 11 Pac. Rep. 312.

Change of County—Two Judges.—The trust imposed upon the judge of a county in which such a town site is located is an official and not a personal one. Therefore, a town site having been patented in trust to the county judge as prescribed, the judge of a new county formed out of a part of the old one and embracing the site is the proper officer to execute the trust. *Tucker v. Whittlesey*, 74 Wis. 74; *Whittlesey v. Hoppenyan*, 72 Wis. 140.

"Occupant."—An occupant within the meaning of the town-site law is one who is a settler or resident of the town and in *bona fide* actual possession of the lot at the time the entry was made. One who has never been in actual possession of a lot cannot therefore be said to be an occupant of it. The oc-

cupancy must be actual and cannot be begun by an agent. It must be for residence or for business or use, and the residence, business or use must be by the claimants. There must be a subjection of the land to his will and control. *Pratt v. Young*, 1 Utah 347; *Cain v. Young*, 1 Utah 361; *Lechler v. Chapin*, 12 Nev. 65; *Singer Mfg. Co. v. Tillman* (Arizona, 1889), 21 Pac. Rep. 818. Compare *Hussey v. Smith*, 99 U. S. 20 (reversing 1 Utah 129).

Presumption of Proper Performance by County Judge.—Where the judge who holds land under the United States town-site act, in trust for the occupants, executes an official deed for a part of it, the presumption obtains that he did his duty in all respects by compliance with all the statutory prerequisites, and that he conveyed it to a proper party; and one not a beneficiary of the trust, but a mere stranger to the title, cannot litigate or call in question the validity or regularity of the deed in those respects. *Taylor v. Winona etc. R. Co.*, 45 Minn. 66; *Lamm v. Chicago etc. R. Co.*, 45 Minn. 71.

1. *Deffebach v. Hawke*, 115 U. S. 392; *Sparks v. Pearce*, 115 U. S. 408; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 218.

2. U. S. Rev. Stat., § 2258; *Steel v. St. Louis Smelting etc. Co.*, 106 U. S. 447.

3. U. S. Rev. Stat., §§ 2458–2463;

punishable by fine and imprisonment to engage, or to assist in cutting or removing from the public lands any live oak, or red cedar, or other timber, without authority;¹ this provision, however, is not to be construed so as to interfere with the rights of a

Gould & Tucker's Notes on Rev. St. 558-559; U. S. v. Garretson, 42 Fed. Rep. 22.

1. Cutting Timber on Public Lands.—An Offense.—Every such person is liable to a fine of not less than three times the value of the trees or timber so cut, destroyed or removed, and to imprisonment not exceeding twelve months: U. S. Rev. Stat., §§ 2461, 4751, 5388. Act of June 3rd, 1878, set forth at length in Gould & Tucker's Notes on Rev. Stat. 558-9; 16 A. G. Op. 189; U. S. v. Norris, 41 Fed. Rep. 424.

The term "timber," as used in this section (2461) is held not to apply alone to large trees fitted for house or ship building, but includes trees of any size, character, or sort, useful in manufacturing or constructing any useful article, and it is no defense that the timber when cut was used for firewood or for charcoal. U. S. v. Stores, 14 Fed. Rep. 824.

The statute of June 3, 1878, which gave permission to the residents of Colorado, Nevada, the Territories, and other mineral districts of the United States to cut timber for certain purposes upon the mineral lands therein, does not apply to Oregon, there being no "mineral district" in that State. The subject of cutting timber on the public lands in Oregon is regulated by an act of the same date, providing for the sale of timber lands therein. U. S. v. Smith, 8 Sawy. (U. S.) 100. See also as to the construction of this act relating to the cutting of timber in Oregon, U. S. v. Young, 8 Sawy. (U. S.) 108.

Measure of Damages.—The Act of June 3, 1878, spoken of above, prohibits the cutting of timber with intent to dispose thereof, except that the settler under the homestead or preemption laws may dispose of the timber cut while clearing his claim; if, therefore, the timber is cut for the purpose of disposing of it, and not merely as a means of preparing the land for tillage, an offense against the act is committed. If, however, the offense is inadvertent, the value of the timber standing affords the proper measure of damages; if willful, the value of the labor should be added. U. S. v. Williams, 18 Fed. Rep. 475;

U. S. v. Heilner, 26 Fed. Rep. 80; Wooden Ware Co. v. U. S., 106 U. S. 432; Bly v. U. S., 4 Dill. (U. S.) 464; 16 A. G. Op. 189; U. S. v. Ordway, 30 Fed. Rep. 36; U. S. v. Perkins, 44 Fed. Rep. 670.

Boxing and chipping trees for the purpose of gathering turpentine is not a violation of the statute where the trees are not felled and are not upon public lands reserved for supplying timber for the navy, and where there is no intent to export, dispose of, or use the trees for timber. U. S. v. Garretson, 42 Fed. Rep. 22; Leatherburg v. U. S., 32 Fed. Rep. 780 (reversing 27 Fed. Rep. 606). See also U. S. v. Taylor, 35 Fed. Rep. 484.

Timber on Indian Lands.—Indians do not own the fee of the lands which they occupy; they have only a right of occupancy. The timber on such land being a part of the realty they can no more make a valid sale of it than of any other part. They may rightfully sever such timber as may be necessary to improve the land and make it more habitable; but for no other purpose. And when rightfully severed it of course being no longer a part of the realty may be disposed of by sale. U. S. v. Cook, 19 Wall. (U. S.) 591; Spencer v. U. S., 10 Ct. of Cl. 255; Cotton v. U. S., 11 How. (U. S.) 229.

The principle as to the property Indians have in the lands they occupy, as above stated, is confirmed by several cases. U. S. v. Cook, 19 Wall. (U. S.) 591; Johnson v. McIntosh, 8 Wheat. (U. S.) 574; Worcester v. Georgia, 6 Pet. (U. S.) 580; Cherokee Nation v. Georgia, 5 Pet. (U. S.) 48; 1 Kent's Com. 257; Leavenworth etc. R. Co. v. U. S., 92 U. S. 733; U. S. v. Kayama, 118 U. S. 375.

Where, in an action by the United States to recover the value of logs cut on public land, the plaintiff's evidence shows that the defendant purchased from the trespasser and converted to his own use a large number of logs, among which were some of those cut from the public land, the burden is on the defendant to show that all the logs so bought by him

preemptor or homestead claimant to cut and remove timber from the land upon which he has settled.¹

By special act of Congress March 3rd, 1872, and other statutes, license was given to railroad companies generally to take timber

were not so cut. *Norris v. U. S.*, 44 Fed. Rep. 735.

Innocent Purchaser of Timber Unlawfully Cut.—An innocent purchaser from a willful trespasser of timber cut on public lands is liable to the government for the value of the timber at the date of such purchase, including the value of all labor and expense which the trespasser had before bestowed upon it. *U. S. v. Heilner*, 26 Fed. Rep. 80; *U. S. v. Eureka etc. R. Co.*, 40 Fed. Rep. 419; *U. S. v. Norris*, 41 Fed. Rep. 424.

Compromise with Offenders.—The Commissioner of the General Land Office instructed his agents to seize and sell timber cut on the public land, and to compromise with the trespasser upon his paying a reasonable compensation. A compromise made under these instructions by which the trespasser agreed to pay all costs of the seizure and gave bond to pay for the timber when its value should be ascertained, is binding upon the United States. *Wells v. Nickles*, 104 U. S. 444.

A party convicted of a violation of § 2461 is only relieved from the criminal prosecution and liabilities provided for in said section by payment of \$2.50 per acre for the land on which it is cut, in pursuance of the provisions of the act of Congress of 1878 (1 Supp. Rev. St., p. 329, § 5). He is not relieved from his civil common law liability to the United States as owner of the land for the value of the timber cut. *U. S. v. Scott*, 39 Fed. Rep. 900.

Pleading.—As to the pleading in an action against any person for a violation of the laws concerning the preservation of timber on the public lands, see *U. S. v. Williams*, 6 Mont. 379; *U. S. v. Ordway*, 30 Fed. Rep. 36.

1. Act of June 3, 1878; Gould & Tucker's Notes on Rev. Stat., pp. 558 & 559, where this act is set forth. *U. S. v. Murphy*, 32 Fed. Rep. 376; *U. S. v. Mann*, 32 Fed. Rep. 386; *U. S. v. Ball*, 31 Fed. Rep. 667; *U. S. v. Freyberg*, 32 Fed. Rep. 195; Timber Cases, 3 McCrary (U. S.) 519; *U. S. v. Benjamin*, 21 Fed. Rep. 285; *Ladda v. Hawley*,

57 Cal. 51; *U. S. v. Lane*, 19 Fed. Rep. 910; *U. S. v. Yoder*, 18 Fed. Rep. 372; *Wells v. Nickles*, 104 U. S. 444.

But one holding land under a homestead claim can only cut and sell timber from such portion or parts of the land as are being cleared for cultivation or settlement, and the fact that defendant was induced through the wrong representations of the register of the land office to believe that the homesteader had an unrestricted right to cut timber from his entry does not estop the government from prosecuting him for such unlawful cutting. *U. S. v. Murphy*, 32 Fed. Rep. 376; *U. S. v. Mann*, 32 Fed. Rep. 386.

A settler on the public lands under the homestead act is not authorized prior to the issue of a final certificate to remove timber therefrom except for purpose of preparing the land in the ordinary way for tillage; but if he does cut and remove timber therefrom for export and sale merely, and afterwards obtains a certificate from the register and receiver of his compliance with the law as such settler, the government can maintain no action against him for damages for cutting such timber, nor against any one to whom he may have disposed of the same. *U. S. v. Ball*, 31 Fed. Rep. 667; *U. S. v. Freyberg*, 32 Fed. Rep. 195.

If the preemptor on public land before payment makes a contract permitting another to cut timber from the land, he cannot recover the price agreed, unless it be shown that the timber was cut for the use of the navy, or that it was to enable the preemptor to cultivate the land; and a subsequent acquirement of the title by the preemptor does not confer a right of action. *Ladda v. Hawley*, 57 Cal. 51.

Section 5388 does not apply to one who removes and uses for building purposes timber which has been cut on an Indian reservation by another person without his aid or encouragement. *U. S. v. Konkapt*, 43 Fed. Rep. 64.

Possession by a homestead claimant and a receiver's receipt issued since bringing the action, do not divest the

from the public lands lying contiguous to their route, but this is not to be construed so as to allow such companies to waste the timber lands of the United States by disposing of the timber thereon not needed for their own use in construction or repairs.¹

By a recent act of Congress timber may be taken from the mineral lands on the public domain for building or other domestic purposes.²

2. Swamp Land Grants.—In 1850 an act known as the Arkansas Swamp Land Grant was enacted, which provided that in order to enable States to construct levees and drains and reclaim swamp and overflowed lands, all swamp and overflowed lands unfit for cultivation on that account and unsold on Sept. 28th, 1850, were granted, with certain restrictions, to the several States.³ The duty was

government of possession or title so that it cannot bring trespass for cutting timber on the land. *U. S. v. Taylor*, 35 Fed. Rep. 484.

See further, *People v. Turner*, 49 Hun (N. Y.) 466; *U. S. v. Williams*, 8 Mont. 85; *U. S. v. Saucier* (N. Mex. 1891), 25 Pac. Rep. 791.

1. 13 Stat. at L. 365; 17 Stat. at L. 339; 18 Stat. at L. 482; *U. S. v. Ordway*, 30 Fed. Rep. 36; *U. S. v. Denver etc. R. Co.*, 31 Fed. Rep. 886; *U. S. v. Chaplin*, 31 Fed. Rep. 890; *U. S. v. Northern Pac. R. Co.*, 6 Mont. 351; *Denver etc. R. Co. v. U. S.*, 34 Fed. Rep. 838.

Sale of Timber Lands.—See *U. S. v. Budd*, 43 Fed. Rep. 630.

2. Land returned on the government survey as mineral land, of broken and rugged surface, with every indication of mineral ground, but on which no mines have been located, though in the vicinity of valuable mines, and which is unfit for cultivation or entry as agricultural lands, is not included in the act mentioned. *U. S. v. Edwards*, 38 Fed. Rep. 812; *U. S. v. Williams*, 8 Mont. 85.

Unsurveyed public lands, mineral in character, of little or no value except for the mineral therein, and within organized mining districts, or not far remote from known mines, constitute mineral lands as intended by the act. *U. S. v. Richmond Min. Co.*, 40 Fed. Rep. 415.

3. *U. S. Rev. Stat.*, § 2479; *Gould & Tucker's Notes on Rev. Stat.*, p. 562.

Swamp and Overflowed Lands.—The grant related only to lands which were in fact swamp and overflowed. *Sacramento Sav. Bank v. Hynes*, 50 Cal. 195; *Hamilton v. Shoaff*, 99 Ind. 63.

The States of Kansas, Nebraska and Nevada are excepted in this provision, and the grants to the States of California, Minnesota and Oregon are subject to special limitations, restrictions and conditions. *U. S. Rev. Stat.*, §§ 2479, 2490. In order to constitute swamp and overflowed land within the meaning of this act, it is not essential that the land should be overflowed annually, but merely that it be subject to overflow and require artificial means to subject it to beneficial use. *Keller v. Brickey*, 78 Ill. 133.

It is essential that the lands have been rendered unfit for successful cultivation prior to the date of the act (Sept. 28, 1850), by reason of the overflow. And the fact that some staple products may be cultivated and raised on the land is not a test, but it is whether such products, or some of them, may be ordinarily cultivated successfully. *Thompson v. Thornton*, 50 Cal. 142. It seems that by this statute the title to the bed of a pond or a non-navigable lake would pass. *Indiana v. Milk*, 11 Fed. Rep. 289.

If lands are patented by a State "according to the official plat," in the State land office, which plat designates them as tidal overflow, it cannot be objected that the lands were not conveyed as overflowed lands. *Cragin v. Powell*, 128 U. S. 691.

Unsold Lands.—It will be observed that only such lands of the character mentioned pass to the States by virtue of this grant as were unsold at the time of the grant. Therefore it did not pass to the State the title to such land, as the government had before that time agreed or assumed to pass to others, so that a tract upon which land officers had allowed a military bounty warrant to

imposed upon the Secretary of the Interior to make accurate lists of plats of all such lands and to transmit them to the governors of the States in which they lay, and upon the request of a governor of any State to issue patents conveying the fee-simple of the land to such State.¹ The proceeds of the land derived from their sale by the State were to be applied exclusively, as far as

be located before the passage of the act was not included within the terms of the grant. *Gormley v. Uthe*, 116 Ill. 643; 133 U. S. 655 (*sub nomine* *Culver v. Uthe*). *Compare* *Five Per Cent. Cases*, 110 U. S. 471.

Evidence of the Character of Lands.—Verbal testimony of witnesses is admissible to show the character of lands claimed to be swamp and overflowed lands in order to show that they are such, and so excluded from a railroad grant. *Hannibal etc. R. Co. v. Smith*, 9 Wall. (U. S.) 95.

In the case of *Iowa R. Co. v. Antoine*, 52 Iowa 429, which was an action at law to recover real estate, the plaintiff claimed under a railroad grant, and produced as evidence of his title the certificate of the Commissioner of the General Land Office approved by the Secretary of the Interior, and the defendant was not allowed to prove by parol the swampy character of the land in order to show that it passed to him under the swamp land grant.

In the case of *Thompson v. Thornton*, 50 Cal. 142, a suit in ejectment between a plaintiff claiming the land as swamp and overflowed land, purchased by him from the State, and the defendant claiming it under the United States, as dry land, the township plats from the land office were admitted in evidence on behalf of the plaintiff to prove that the land had been surveyed and that the title had vested in the State under the swamp land grant of Congress July 23, 1866.

Confirmation of Lands to California.—By §§ 2485-2489 all selections of any portion of the public domain to which no homestead, preemption, or other right had attached under the laws of the United States, and which were not otherwise excepted by being mineral lands, or reserved for certain purposes, or claimed under valid Mexican or Spanish grants, etc., were confirmed to the State of California. U. S. Rev. St., § 2485.

Section 2486 and the following prescribe the conditions and qualifications of the confirmation. See these sec-

tions reviewed in *Huff v. Doyle*, 93 U. S. 558; reversing 50 Cal. 130.

By this act the State of California by the selection and segregation of certain lands as swamp lands, acquired the right under that act to have the character of the lands determined in the mode prescribed therein, and the purchaser from the United States pending proceedings, for the determination of the character of the land took subject to such determination, which being in favor of the State entitled the State to a patent relating back to Sept. 28, 1850, the date of the passage of the act granting swamp and overflowed lands to the State. The character of the lands having been once determined by the mode prescribed, such determination cannot be impeached collaterally. *Sacramento Valley Reclamation Co. v. Cook*, 61 Cal. 341.

A description of land in the government survey as "subject to periodical overflow" cannot be said to mean the same as "swamp and overflowed lands," so as to pass title to the land to the State under this confirmation act. *Heath v. Wallace*, 71 Cal. 50.

1. U. S. Rev. Stat., § 2480.

It seems that the grant being as we have seen before one *in presenti*, the interest of the States in the lands cannot be impaired by the delay or refusal of the Secretary to have the lists and plats made. *San Francisco Sav. Union v. Irwin*, 28 Fed. Rep. 708; *Owens v. Jackson*, 9 Cal. 322; *Summers v. Dickinson*, 9 Cal. 554; *French v. Fyan*, 93 U. S. 169; *Gaines v. Thompson*, 7 Wall. (U. S.) 347; *Cox v. McGarrahan*, 9 Wall. (U. S.) 298; *Litchfield v. Richards*, 9 Wall. (U. S.) 575; *Hannibal etc. R. Co. v. Smith*, 9 Wall. (U. S.) 95.

A patent issued by the Secretary in pursuance of this provision cannot be impeached, in an action at law, by evidence to show that the land which it purports to convey was not, in fact, swamp and overflowed land; in a case where the Secretary has assumed to perform the duties imposed by the act his action is conclusive. (*Overruling*

necessary, to the reclaiming of such lands.¹ Upon proper proof being made that any of the land purchased from the United States prior to March 2, 1855, were "swamp lands" within the meaning of the act of 1850, the purchase money of such lands

27 Cal. 87; and distinguishing Hannibal etc. R. Co. v. Smith, 9 Wall. (U. S.) 95). French v. Fyan, 93 U. S. 169.

And the decision by the Interior Department that certain land was not swamp and overflowed land cannot be attacked in a suit by an individual against one claiming it under the pre-emption laws and a government patent. Ehrhardt v. Hogaboom, 115 U. S. 67. See also, *supra*, this title, *Force and Effect of Decisions of the Land Office*.

The issue of a patent is not essential in order to vest the title in the State. Upon approval of the selection of a swamp land tract by the Secretary of the Interior, and acceptance by the governor, the title becomes vested in the State, without any patent from the general government. Masterson v. Marshall, 65 Mo. 94; Campbell v. Wortman, 58 Mo. 258.

1 U. S. Rev. Stat., § 2480.

Although the grant is made apparently for the exclusive purpose of enabling such States to reclaim the lands by means of levees and drains, yet since the proceeds are to be applied to this purpose only "as far as necessary," each State has a large discretion as to the necessity of so applying the proceeds, and may exercise its discretion in its behalf without affecting its title. Congress alone has the power, and only in a clear case of violation of the trust to enforce the conditions of the grant by revocation or otherwise. American Emigrant Co. v. Adams Co., 100 U. S. 61.

So that notwithstanding the provision of § 2480, it is held that the State may authorize the counties in which the lands lay, to devote the proceeds therefrom to erecting public buildings, and building bridges and roads. Mills Co. v. Burlington etc. R. Co., 107 U. S. 557; Cook Co. v. Calumet etc. Co., 131 Ill. 505.

Not a Trust Fund.—And it is well settled that this appropriation of the proceeds of these lands rests solely with the good faith of the several States. The act created neither a trust nor a contract. Mills Co. v. Chicago etc. R. Co., 107 U. S. 557; Hagar v. Reclamation District No. 108, 111 U. S. 701;

U. S. v. Louisiana, 127 U. S. 182; A. P. Cook Co. v. Auditor Genl., 79 Mich. 100.

The proceeds to be obtained from the sale of swamp land, and the purchase money to be paid for such lands already sold, are not subject to a property trust either in the heads of the United States or of any State, in such a sense that a claim of the United States upon a particular State for money due may not be set off against the claim of the State to the swamp land fund. U. S. v. Louisiana, 127 U. S. 182. See also Mills Co. v. Burlington etc. R. Co., 107 U. S. 557; American Emigrant Co. v. Wright Co., 97 U. S. 339; Louisiana v. U. S., 22 Ct. of Cl. 284; affirmed 123 U. S. 32; Hager v. Reclamation District No. 108, 111 U. S. 701.

Evidence of Sale by the State.—In an action to impeach a patent issued by the United States on the ground that plaintiff had purchased the lands in question from the State as swamp lands included in the grant of 1850, the certificate of the State land commissioner as to the records of his office was held inadmissible as evidence, since the purchase of swamp lands from the State can only be shown by the certificate of purchase or by certified transcript of the records and official documents of the proper land office. Driver v. Evans, 47 Ark. 300; Branch v. Mitchell, 24 Ark. 441; Bohall v. Dilla, 114 U. S. 47.

Purchase of Swamp Lands From a State.—Various provisions have been made in the several States concerning the disposal by sale of such lands. Thus it is held that an application for the purchase of swamp lands under act Oregon Oct. 26, 1870, § 3, for "the selection and sale" of swamp lands, from the date of its receipt and filing by the Land Commissioner, constitutes a contract between the State and the applicant for the sale to the latter of the tract or tracts therein mentioned, with the right to the immediate possession thereof, and, on the performance of the conditions subsequent, of payment and reclamation within the terms and requirements of said action, the applicant or his assigns is entitled to a patent

was to be paid over to the State; or if the land had been sold by warrant or scrip, the State was authorized to select indemnity lands from such of the public lands as were open to sale at \$1.25 per acre.¹

By a subsequent act all lands selected and reported to the General Land Office as swamp and overflowed lands by the several States entitled to the provisions of the act prior to 1857, were confirmed to the said States respectively.²

The words of the statute that the lands "shall be and the same are hereby granted" to the States have the effect to create a grant *in præsenti*, so that the title of the State dates from the date of the act, notwithstanding a subsequent provision concerning the making of lists of plats of the land and the issuing of patents, etc.³

In recognition of this principle, Congress passed an act for the relief of locators upon swamp lands, and directed the President to cause patents to be issued as soon as practicable to locators

therefor. *McConaughy v. Pennoyer*, 43 Fed. Rep. 196.

1. U. S. Rev. Stat., § 2482.

The term "land purchased from the United States" is considered not to include those lands upon which prior to the date of the act land warrants had been properly located, the taking of land by the location of land warrants not being considered a sale within the meaning of the statute here. *Gormley v. Uthe*, 116 Ill. 643; 133 U. S. 655 (*sub nomine* *Culver v. Uthe*).

2. U. S. Rev. Stat., § 2484. The confirmation extended only so far as the lands remained unappropriated and not interfered with by any actual settlement under the laws of the United States. U. S. Rev. St., § 2484.

It has been held that this confirmation vested the lands absolutely in the State whether actually swamp lands or not. *American Emigrant Co. v. Chicago etc. R. Co.*, 47 Iowa 515.

3. *Wright v. Roseberry*, 121 U. S. 488 (reversing 63 Cal. 252); *Martin v. Marks*, 97 U. S. 345; *Hannibal etc. R. Co. v. Smith*, 9 Wall. (U. S.) 95; *French v. Fyan*, 93 U. S. 171; *San Francisco Sav. Union v. Irwin*, 28 Fed. Rep. 708; 136 U. S. 578; *Edmondson v. Corn*, 62 Ind. 17; *Hendry v. Willis*, 33 Ark. 833; *Ringo v. Rotan*, 29 Ark. 56; *Chicago etc. R. Co. v. Brown*, 40 Iowa 333; *Danel v. Purvis*, 50 Miss. 261; *Rice v. Sioux City etc. R. Co.*, 110 U. S. 695; *Campbell v. Wortman*, 58 Mo. 258; *Owens v. Jackson*, 9 Cal. 322; *Summers v.*

Dickinson, 9 Cal. 554. Compare, however, *Grantham v. Atkins*, 63 Cal. 359; *Thompson v. Prince*, 67 Ill. 281; *Keller v. Brickey*, 78 Ill. 133; in which cases it is held that the act in question did not create a title *in præsenti*; that the fee simple remained in the United States until the patent issued, and, therefore, the right of private entry continued until the actual issue of the patent to the State, notwithstanding the land in controversy had been reported and confirmed as swamp land, inuring to the State. These cases, are, however, clearly overruled by the weight of authority.

Since the act created a title *in præsenti* in the State, the State's grantee may recover possession from one claiming under a preemption, and a United States patent issued thereunder, without regard to whether the certificate provided for had issued or not. The only question open is whether the lands were or were not swamp and overflowed lands in 1850. After the passage of the act, the approval by the land office of the selections of land reported to it by the several States, and the issue of patents, etc., were mere ministerial acts. *Wright v. Roseberry*, 121 U. S. 488; *Martin v. Marks*, 97 U. S. 345; *San Francisco Sav. Union v. Irwin*, 28 Fed. Rep. 708.

And this grant being *in præsenti* cannot be impaired by the delay or refusal of the secretary to have the lists and plates, etc., made. *San Francisco Sav. Union v. Irwin*, 28 Fed.

who had made entries on the public lands claimed as swamp lands with land warrants prior to the issue of patents to the States under the Act of 1850.¹

The Act of 1850 applied only to the States and not to the Territories, and upon a State's being admitted to the Union after the passage of the act, it acquired no rights under it, unless the rights were by an express provision extended to it.²

3. Other Provisions.—Express grant of the right of way is made for highways and railroads over the public lands not reserved for public uses.³ Provision is also made for the setting aside of a certain portion of land at the head of Yellowstone river as a public

Rep. 708; *Owens v. Jackson*, 9 Cal. 322; *Summers v. Dickinson*, 9 Cal. 554; *Edmundson v. Corn*, 62 Ind. 17.

1. 10 Stat. at L. 634. The statute adds "Any decision of the Secretary of the Interior, or any other officer of the government, to the contrary, notwithstanding."

In the case of *Huggett v. Case*, 61 Mich. 480, a *bona fide* locator of lands in Michigan which are patented to the State under the swamp land act, but unknown to him, the list of swamp lands not having then been approved by the Secretary of the Interior, and there being nothing in the land office to designate the lands as swamp lands, is relieved by this act of Congress of 1855, and a person deriving title subsequently from the State holds his apparent title in trust for such locator and those holding under him. See also *Dale v. Turner*, 34 Mich. 405; *Ives v. Ely*, 57 Mich. 574.

A proceeding instituted to contest the right of a State to land claimed by it under the swamp land grant is not conclusive of the rights of a grantee of the State who was not a party to the proceeding. *Snell v. Dubuque etc. R. Co.*, 80 Iowa 767; *Connors v. Meseroy*, 76 Iowa 691.

2. *Rice v. Sioux City R. Co.*, 110 U. S. 695; *St. Paul etc. R. Co. v. Rice*, 9 Fed. Rep. 368.

Therefore, the State of Minnesota, being a Territory at the time of the passage of the act acquired no rights under it upon being admitted to the Union, notwithstanding a clause in the act of admission provided that "all the laws of the United States which are not locally applicable are to have the same force and effect within that State as in other States of the Union." *Rice v. Sioux City R. Co.*, 110 U. S. 695.

Cases in which certain portions of

the act making a grant were reviewed may be seen in *Buena Vista Co. v. Iowa Falls etc. R. Co.*, 112 U. S. 165; *American Emigrant Co. v. Adams Co.*, 100 U. S. 61; *Hagar v. Reclamation District*, No. 118, 111 U. S. 701; *Wright v. Roseberry*, 121 U. S. 488; *Sacramento Sav. Bank v. Hynes*, 50 Cal. 195. See also *Cape Girardeau etc. R. Co. v. Hatton*, 102 Mo. 45; *Funston v. Metcalf*, 40 Miss. 504; *Dowd v. Louisville etc. R. Co.* (Miss. 1890), 8 So. Rep. 295.

3. Railroad Right of Way.—U. S. Rev. Stat., § 2477.

The statute reads, "The right of way for the construction of highways over public lands not reserved for public uses is hereby granted." § 2477. Though railroads are not specifically mentioned in this provision, the term highways is considered to include them. *Flint etc. R. Co. v. Gordon*, 51 Mich. 420; *Rogers v. Burlington etc. R. Co.*, 3 Wall. (U. S.) 654; *Chicago etc. R. Co. v. Otoe Co.*, 16 Wall. (U. S.) 667. Compare, however, *Burlington etc. R. Co. v. Johnson*, 38 Kan. 142; 33 Am. & Eng. R. Cas. 315.

But whether the term "highways" as here used included railroads or not is now immaterial, since by 18 Stat. at L. 482, the right is extended to railroads. *Red River etc. R. Co. v. Sture*, 32 Minn. 95; *U. S. v. Chaplin*, 31 Fed. Rep. 890.

Rights of Preemptors Protected.—But in order for a railroad company to acquire a right of way through the public lands of the United States, as against one in possession of such lands under homestead, preemption or other laws, it must appear that such company complied with the other provisions of the Act granting the right of way; that is, it must have filed with the Secretary of the Interior a copy of its

park, to be under the exclusive control of the Secretary of the Interior.¹ There is a recognized public right of pasturage on the public domain which is left open, and the right cannot be interfered with by adjacent land owners though they may be in a degree injured by the exercise of it.²

Inclosure of any portion of the public lands by any person who has no claim, or color of title, or any right to such land, is prohibited, and jurisdiction is conferred upon territorial and other courts to grant injunctions to restrain such inclosures, whenever it may be necessary.³

articles of incorporation, and due proof of its organization under the same, and it must also have claimed the benefits of the act by filing with the register of the land office of the proper district a profile of the road. All preemption, homestead, or other rights acquired prior to such filing will be protected as a vested right. *Larsen v. Oregon R. etc. Co.*, (Oregon, 1890), 23 Pac. Rep. 974; *Burlington etc. R. Co. v. Johnson*, 38 Kan. 142; 33 Am. & Eng. R. Cas. 215.

Congress has the power to grant a right of way over the public lands of the United States, and it is immaterial that such lands have long been occupied by one who is a qualified preemptor, but who has taken no steps to procure a title. *Southern Pac. R. Co. v. Burr*, 86 Cal. 279.

Other Matters.—A grant of lands over which a railroad has been constructed is to be construed as excepting the railroad's right of way. *Verdier v. Port Royal etc. R. Co.*, 15 S. Car. 476; 10 Am. & Eng. R. Cas. 677; *Sams v. Port Royal etc. R. Co.*, 15 S. Car. 484; 10 Am. & Eng. R. Cas. 683; *Flint etc. R. Co. v. Gordon*, 41 Mich. 420. See also *Gould & Tucker's Notes on Rev. Stat.*, p. 561.

The Act of July 26, 1866 (14 St. U. S. 289), giving a right of way over the Osage ceded lands reserved by the United States for the Great and Little Osage Indians, gave such right only over such lands as had not previously been disposed of by the government. *Roberts v. Missouri etc. R. Co.*, 43 Kan. 102; *Wilcox v. Jackson*, 13 Pet. (U. S.) 498.

Congress retains the right of eminent domain over Indian lands and may therefore grant to a railroad a right of way over them. *Cherokee Nation v. Southern Kan. R. Co.*, 135 U. S. 641 (reversing 33 Fed. Rep. 900.)

1. U. S. Rev. St., §§ 2474-5. Statute of June 15, 1880 (21 Stat. 199), withdrew from sale the hot springs in Uncompahgre Park, and four square miles of the surrounding land, and made the two sections (§§ 2475 & 2474) applicable to the said tract; but this provision was repealed by statute May 14, 1884, (23 Stat. 22). *Gould & Tucker's Notes on Rev. St. U. S.* p. 561.

2. **Pasturage.**—Therefore persons entitled to the right cannot be enjoined from exercising it by persons who own parcels of land detached and scattered through a large body of the public domain, and lying open, though thereby defendants' cattle will trespass on complainants' lands. *Buford v. Houtz*, 133 U. S. 320.

In the case of *McGinnis v. Friedman*, (Idaho, 1888), 17 Pac. Rep. 635, the plaintiff M applied for an injunction to restrain F from pasturing sheep upon the ranges on the public lands, because to allow sheep to graze upon the land would ruin the pasturage for cattle. M grounded his right to the injunction upon the fact of priority of possession, having enjoyed exclusive use for some years previous. Section 6872 of the Territorial statutes was also invoked in support of his right. It was held, however, that M having no claim of title, the injunction must be denied.

3. **Inclosure of Public Land.**—23 U. S. St. at L. 322, § 3. A curious case arose in this connection. It seemed that the defendant owned a large number of sections, designated by odd numbers, the title to the alternate or even numbered sections being still in the government. The defendant undertook to inclose a part of this land by a long line of fences wholly within the limits of his own property, the practical effect of which was, however, to inclose a large number of the even numbered sections

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to make all regulations necessary for the carrying out of these miscellaneous provisions, which are not elsewhere provided for.¹

XII. MISCELLANEOUS GRANTS.—An act of Congress passed in 1841 and renewed by a later statute granted for purposes of internal improvement to each new State afterward admitted into the Union, upon its admission, so much public land as, including the quantity that was granted to it before its admission, would amount to five hundred thousand acres.² The selection of the land was to be made in such manner as the legislature of each State might direct. The location was to be made in parcels conformably to sectional divisions and subdivisions of not less than three hundred twenty acres in one location and on public land

of the public lands. In a proceeding for an injunction instituted by the United States attorney, the Supreme Court of Wyoming held that the statute so far as it forbade as a nuisance the erection by any person of a fence wholly within the limits of his own land, is not a legitimate exercise of police power, but an unwarranted invasion of private property, and therefore unconstitutional. The court in this case following the case of *U. S. v. Brandestein*, 32 Fed. Rep. 738; *U. S. v. Douglas-Willan Sartoris Co.* (Wyoming 1889), 22 Pac. Rep. 92.

Sections sixteen and thirty-six of each township, though reserved by special act for the purposes of public schools, still form a part of the public lands within the meaning of the act. *U. S. v. Bisel*, 8 Mont. 20; *U. S. v. Flaherty*, 8 Mont. 31; *Barkley v. U. S.*, 3 Wash. 522.

The act makes an exception in case of lands inclosed under an "asserted right" thereto by or under claim made in good faith, with a view to entry thereof at the proper land office. Therefore, one cannot be convicted of an offense under the act where he fenced in one hundred and sixty acres of unsurveyed land, and at the same time filed a notice of declaration as a settler on the public land, in the office of the recorder of the county with a view of entering the land as soon as possible. *U. S. v. Godwin*, 7 Mont. 402.

Lands granted by a railroad, but to which the grantee has been unable to get title, owing to the township not being surveyed, are not within the contemplation of the act. *U. S. v. Godwin*, 7 Mont. 402.

In the case of *U. S. v. Brandestein*, 32 Fed. Rep. 738, the lands on the filing of the plat of a proposed railroad by the company had been withdrawn from settlement by the United States, being granted to the railroad, although they had not yet been earned by the company. It was held that the inclosure of such land did not fall within the prohibition of the act.

Defendant inclosed and occupied land on a section within the limits of a grant to a railroad, after the land had been withdrawn from sale or entry, relying on the railroad company's promise to sell the land to him as soon as it should perfect its title thereto. The railroad had not been completed when the entry was made, and the grant had not been declared forfeited. It was held that this was not an unlawful occupancy under the act in question. *U. S. v. Osborn*, 44 Fed. Rep. 29.

An indictment under the act mentioned must show that the defendant is not within any of the exceptions permitting such inclosure. *U. S. v. Felderward*, 36 Fed. Rep. 490. It need not, however, allege that defendant had not gone upon the land, improved and occupied it under the land laws of the United States, claiming title thereto in good faith. That is a matter of defense. *U. S. v. Cook*, 36 Fed. Rep. 896.

1. *U. S. Rev. Stat.*, § 2478; *Gould & Tucker's Notes on Rev. Stat.*, p. 562; *U. S. v. Waitz*, 3 Sawy. (U. S.) 473; *Cragin v. Powell*, 128 U. S. 601; *Thompson v. Hanson*, 28 Minn. 484. See also *supra*, this title, *Land Office*.

2. 5 Stat. at L. 455; *U. S. Rev. Stat.*, § 2378.

not reserved from sale by law of Congress or proclamation of the President.¹ In a very early case it was decided that the act did not convey the fee simple of any lands whatever to the State, but left the land system of the United States in full operation as to the regulation of titles, so as to prevent conflicting interests.²

In 1850, owing to the disturbed and unsettled state of affairs in the Territory of Oregon, Congress passed a bill known as the Oregon Donation Act, making a grant of certain lands to all settlers complying with certain conditions and requirements. The general nature and several provisions of the act may be better discussed in the note.³

The act of 1841 limited the use of the fund arising from these lands to certain designated objects, but the later statute (§§ 2378-9), provided only that it shall be "for the purpose of internal improvement." The repeal of the former provision shows clearly an intent to leave the designated objects of internal improvement to which this fund is to be applied entirely to the direction of the proper State authorities. *In re* Senate Resolution, 12 Colo. 285.

It was further decided in the above case of *In re* Senate Resolution, 12 Colo. 285, that the construction by the State of reservoirs and canals for purposes of irrigation, and the changing of channels of natural streams when necessary to the success of such improvements, when the same can be done without invasion of the rights of prior appropriators, were within the authority conveyed by the section (§ 2378), provided the control of such improvements be retained by the State.

1. 5 Stat. at L. 455; U. S. Rev. Stat., § 2379; *Foley v. Harrison*, 15 How. (U. S.) 433.

The location may be made at any time after the public lands in any such new State have been surveyed according to law. U. S. Rev. Stat., § 2379.

2. *Foley v. Harrison*, 15 How. (U. S.) 433.

The words "shall be granted" import that the grant is not to be *in presentii*, and for this reason do not pass the fee but rather impose a trust upon the States. *Patterson v. Tatum*, 3 Sawy. (U. S.) 64; *Shepley v. Cowan*, 91 U. S. 330.

In the case of *Foley v. Harrison*, 15 How. (U. S.) 433, the plaintiff claimed under a patent from the State of Louisiana and entries only in the United States office. The defendants claimed under patents from the United

States direct. In accordance with the principle above announced, namely, that the State did not possess the fee simple of the land, the patentee of the United States was held to have the superior title.

In the case of *Patterson v. Tatum*, 3 Sawy. (U. S.) 164, it was held that when the selection and location of the lands were once made according to the direction of the State legislature out of land not reserved but subject to location, the general gift became a particular gift of the particular lands located, vesting in the State a perfect and absolute title to the same which will pass by her patent.

In the case of *Shepley v. Cowan*, 91 U. S. 330, it was held that the provision of the Act of 1841 authorizing the State to make selections of land did not interfere with the operations of the provisions of the act regulating the system of settlement and preemption. The two modes of acquiring title to lands from the United States are not in conflict with each other, but both are to have full operation, that one controlling in each particular case under which the first initiatory step was had. In that same case Justice Field also observed that it was implied by the decision in *Foley v. Harrison*, 15 How. (U. S.) 433, that the act was merely the terms of a grant, requiring further legislation, or further action in some form by the government in order to vest the title of the land selected in the State.

3. *Oregon Donation Act*.—Act of Sept. 27, 1850, 9 Stat. at L. 496.

Many of the sections of this act are set forth in full in *Hall v. Russell*, 101 U. S. 503. The act has received judicial interpretation in many cases. See *Davenport v. Lamb*, 13 Wall. (U. S.) 418; *Hall v. Russell*, 101 U. S. 503; *Silver v. Ladd*, 7 Wall. (U. S.) 219;

Vance v. Burbank, 101 U. S. 514; Johnson v. U. S., 2 Ct. of Cl. 391; Barney v. Dolph, 97 U. S. 652; Lamb v. Davenport, 18 Wall. (U. S.) 307; Stark v. Starr, 94 U. S. 477; Missionary Soc. v. Dalles City, 107 U. S. 336; and many others.

Lands Granted by the Act.—The lands subject to the grant were any of the public lands of the United States within the Territory of Oregon which were unappropriated. 9 Stat. at L. 496, §§ 1-2-3.

Land occupied and cultivated under the provisional government and occupied as a town site prior to Dec. 1st, 1850, may be held as a donation under the act. Martin v. T.V. Vault, 1 Oregon 77.

The amount of the grant varied. To a settler prior to Dec. 1st, 1850, the amount to a married man or one who should become married prior to Dec. 1st, 1850, a whole section, six hundred forty acres, was granted, one-half to himself and the other half to his wife to hold in her own right. To single persons half that amount.

By section five it was provided that to those who should settle after Dec. 1st, 1850, and before Dec. 1st, 1853, should receive one-half section if married as above, and if unmarried, one-quarter section.

Where one was married but his wife died in Sept. 1850, he could take but one-half section of land under § 4; he was not a "married man" as intended by that section. White v. Allen, 3 Oregon 103.

Section four of the act provided that a married man might enter one whole section, six hundred forty acres, one-half for himself, the other half for his wife to be held by her for her sole separate use and benefit.

In the case of Jette v. Picard, 4 Oregon 296, one L took up two hundred sixty-three and fifty-three hundredths acres of land, under this section, being married at the time. It was held that his wife was entitled to have one-half of the same set apart to her, her right being in no wise dependent upon the number of acres in the claim.

Persons to Whom It Applied.—The grant was made in favor of every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States or having made his declaration to become a citizen. See

Hall v. Russell, 101 U. S. 503, where the statute is set forth; 9 Stat. at L. 496, § 4.

To acquire the benefit of the act one must have become a resident on the land before December 1st, 1850, and must reside upon and cultivate the land for four consecutive years. Hall v. Russell, 101 U. S. 503.

Upon the death of any settler prior to the issuing of the patent or prior to the expiration of the four years, his widow and heirs were to receive equal parts. 9 Stat. at L. 496, § 8. Under this provision, if the husband or wife dies before the patent issues, each of the children and the surviving husband or wife take equal shares. Davenport v. Lamb, 13 Wall. (U. S.) 418.

An unmarried female incapable of labor was held capable to take lands under the act. Silver v. Ladd, 7 Wall. (U. S.) 219.

An Indian woman married to a white man, is a wife within the meaning of the term as used above, and is therefore entitled to one-half her husband's claim. Vandolf v. Otis, 1 Oregon 153.

Conditions of the Grant.—A settlement in good faith and four years' continuous residence and cultivation were requisite in order to acquire any donation under the act. Affidavits were to be made by the settler that the land was for his own use and cultivation. The other proceedings were very similar to those already set forth as required in case of preemption settlers. *Supra*, this title, *Preemption*; 9 Stat. at L. 496.

The grant being one *in præsentia* in certain respects, the conditions of settlement etc., were conditions subsequent. Blakesly v. Caywood, 4 Oregon 280; Lee v. Summers, 2 Oregon 260; Summers v. Dickinson, 9 Cal. 554. See also Hall v. Russell, 101 U. S. 503.

The wife or her heirs get nothing until the husband, or some one for him, proves up the claim under the act. The wife could not be a settler or get anything, except through her husband. If he abandoned possession before becoming entitled to the grant, her estate was gone as well as his. Whatever will bar her, will necessarily bar her heirs. Vance v. Burbank, 101 U. S. 514.

The claimant must set the land apart for his own use and designate it by boundaries with reasonable cer-

tainty; and any substantial change in the location will be construed an abandonment of his claim and as the taking of a new one. *Carter v. Chapman*, 2 Oregon 93; *Stark v. Stark*, 2 Oregon 118.

As to what constitutes residence and cultivation see *Starr v. Stark*, 2 Oregon 118; the residence is to be determined from all the facts and circumstances in each particular case. *Lee v. Simonds*, 1 Oregon 158.

The heirs of settlers who died prior to Dec. 1, 1850, cannot under the act inherit by virtue of the residence and cultivation of their ancestors. *Newton v. Spencer*, 3 Oregon 548.

Interest Acquired by the Grant.—The words of the statute "shall be and is hereby granted" import, as in all other cases, a grant *in presenti*. This principle has been well settled in many cases. See *Lee v. Summers*, 2 Oregon 260; *Blakesly v. Caywood*, 4 Oregon 280; *Fremont v. U. S.*, 17 How. (U. S.) 559; *Adams v. Burke*, 3 Sawy. (U. S.) 418; *Wright v. Roseberry*, 121 U. S. 488; *Martin v. Marks*, 97 U. S. 345; *Hannibal etc. R. Co. v. Smith*, 9 Wall. (U. S.) 95.

And the conditions of settlement, occupation, etc., are considered to be conditions subsequent, upon the non-performance of which the grant is to be defeated. *Blakesly v. Caywood*, 4 Oregon 280; *Simmons v. Dickinson*, 9 Cal. 554.

It is contended that as the necessary consequence of these two principles the legal title passed to the several grantees under the act by the act itself, and that the patent was only the consummation and the evidence of title, and that, therefore, the parties might alien and devise the land prior to the issue of the patent. See *Lee v. Summers*, 2 Oregon 260; *Blakesly v. Caywood*, 4 Oregon 280.

But a different doctrine has been laid down by the Supreme Court of United States and the following principles in regard to the alienation or devising of lands acquired under the act seem to be settled.

The court in the case of *Hall v. Russell*, 101 U. S. 503, reviewed the provisions of this act, and while recognizing that the language seemed to import a grant *in presenti*, yet held that the grantee acquired no divisible interest in the land until the completion of the conditions subsequent. The court uses this language: "There

cannot be a grant unless there is a grantee, and, consequently, there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently. In all previous cases in which we have given these words ("shall be and is hereby granted," etc.) the effect of an immediate and present transfer, it would be found that the law has designated a grantee qualified to take under terms of the law actually in existence at the time."

Contracts in regard to possessory interests in such lands made by the occupant before the Donation Act, were not invalidated by it, the Act only prohibiting the sale of such interests in future. Therefore the purchaser by such a contract acquired an equitable right to the land which might be enforced when he had obtained a legal title. *Lamb v. Davenport*, 18 Wall. (U. S.) 307; *Starks v. Starrs*, 94 U. S. 477. This is true although no constructive possession of public lands in the Territory of Oregon could be had prior to the Donation Act. *Missionary Soc. v. Dalles City*, 107 U. S. 335.

But, as has been seen, it is not always essential that a patent shall have been acquired in order to empower a party to alien his interest in lands claimed by virtue of the act. If his right to a patent has been completed, he may, before receiving the patent, sell and convey land even so as to cut off the rights of children, or heirs of husband or wife. *Barney v. Dolf*, 97 U. S. 652; *Myers v. Croft*, 13 Wall. (U. S.) 291; *Thurston v. Alva*, 45 Cal. 16.

In accordance with the principles above stated, under the act there was no grant of land to a settler until he had qualified himself to take as grantee by completing his four years of residence and cultivation, and performing such other acts as were required by the statute in order to protect and keep alive his claim. Therefore, such settler could not devise his interest in the land unless the fee passed to him before his death. *Hall v. Russell*, 101 U. S. 503.

The act authorized the right of only two classes of persons to dispose of their donation by will; namely, first, married persons who were settlers under the act and had complied with the provisions of the act, and die before the patent issues; second, alien

Prior to the act there could be no constructive possession of public lands, in the Territory of Oregon.¹

Other grants have been made at various times and under varying conditions, which call for no special treatment here.²

PUBLIC LAW—(See also **INTERNATIONAL LAW**, vol. 11, p. 431; **LAW**, vol. 12, p. 950).—Public law in one sense is a designation given to international law, as distinguished from the laws of a particular nation or state. In another sense, a law or statute that applies to the people generally of the nation or state adopt-

settlers who die before their naturalization is completed. *Hall v. Russell*, 3 Sawy. (U. S.) 506, aff'd 101 U. S. 503.

Whether the husband or wife who takes as survivor the share of the deceased under the act takes as purchaser or by inheritance, the contracts of the husband concerning the equitable interest of the part allotted to him made before the act was passed are binding on the title which goes to his children by reason of a patent issued after the death of both husband and wife. *Lamb v. Davenport*, 18 Wall. (U. S.) 307.

1. *Missionary Soc. v. Dalles City*, 107 U. S. 336; *Lounsedale v. Parrish*, 21 How. (U. S.) 290; *Stringfellow v. Cain*, 99 U. S. 610.

2. **Huntington Bay Grant**.—Colonial patents of 1666, 1688 and 1694 granted to the town of Huntington a title to all lands south of Long Island Sound between certain fixed east and west points including "all havens harbors, waters, etc." *Huntington Bay*, a body of water lying between Lloyd's Neck and Eaton's Neck, on the north shore of Long Island, is a "haven" or "harbor" within the meaning of the patents, so that the title to the soil under the said bay passes to the trustees of the town by virtue of the said patents. *Huntington v. Lowndes*, 40 Fed. Rep. 625. The defendant in that case was once a citizen of *New York*, and had possessed during that time an oyster-bed in Huntington Bay, from 1867-1872, claiming that the said oyster-bed was upon the common lands of the State, but claimed no title to the soil himself. He then removed to, and thereafter resided in the State of *Connecticut*, but still continued to occupy the oyster-bed. It was held that when he removed from the State of *New York*, and gave up his citizenship, he at the same time yielded up whatever equitable right of ownership

he might have had in the premises, and his use and occupation thereafter was that of a trespasser only, which could not by any lapse of time ripen either into a title in fee or to a right to continue the occupation thereof. *Huntington v. Lowndes*, 40 Fed. Rep. 625.

Other Grants.—For other miscellaneous grants of land see U. S. v. *Des Moines River Nav. etc. Co.*, 43 Fed. Rep. 1 (grant to *Iowa* for purpose of improving the *Des Moines River*).

Authorities on Public Lands.—The subject of public lands receives brief attention in Tiedman on Real Property, § 682 and §§ 744-7; 3 Washb. on Real Property; 6 Lawson's Rights and Remedies, § 2696, *et seq.*; Gerard's Titles (a *New York* work); 2 Minor's Inst. 998 (concerning *Virginia* lands).

Copp's Public Lands contains all the United States statutes on the subject of public lands together with the decisions of the Department of the Interior and the various questions which have arisen. See also Lester's Land Laws; Kinney's Dig. of U. S. Supreme Ct. Reports.

Gould & Tucker's Notes on Rev. Stat. of U. S. contain all the later revisions of the statutes and references to all the leading cases.

There are numerous decisions by the State courts which have received no notice in this article; they relate chiefly to local matters, and depend upon special statutory enactments. It has not been thought necessary to incur this article with them, since they are of no value outside the State in which they were rendered, and within each State may be easily found from the State Digest. The article **SPANISH LAND GRANTS** will necessarily treat of many questions intimately connected with public lands.

ing or enacting it, is denominated a public law, as contradistinguished from a private law affecting only an individual or a small number of persons.¹

PUBLIC OFFICERS—(See also CONSTITUTIONAL LAW, vol. 3, p. 670, and the cross-references in the following analysis).

- I. Definition, 380.
- II. Essential Elements of Public Office, 382.
- III. Kinds of Offices and Officers, 390.
 1. *Executive Officers* (See also GOVERNOR, vol. 8, p. 1400; PRESIDENT OF THE UNITED STATES), 391.
 2. *Legislative Officers*, 391.
 3. *Judicial Officers* (See also COURTS, vol. 4, p. 447; JUDGE, vol. 12, p. 2), 391.
 4. *Ministerial Officers*, 392.
 5. *Civil Officers*, 392.
 6. *Military Officers* (See also MILITARY LAW, vol. 15, p. 390), 392.
 7. *Naval Officers*, 392.
 8. *Offices of Trust*, 392.
 9. *Offices of Profit*, 393.
 10. *Honorary Officers*, 393.
 11. *Officers De Jure*, 394.
 12. *Officers De Facto* (See also DE FACTO OFFICERS, vol. 5, p. 92), 394.
 13. *Usurpers or Intruders*, 396.
- IV. Eligibility to Public Office, 397.
 1. *Qualifications*, 401.
 - a. *Citizenship*, 401.
 - b. *Residence*, 402.
 - c. *Age*, 402.
 - d. *Sex*, 403.
 - e. *Mental Capacity*, 405.
 - f. *Property Qualifications*, 406.
 2. *Disqualification*, 406.
 - a. *By Holding Prior Office*, 406.
 - b. *For Criminal Acts*, 409.
 3. *Preference to Veterans*, 412.
 4. *Civil Service Examinations*, 414.
- V. Right to Hold Office—How Conferred, 416.
 1. *By Election* (See ELECTIONS, vol. 6, p. 255), 417.
 2. *By Appointment*, 417.
 - a. *The Appointing Power*, 418.

- b. *Exercise of the Power to Appoint*, 423.
- c. *Appointment by Concurrent Action of Two or More Officers or Bodies*, 428.
- d. *Filling Vacancies*, 430.
- e. *Evidence of Appointment*, 435.

VI. Acceptance, 437.

VII. Qualification for Office, 440.

1. *The Oath of Office* (See also OATH, vol. 16, p. 1017), 443.
2. *Official Bonds* (See also BONDS, vol. 2, p. 448), 445.
 - a. *When Required*, 445.
 - b. *Sureties* (See SURETYSHIP), 445.

VIII. Entry Upon the Discharge of the Duties, 445.

IX. Trafficking in Offices and Contracts Concerning Offices and Officers (See ILLEGAL CONTRACTS, vol. 9, p. 879), 445.

1. *Contracts to Secure Election or Appointment*, 445.
2. *Contracts for Influencing Official Action* (See ILLEGAL CONTRACTS, vol. 9, p. 879), 448.
3. *Contracts Respecting Compensation of Officers* (See ILLEGAL CONTRACTS, vol. 9, p. 879), 448.

X. Power and Authority of Public Officers, 448.

1. *Its Source and Nature*, 448.
2. *How Exercised*, 455.
 - a. *Delegation of Authority*, 461.
 - b. *Exercise of Power by Deputy* (See DEPUTY, vol. 5, p. 623), 465.
 - c. *Exercise of Joint Authority*, 465.
 - d. *In Whose Name Exercised*, 468.
 - (1) *By Officer*, 468.

1. *Morgan v. Cree*, 46 Vt. 786; 14 Am. Rep. 640.

- (2) *By Deputy* (See also DEPUTY, vol. 5, p. 623), 469.
3. *Disqualification to Act*, 470.
- a. *Of Ministerial Officers*, 470.
- b. *Of Judicial Officers* (See JUDGE, vol. 12, p. 2), 471.
- c. *Of Governmental and Political Officers*, 471.
4. *Ratification of Authority* (See also AGENCY, vol. 1, p. 331), 471.
- XI. *Duties of Public Officers*, 477.
1. *Their Character*, 478.
2. *Accountability for Public Property*, 480.
- XII. *Liabilities of Public Officers*, 483.
1. *Legislative Officers*, 485.
2. *Judicial Officers* (See JUDGE, vol. 12, p. 2; JURISDICTION, vol. 12, p. 244), 486.
- a. *Quasi-Judicial Officers*, 486.
3. *Ministerial Officers*, 490.
- a. *For Default of Official Subordinates*, 495.
- b. *For Default of Private Servants*, 496.
- c. *Liability on Their Official Contracts*, 497.
- (1) *Negotiable Instruments*, 502.
- d. *Criminal Liability*, 502.
- (1) *Particular Offenses*, 504.
- XIII. *Liability of the Public for the Acts of Its Officers and Agents*, 506.
1. *Contracts Made by Officers*, 510.
2. *Torts of Officers*, 514.
- XIV. *Liability of the Party at Whose Instance the Officer Acts*, 515.
1. *The General Rule*, 515.
2. *Various Classes of Proceedings*, 516.
- a. *Malicious Prosecution*, 516.
- b. *False Imprisonment*, 516.
- c. *Injunctions*, 518.
- d. *Attachments*, 518.
- e. *Proceedings Under an Unconstitutional Statute*, 519.
- f. *Executions*, 519.
- g. *Levy in Bankruptcy Proceedings*, 521.
- h. *Other Cases*, 521.
3. *Ratification*, 522.
- XV. *Rights of the Public Against Third Persons*, 522.
- XVI. *Rights of the Officer as Against Third Persons*, 523.
- XVII. *Compensation*, 525.
1. *From the Public*, 525.
2. *From the Individual for Whom the Officer Acts*, 537.
3. *Reimbursement and Indemnity*, 540.
- XVIII. *Particular Officers and Classes of Officers*, 543.
1. *Federal Officers*, 543.
- a. *Presidents and Heads of the Departments* (See PRESIDENT OF THE UNITED STATES; UNITED STATES; and *supra*, this title, *Liabilities of Public Officers*), 543.
- b. *Congress* (UNITED STATES; and *supra*, this title, *Liability of Legislative Officers*, 543).
- c. *Judges of Federal Courts* (See UNITED STATES COURTS), 544.
- d. *United States Commissioners* (See UNITED STATES COURTS), 544.
- e. *United States Marshals* (See SHERIFFS), 544.
2. *State Officers* (See also STATE AND STATE OFFICERS; GOVERNOR, vol. 8, p. 1400), 544.
3. *County Officers* (See also COUNTY COMMISSIONERS), vol. 4, p. 373; COUNTIES, vol. 4, p. 343; SHERIFFS; RECORDS; RECORDING ACTS), 544.
- a. *County Treasurers*, 544.
- b. *County Clerks* (See also *infra*, this title, *Clerks of Court and County Recorder*), 547.
- c. *County Recorders* (See RECORDING ACTS), 548.
- d. *Collectors of Taxes* (See TAXATION), 548.
- e. *County Auditors* (See COUNTIES, vol. 4, p. 343), 548.
4. *Town Officers* (See TOWNSHIPS), 548.
5. *Municipal Officers*, 548.
- a. *Election and Appointment*, 549.

- b. Powers and Duties, 552.*
 - (1) *The Mayor, 554.*
 - (2) *Municipal Councils* (See also MUNICIPAL CORPORATIONS, vol. 15, p. 1028), 555.
- c. Compensation, 555.*
- d. Liability of the Municipality for the Acts of Its Officers, 557.*
- e. Liability of the Officer to the Corporation, 562a.*
- f. Removals from Office, 562a.*
- 6. *Court Officers* (See also COURTS, vol. 4, p. 447), 562c.
 - a. Clerks of Courts, 562c.*
 - b. Court Attendants* (See SHERIFFS), 562j.
- 7. *Police Officers, 562j.*
- XIX. *Duration of the Officer's Authority, 562k.*
- XX. *Termination of the Officer's Authority, 562o.*
 - 1. *By Expiration of His Term, 562o.*
 - 2. *By Resignation, 562r.*
 - 3. *By Acceptance of an Incompatible Office, 562u.*
- a. Doctrine at Common Law, 562u.*
- b. Doctrine Under Statutes, 562b*.*
- 4. *By Abandonment, 562c*.*
- 5. *Removal of Subordinate Officers, 562f*.*
- 6. *Removal by Legislative Action, 562p*.*
- 7. *Removal by Judicial Action, 562r*.*
 - a. Impeachment* (See IMPEACHMENT, vol. 9, p. 951), 562s*.
 - b. Quo Warranto* (See QUO WARRANTO), 562s*.
- XXI. *Remedies as Against Public Officers, 562s*.*
 - 1. *Injunctions* (See INJUNCTIONS, vol. 10, p. 777), 562s*.
 - 2. *Mandamus* (See MANDAMUS, vol. 14, p. 88), 562s*.
 - 3. *Certiorari* (See CERTIORARI, vol. 3, p. 60), 562s*.
 - 4. *Writ of Prohibition* (See PROHIBITION, WRIT OF), 562s*.
- XXII. *Procedure in Ordinary Actions by and Against Public Officers, 562s*.*

I. DEFINITION.—An office is a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private,¹ and an officer is one who is lawfully invested with an office,² and a public office is a public charge or employ-

1. Burrill L. Dict.; *Bunn v. People*, 45 Ill. 397; *People v. Langden*, 40 Mich. 673; *People v. Tweed*, 13 Abb. Pr., N. S., (N. Y.) 419; *State v. Kenyon*, 7 Ohio St. 547; *State v. Wilson*, 24 Ohio St. 347.

In the abstract, office signifies a place of trust. *People v. Stratton*, 28 Cal. 382.

The term "office" has no legal or technical meaning attached to it distinct from its ordinary acceptation. *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Hill v. Boyland*, 40 Miss. 618; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659.

An office consists in a right and a corresponding duty to execute a public or private trust, and to take the emoluments. 3 Kent's Com. 454; *Com. v. Gamble*, 62 Pa. St. 343; 1 Am. Rep. 422; *Bunn v. People*, 45 Ill. 397; *State v. Wilson*, 29 Ohio St.

347; *Bowers v. Bowers*, 26 Pa. St. 74; 67 Am. Dec. 398; *Attorney-Gen'l v. Barstow*, 4 Wis. 567; *Butler v. Regents*, 32 Wis. 124.

2. Bacon's Abr., tit. Office and Officer; *Bouv. L. Dict.*; *Miller v. Sacramento Co.*, 25 Cal. 94; *Bunn v. People*, 45 Ill. 397; *Olmstead v. Mayor*, etc., of N. Y., 42 N. Y. Super. Ct. 481.

He who performs the duties of an office is an officer. *U. S. v. Maurice*, 2 Brock. (U. S.) 103; *Hamlin v. Kassafer*, 15 Oregon 456; 3 Am. St. Rep. 176; *Bunn v. People*, 45 Ill. 397.

An officer is one invested by a superior authority, particularly by government, with the duty of transacting affairs of a certain class; an incumbent of an office; a person designated to execute some function of government. *And. L. Dict.*; *Abb. L. Dict.* The meaning of the words "office and officer" necessarily varies with its

ment imposed or conferred by appointment or authority of government and for public purposes,¹ and public officers are officers by whom the government performs its usual political functions—its functions of government.²

An office is a mere right to exercise a public function or employment,³ though it is an entity and may exist in fact though it

use in different statutes, and to determine it correctly in a particular instance, regard must be had to the intention of the act and the subject-matter in respect to which the terms are used. *Ryan v. Mayor, etc.*, of N. Y., 50 How. Pr. (N. Y.) 91.

1. *U. S. v. Hartwell*, 6 Wall. (U. S.) 385; *In re Oaths*, 20 Johns. (N. Y.) 492; *In re Hathaway*, 71 N. Y. 238; *In re Wood, Hopk.* (N. Y.) 6; *Smith v. New York*, 37 N. Y. 518; *People v. Nichols*, 52 N. Y. 478; 11 Am. Rep. 734; *In re Dorsey*, 7 Port. (Ala.) 293; *Miller v. Sacramento Co.*, 25 Cal. 98; *People v. Hayes*, 7 How. Pr. (N. Y.) 248; *Olmstead v. Mayor, etc.*, of N. Y., 42 N. Y. Super. Ct. 481; *Hill v. Boyland*, 40 Miss. 618; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *State v. Stanley*, 66 N. Car. 59; 8 Am. Rep. 488; *State v. Kennon*, 7 Ohio St. 547; *Hamlin v. Kassafer*, 15 Oregon 456; 3 Am. St. Rep. 176.

An office is a public charge or employment, and the term seems to comprehend every charge or employment in which the public are interested. *In re Wood, Hopk.* (N. Y.) 6; *People v. Hayes*, 7 How. Pr. (N. Y.) 248; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659.

Whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or be in office. *Rowland v. Mayor, etc.*, of N. Y., 83 N. Y. 372.

Office has been defined to mean public employment, and its legal meaning to be an employment on behalf of government in any station of public trust. A place of trust by virtue of which a person becomes charged with the performance of certain public duties. *Smith v. Moore*, 90 Ind. 294.

The word office is of very vague and indefinite import; everything concerning the administration of justice or general interests of society may be supposed to be within the meaning of the term, especially if fees and emoluments are annexed to the office. *Com. v. Sutherland*, 5 S. & R. (Pa.) 145; *U. S. v. Hatch*, 1 Pin. (Wis.) 182.

A civil office is a grant and possession of sovereign power, and the exercise of such power within the limits prescribed by law which creates the office constitutes the discharge of the duties of the office. *State v. Valle*, 41 Mo. 29; *Opinion of Judges*, 3 Me. 481; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169.

An office is a public position, to which a portion of the sovereignty of the country, either legislative, executive, or judicial attaches for the time being, and which is exercised for the benefit of the public. *High Ex. Rem.*, §. 620; *Eliason v. Coleman*, 86 N. Car. 235; *Doyle v. Raleigh*, 89 N. Car. 133; 45 Am. Rep. 677.

The word "office" refers to the functions performed, and not to the place where the service is rendered. *Stone v. U. S.*, 3 Ct. of Cl. 260.

2. *Sheboygan Co. v. Parker*, 3 Wall. (U. S.) 93; *Bunn v. People*, 45 Ill. 397; *People v. Nostrand*, 46 N. Y. 375; *Rowland v. Mayor, etc.*, of N. Y., 83 N. Y. 376; *State v. Stanly*, 66 N. Car. 59; 8 Am. Rep. 488.

A public officer is one who has some duty to perform, concerning the public. *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Hill v. Boyland*, 40 Miss. 618.

Any person charged by law with the performance of public functions, affecting the general interests of society, especially if he be elected thereto by the people or appointed directly by the legislature, and who receives his compensation out of the public treasury, is a public officer. *Hall v. State*, 39 Wis. 79; *Foltz v. Kerlin*, 105 Ind. 221; 55 Am. Rep. 197; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659; *People v. Bedell*, 2 Hill (N. Y.) 199.

In *Rowland v. Mayor, etc.*, of N. Y., 83 N. Y. 372, the court by Danforth, J., said: "We are not to be too precise in seeking for words and definitions. We may look also at the intent of the statute and so ascertain the meaning of the words used, and who are aimed at."

3. *Leach v. Cassidy*, 23 Ind. 449; *Waldo v. Wallace*, 12 Ind. 569; *Gos-*

be without an incumbent;¹ and it is not property, nor are prospective fees of an office the property of the incumbent,² nor is it a subject of sale, purchase, or incumbrance.³

II. ESSENTIAL ELEMENTS OF PUBLIC OFFICE.—The term "office" implies a delegation of a portion of the sovereign power to and possession of it by the person filling the office⁴—a public office being an agency for the State,⁵ and the person whose duty it is

man *v.* State, 106 Ind. 203; Miller *v.* Sacramento Co., 25 Cal. 94; People *v.* Stratton, 28 Cal. 382; Shelby *v.* Alcorn, 36 Miss. 273; 72 Am. Dec. 169; Olmstead *v.* Mayor, etc., of N. Y., 42 N. Y. Super. Ct. 481.

Webster defines office as a special duty, trust, or charge, conferred by authority and for a public purpose; an employment undertaken by the commission and authority of the government. See also Butler *v.* Regents, 32 Wis. 124.

1. People *v.* Stratton, 28 Cal. 382.

The power and jurisdiction of an officer, however, constitutes the office, and are of the essence of it, and inseparable from it. Com. *v.* Gamble, 62 Pa. St. 343; 1 Am. Rep. 422.

2. Smith *v.* New York, 37 N. Y. 518; Conner *v.* Mayor, etc., of N. Y., 5 N. Y. 285; State *v.* Davis, 44 Mo. 129; Prince *v.* Skillin, 71 Me. 361; 36 Am. Rep. 325; State *v.* Hawkins, 44 Ohio St. 109; State *v.* Douglass, 26 Wis. 428; 7 Am. Rep. 87. And see People *v.* Murray, 70 N. Y. 521.

Officers of government have no proprietary interest in their offices, and their rights are the mere consequence of their duties. State *v.* Dews, R. M. Charl. (Ga.) 397.

Under the constitution and laws of Alabama, an office is not property, but a mere public trust created for the benefit of the State and not for the advancement of the officer. And, unless expressly inhibited by the constitution, the legislature has entire control over the compensation of officers, whether the office is created by statute or owes its origin to the constitution. *Ex parte* Lambert, 52 Ala. 79; Beebe *v.* Robinson, 52 Ala. 67.

In *North Carolina*, it is held that an office is property, and that the incumbent has the same right to it that he has to any other property. King *v.* Hunter, 65 N. Car. 603; 6 Am. Rep. 754; Vann *v.* Pipkin, 77 N. Car. 408; Brown *v.* Turner, 70 N. Car. 93; Hoke *v.* Henderson, 4 Dev. (N. Car.) 1; 25 Am. Dec. 676. Subject, however, to legislative control in all that concerns

the interests of the community. Hoke *v.* Henderson, 4 Dev. (N. Car.) 1; 25 Am. Dec. 676.

3. Smith *v.* New York, 37 N. Y. 518; Conner *v.* Mayor, etc., of N. Y., 5 N. Y. 285.

An office will not pass by an assignment by the incumbent of all his property, nor will such assignment affect his right to prospective fees. Smith *v.* New York, 37 N. Y. 518; Conner *v.* Mayor, etc., of N. Y., 5 N. Y. 285.

4. Opinion of Judges, 3 Me. 481; Miller *v.* Sacramento Co., 25 Cal. 98; People *v.* Middleton, 28 Cal. 603; Bunn *v.* People, 45 Ill. 397; State *v.* Kirk, 44 Ind. 401; 15 Am. Rep. 239; Lindsey *v.* Attorney-Gen'l, 33 Miss. 508; Shelby *v.* Alcorn, 36 Miss. 273; 72 Am. Dec. 169; Olmstead *v.* Mayor, etc., of N. Y., 42 N. Y. Super. Ct. 481; Doyle *v.* Raleigh, 89 N. Car. 133; 45 Am. Rep. 677; Eliason *v.* Coleman, 86 N. Car. 235; Worthy *v.* Barrett, 63 N. Car. 199; U. S. *v.* Hatch, 1 Pin. (Wis.) 182; Sheboygan Co. *v.* Parker, 3 Wall. (U. S.) 93.

In Attorney-Gen'l *v.* Barstow, 4 Wis. 567, it was said that the very legal idea of office is that it is derivative. That it has a source from whence it proceeds, a power which creates it, and to which it is responsible. In this sense of the term the king is not a public officer, and he is never so regarded in the British Constitution. Nor is the President of the United States such an officer, nor is a governor of a State, though their original creations of the very sovereign power in the organization of government emanate directly from the Constitution itself.

5. State *v.* Stanley, 66 N. Car. 59; 8 Am. Rep. 488; Augusta *v.* Sweeney, 44 Ga. 469; 9 Am. Rep. 172; State *v.* Judges, 21 Ohio St. 1; People *v.* Hayes, 7 How. Pr. (N. Y.) 250; Conner *v.* Mayor, etc., of N. Y., 5 N. Y. 285; People *v.* Murray, 5 Hun (N. Y.) 42.

A school trustee, deriving his official character from general law and the election of the people of a given

to perform the agency being a public officer.¹ The term embraces the idea of tenure, duration, emolument and duties,² and has respect to a permanent public trust to be exercised in behalf of government,³ and not to a merely transient occasional or inci-

district, is as much a public agent as if he were the immediate agent of the State, or of one of its political divisions. *Ogden v. Raymond*, 22 Conn. 379; 58 Am. Dec. 429; and see *People v. Bennett*, 54 Barb. (N. Y.) 480.

A board authorized to take measures in the manner prescribed to obtain a supply of water for the use of a city, and invested with the necessary power to accomplish the object, all their powers being derived from the act, and the board being a part of the local administration of the city, constitutes a civil office and not a mere agency. *State v. Valle*, 41 Mo. 29.

A treasurer or other person authorized to receive, hold or disburse public moneys is always a public officer. See *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *State v. Brandt*, 41 Iowa 593; *People v. McKinney*, 10 Mich. 54; *Lorillard v. Monroe*, 11 N. Y. 392; 62 Am. Dec. 120; *Com. v. Morrissey*, 86 Pa. St. 416; *Com. v. Evans*, 74 Pa. St. 124; *Brown v. Turner*, 70 N. Car. 93; *U. S. v. Bloomgart*, 2 Ben. (U. S.) 356.

Selectmen who are invested with the function of a treasurer, upon failure of the town to elect such an officer, or who by special vote of the town, may be constituted a special agent of the town, to receive as well as to hold the funds of the town, are receivers of public money, and therefore public officers. *State v. Boody*, 53 N. H. 610.

1. *State v. Stanley*, 66 N. Car. 59; 8 Am. Rep. 488.

The test as to whether one is a city officer is whether his office constitutes part of the government of the city as organized by the act incorporating it. *Greaton v. Griffin*, 4 Abb. Pr. N. S. (N. Y.) 310.

Postmasters, *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632; *Spence v. Harvey*, 22 Cal. 336; 83 Am. Dec. 69; *deputy postmasters*, *Maxwell v. M'Ilvoy*, 2 Bibb (Ky.) 211; *Schroyer v. Lynch*, 8 Watts (Pa.) 453; and *mail contractors*, *Cornwell v. Vorhees*, 13 Ohio 523; 42 Am. Dec. 206, are public agents acting for the general government in the performance of a function which the government is charged to have executed;

but *mail carriers* are not. *Sawyer v. Corse*, 17 Gratt. (Va.) 230; 94 Am. Dec. 445.

2. *U. S. v. Hartwell*, 6 Wall. (U. S.) 385; *Olmstead v. Mayor*, etc., of N. Y., 42 N. Y. Super. Ct. 481; *Bunn v. People*, 45 Ill. 397; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169.

Persons performing duties, and exercising functions in pursuance of statutory directions, and authority, of a various, delicate, and important nature, which could be successfully performed only by men of large experience and knowledge of affairs, and which are not merely subordinate and provisional, but in the highest degree authoritative, discretionary and final in their character, are not to be regarded as mere employes, agents, or committeemen, but are, properly speaking, officers, and the places which they hold are offices. *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538.

3. *In re Hathaway*, 71 N. Y. 238; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659; *People v. Nostrand*, 46 N. Y. 375; *State v. Anderson*, 45 Ohio St. 196.

The practice of the law in the courts by attorneys is considered as a part of the administration of justice, and attorneys are considered as public officers. *In re Wood*, Hopk. (N. Y.) 7; and see *Richardson v. Brooklyn*, etc., R. Co., 22 How. Pr. (N. Y.) 368; *Merritt v. Lambert*, 10 Paige (N. Y.) 352; 2 Den. (N. Y.) 607; *Watters v. Whittemore*, 22 Barb. (N. Y.) 593; *In re Austin*, 5 Rawle (Pa.) 191; 28 Am. Dec. 657; *Thomas v. Steele*, 22 Wis. 207; *In re Mosness*, 39 Wis. 509; 20 Am. Rep. 55. But the contrary was held in *In re Dorsey*, 7 Porter (Ala.) 293; *In re Oaths*, 20 Johns. (N. Y.) 492; *Leigh's Case*, 1 Munf. (Va.) 468.

Trustees and directors and other officials of the benevolent institutions of the State are public officers. See *People v. Nichols*, 68 N. Car. 429; *People v. Bledsoe*, 68 N. Car. 457; *State v. Wilson*, 29 Ohio St. 347; *People v. Sanderson*, 30 Cal. 160.

The superintendent or principal keeper of the Albany county penitentiary is a public officer. *Porter v. Pillsbury*, 11 How. Pr. (N. Y.) 240.

dental employment.¹ A person in the service of the government who derives his position from a duly and legally authorized election or appointment,² whose duties are continuous in their nature³ and defined by rules prescribed by government and not by contract,⁴ consisting of the exercise of important public

A receiver of a national bank appointed in accordance with an act of Congress is an officer of the United States. *Platt v. Beach*, 2 Ben. (U. S.) 303.

1. *In re Oaths*, 20 Johns. (N. Y.) 492; *People v. Nichols*, 52 N. Y. 478; 11 Am. Rep. 734; *People v. Nostrand*, 46 N. Y. 375; *Hill v. Boyland*, 40 Miss. 618; *State v. Board of Public Works*, 51 N. J. L. 240; *State v. Wilson*, 29 Ohio St. 347; *U. S. v. Germaine*, 99 U. S. 508; *U. S. v. Maurice*, 2 Brock. (U. S.) 96; *U. S. v. Hartwell*, 6 Wall. (U. S.) 385; *Sheboygan Co. v. Parker*, 3 Wall. (U. S.) 93.

The idea of an officer clearly embraces the idea of tenure, duration, fees, or emoluments, rights and powers as well as that of duty; a public station or employment; an employment confirmed by appointment of government. *People v. Nostrand*, 46 N. Y. 375; *In re Oaths*, 20 Johns. (N. Y.) 493.

2. *U. S. v. Maurice*, 2 Brock. (U. S.) 103; *U. S. v. Smith*, 124 U. S. 525; *U. S. v. Mouat*, 124 U. S. 303; *U. S. v. Germaine*, 99 U. S. 508; *Platt v. Beach*, 2 Ben. (U. S.) 303; *Vaughn v. English*, 8 Cal. 39; *Bunn v. People*, 45 Ill. 397; *People v. Hayes*, 7 How. Pr. (N. Y.) 249; *McCoy v. Curtice*, 9 Wend. (N. Y.) 17; 24 Am. Dec. 113; *Ricketts v. Mayor*, etc., of N. Y., 67 How. Pr. (N. Y.) 320; *Collins v. Mayor*, etc., of N. Y., 3 Hun (N. Y.) 680; *Bradford v. Justices*, 33 Ga. 332; *State v. Castell*, 22 La. Ann. 15; *State v. Board of Public Works*, 51 N. J. L. 240; *State v. Wilson*, 29 Ohio St. 347; *Walker v. Cincinnati*, 21 Ohio St. 14; 8 Am. Rep. 24.

Congress has by express enactment vested the appointment of cadet engineer in the Secretary of the Navy, and when thus appointed they become officers and not employés. *U. S. v. Perkins*, 116 U. S. 483; *citing U. S. v. Germaine*, 99 U. S. 508; *U. S. v. Moore*, 95 U. S. 760; *U. S. v. Hartwell*, 6 Wall. (U. S.) 385.

The fact that the president of a city council is chosen by a limited elective body, composed of public officers, does

not deprive him of the character of a public officer. *State v. Anderson*, 45 Ohio St. 196.

Where the other elements exist, it can make no difference whether or not a person is commissioned by the chief executive officer with the authentication of the seal of the State, in order to constitute him an officer. *Bradford v. Justices*, 33 Ga. 332.

An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law or the head of a department. A person in the service of the government, who does not derive his position from one of these sources, is not an officer of the United States in the sense of the Constitution. *U. S. v. Smith*, 124 U. S. 525; *U. S. v. Mouat*, 124 U. S. 303; *U. S. v. Germaine*, 99 U. S. 508.

3. *U. S. v. Maurice*, 2 Brock. (U. S.) 103; *Bunn v. People*, 45 Ill. 397; *State v. Board of Public Works*, 51 N. J. L. 240; *Hill v. Boyland*, 40 Miss. 618; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *State v. Wilson*, 29 Ohio St. 347; *Sheboygan Co. v. Parker*, 3 Wall. (U. S.) 93.

A clerk of the district court is an inferior officer. *Ex parte Hennen*, 13 Pet. (U. S.) 230.

4. *U. S. v. Maurice*, 2 Brock. (U. S.) 103; *U. S. v. Tinklepaugh*, 3 Blatchf. (U. S.) 430; *Ogden v. Raymond*, 22 Conn. 379; 58 Am. Dec. 429; *Bradford v. Justices*, 33 Ga. 332; *Bunn v. People*, 45 Ill. 397; *Ellis v. State*, 4 Ind. 1; *Prather v. Lexington*, 13 B. Mon. (Ky.) 559; 56 Am. Dec. 585; *McCoy v. Curtice*, 9 Wend. (N. Y.) 17; 24 Am. Dec. 113; *Moser v. Mayor*, etc., of N. Y., 21 Hun (N. Y.) 163; *People v. Comptroller*, 20 Wend. (N. Y.) 595; *Hill v. Boyland*, 40 Miss. 618; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Com. v. Gamble*, 62 Pa. St. 343; 1 Am. Rep. 422; *State v. Wilson*, 29 Ohio St. 347; *State v. Anderson*, 45 Ohio St. 196; *State v. Valle*, 41 Mo. 29; *State v. Castell*, 22 La. Ann. 15; *Opinion of Justices*, 3 Me. 481. And see *Smith v. Mayor*, etc., of N. Y., 67 Barb. (N. Y.) 223; *Sweeny*

powers, trusts, or duties, as a part of the regular administration of the government,¹ the place and the duties remaining, though the incumbent dies or is changed,² and who receives his compensation out of the public treasury,³ is a public officer, and his charge or employment is a public office,⁴ every office in the constitutional meaning of the term implying an authority to

v. Mayor, etc., of N. Y., 5 Daly (N. Y.) 274; affirmed 58 N. Y. 625.

A deputy whose place is provided for and whose duties are prescribed by law is not a mere agent or servant, but is to a certain extent an independent public officer. *Dayton v. Lynes, 30 Conn. 351; White v. State, 44 Ala. 409; Conwell v. Voorhies, 13 Ohio 523; 42 Am. Dec. 209; Towns v. Harris, 13 Tex. 507; Eastman v. Curtis, 4 Vt. 616; U. S. v. Martin, 17 Fed. Rep. 150; U. S. v. Tinklepaugh, 3 Blatchf. (U. S.) 430.* But a special deputy employed for a particular purpose is a mere agent or servant. *Kavanaugh v. State, 41 Ala. 399; Armstrong v. U. S., Gilp. (U. S.) 399.*

A policeman of a city is a public officer holding his office as a trust from the State, and not as a matter of contract between himself and the city. *Farrell v. Bridgeport, 45 Conn. 191.* But police patrolmen are not "public officers." *Shanley v. Brooklyn, 30 Hun (N. Y.) 396.*

1. *Bunn v. People, 45 Ill. 397; People v. Nostrand, 46 N. Y. 381; People v. Langdon, 40 Mich. 673; People v. McKinney, 10 Mich. 54; State v. Kennon, 7 Ohio St. 546; Walker v. Cincinnati, 21 Ohio St. 14; 8 Am. Rep. 24; State v. Wilson, 29 Ohio St. 347; Conwell v. Voorhees, 13 Ohio 523; 42 Am. Dec. 206; Sheboygan Co. v. Parker, 3 Wall. (U. S.) 93.*

Office embraces the idea of rights and powers as well as that of duty, *U. S. v. Hartwell, 6 Wall. (U. S.) 385; Olmstead v. Mayor, etc., of N. Y., 42 N. Y. Super. Ct. Rep. 481.*

Assessors, *Lorillard v. Monroe, 11 N. Y. 392; 62 Am. Dec. 120,* and collectors of taxes are public officers. *State v. Walton, 62 Me. 106; Morse v. Lowell, 7 Met. (Mass.) 152; People v. Bedell, 2 Hill (N. Y.) 199; Lorillard v. Monroe, 11 N. Y. 392; 62 Am. Dec. 120.*

The collector of delinquent taxes for Philadelphia is a public officer and therefore removable at the pleasure of the receiver of taxes. *Houseman v. Com., 100 Pa. St. 222.*

2. *Bunn v. People, 45 Ill. 397; State*

v. Wilson, 29 Ohio St. 347; U. S. v. Maurice, 2 Brock. (U. S.) 103.

Change from Territory to State.—Where an office is recognized both by the organic law of a territory and of the State created from the territory, the office remains the same, although dependent on varying provisions of law. *People v. Jobs, 7 Colo. 589.*

All officers of the old government, on the admission of the State, became *ad interim*, State officers. They could do no act prohibited by the constitution to regular State officers of like functions, but were not obliged to follow the mode of procedure prescribed for them. *State v. Hitchcock, 1 Kan. 178; 81 Am. Dec. 503.*

3. *Hall v. State, 39 Wis. 79; Vaughn v. English, 8 Cal. 39; Foltz v. Kerlin, 105 Ind. 221; 55 Am. Rep. 197; People v. Brooklyn, 77 N. Y. 503; 33 Am. Rep. 659; People v. Bedell, 2 Hill (N. Y.) 199; Shelby v. Alcorn, 36 Miss. 273; 72 Am. Dec. 169; Lindsey v. Attorney-Genl., 33 Miss. 508.*

A clerkship in the Treasury or in the Attorney-General's office is an office within the provision that no person shall be paid the salaries of two or more different offices on account of having performed the duties thereof. *Talbot v. U. S., 10 Ct. of Cl. 426.*

A court crier, whose appointment is authorized, and whose compensation is fixed by law, is a public officer. *Ricketts v. Mayor, etc., of N. Y., 67 How. Pr. (N. Y.) 320.*

4. *U. S. v. Maurice, 2 Brock. (U. S.) 103.*

The duty which a court attendant owes to perform such duties as are required to be performed by the court, and to aid in the proper business of the court, and to be present at its sittings, and execute its commands, secure due order in its proceedings, and attend upon juries, is regarded as a public duty, and the attendant is regarded as a public officer. *Rowland v. Mayor, etc., of N. Y., 83 N. Y. 372; Moser v. Mayor, etc., of N. Y., 21 Hun (N. Y.) 163; Sweeney v. Mayor, etc., of N. Y., 5 Daly (N. Y.) 274.* Formerly, however, they were regarded in *New York* not as

exercise some portion of the sovereign power, either in making or executing or administering the laws.¹ But although an office is an employment, it does not follow that every employment is an office.²

A duty or employment arising out of contract, and dependent for its duration and extent upon the terms of such contract;³ or

officers, but merely as servants of the court, performing such menial services as would be required of them from time to time. *Wines v. Mayor, etc.*, of N. Y., 9 Hun (N. Y.) 659; *Holley v. Mayor, etc.*, of N. Y., 56 N. Y. 166; *Brennan v. Mayor, etc.*, of N. Y., 62 N. Y. 365; *Rowland v. Mayor, etc.*, of N. Y., 44 N. Y. Super. Ct. 559.

A *notary public* is an officer known to the common law, the civil law, and the law of nations. *Kiriksey v. Bates*, 7 Port. (Ala.) 529; 31 Am. Dec. 722; *Governor v. Gordon*, 15 Ala. 72.

The city notary of the city of New Orleans, however, is not a municipal officer. *State v. Castell*, 22 La. Ann. 15.

In *Goshen v. Stonington*, 4 Conn. 209; 10 Am. Dec. 121, it was held that a *clergyman*, in the celebration of marriage, is a public civil officer, and his acts in that capacity are admissible as *prima facie* evidence of his official character. But see *Union Church v. Saunders*, 1 Houst. (Del.) 100; 63 Am. Dec. 187.

1. Opinion of Judges, 3 Me. 481; *Bunn v. People*, 45 Ill. 397; *Lindsey v. Attorney-Gen'l*, 33 Miss. 508; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *People v. Nostrand*, 46 N. Y. 375; *Olmstead v. Mayor, etc.*, of N. Y., 42 N. Y. Super. Ct. 481; *U. S. v. Hatch*, 1 Pin. (Wis.) 182.

The true test of a public office is that it is parcel of the administration of the government, civil or military, or is itself created directly by the law-making power. *Eliason v. Coleman*, 86 N. Car. 235.

Commissioners appointed by the legislature on behalf of the State to sign an issue to the city treasury certain city treasury warrants to be issued and circulated as money, are not officers or agents of the corporation; they are State officers only. *Garnier v. St. Louis*, 37 Mo. 554.

An **inspector** is an officer of the customs, and may visit vessels to discover if any goods are illegally on board, and, if obstructed in so doing, an indictment lies under § 71 of the Collection Act of March 1, 1799, ch. 128. *U. S. v. Sears*, 1 Gall. (U. S.) 215.

A United States marshal is an officer within the meaning of the revised statutes of the United States, to whom it is a criminal offense for a deputy marshal to present a false claim for fees for approval. *U. S. v. Strobach*, 4 Woods (U. S.) 592.

2. *U. S. v. Maurice*, 2 Brock. (U. S.) 96; *Hall v. Wisconsin*, 103 U. S. 5.

As to who are public officers under particular constitutional and statutory provisions, see generally *Rowell v. Horton*, 58 Vt. 1; *Armstrong v. U. S.*, Gilp. (U. S.) 399; *Wilcox v. Hemming*, 58 Wis. 144; 46 Am. Rep. 625; *Com. v. Evans*, 74 Pa. St. 124; *Platt v. Beach*, 2 Ben. (U. S.) 303; *U. S. v. Hartwell*, 6 Wall. (U. S.) 385; *U. S. v. Bloomgart*, 2 Ben. 356; *Castle v. Lawlor*, 47 Conn. 340; *Jacksonville v. Allen*, 25 Ill. App. 54; *State v. Wilson*, 29 Ohio St. 347; *Dullam v. Wilson*, 53 Mich. 392; 51 Am. Rep. 128; *Talbot v. U. S.*, 10 Ct. of Cl. 426; *U. S. v. Smith*, 124 U. S. 525; *U. S. v. Mouat*, 124 U. S. 303; *People v. McKinney*, 10 Mich. 54; *People v. Board of Police*, 75 N. Y. 38; *In re Carpenter*, 7 Barb. (N. Y.) 30; *Mangam v. Brooklyn*, 98 N. Y. 585; 50 Am. Rep. 705; *In re Stuart*, 53 Cal. 745; *People v. Ct. of General Sessions*, 13 Hun (N. Y.) 395; *Ex parte Hennen*, 13 Pet. (U. S.) 230; *Enkle v. Edgar*, 63 Cal. 188; *State v. Castell*, 22 La. Ann. 15; *Britton v. Steber*, 62 Mo. 370; *State v. Walsh*, 69 Mo. 408; *Seiple v. Mayor, etc.*, of Elizabeth, 27 N. J. L. 407; *People v. Bledsoe*, 68 N. Car. 457; *Fisher v. Cortland*, 42 Hun (N. Y.) 173; *State v. Wells*, 112 Ind. 237; *Dolan v. Mayor, etc.*, of N. Y., 6 Hun (N. Y.) 506; *Hauck v. State*, 45 Ohio St. 439; *People v. Nichols*, 68 N. Car. 429; *Attorney-Gen'l. v. Barstow*, 4 Wis. 567; *Auffmordt v. Hedden*, 30 Fed. Rep. 360; *Jacksonville v. Allen*, 25 Ill. App. 54; *U. S. v. Hendee*, 124 U. S. 309; *Sawyer v. Corse*, 17 Gratt. (Va.) 230; 94 Am. Dec. 445; *U. S. v. Cook*, 128 U. S. 254; *People v. Perry*, 79 Cal. 105; *State v. Connelly*, 104 N. Car. 794; *State v. Gt. Man*, 7 Heisk. (Tenn.) 472.

3. *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Detroit Free Press Co.*

a position, the duties of which are undefined, and which can be changed at the will of the superior;¹ or, a species of service performed under public authority, and for public good, but not in the execution of any standing laws which are considered as rules of action and guardians of rights;² or a public agency, for the performance of acts in behalf of the principal,

v. State Auditors, 47 Mich. 135; *Olmstead v. Mayor*, etc., of N. Y., 42 N. Y. Super. Ct. 481; *State v. Board of Public Works*, 51 N. J. L. 240; *Brown v. Turner*, 70 N. Car. 93; *Eliason v. Coleman*, 86 N. Car. 235; *Butler v. Regents*, 32 Wis. 124; *Hall v. Wisconsin*, 103 U. S. 5; *U. S. v. Hartwell*, 6 Wall. (U. S.) 385.

A government office is different from a government contract. The latter from its nature is necessarily limited in its duration, and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other. *U. S. v. Hartwell*, 6 Wall. (U. S.) 385; *citing U. S. v. Mauriee*, 2 Brock. (U. S.) 103; *Jackson v. Healy*, 20 Johns. (N. Y.) 495; *Vaughn v. English*, 8 Cal. 39; *Sandford v. Boyd*, 2 Cranch (U. S.) 79; *Ex parte Smith*, 2 Cranch (U. S.) 693.

A contractor is not an officer of government, when he undertakes to perform work or render services for the government for a compensation, to be paid to him with a view to his own profit, and when his subordinates are employed and paid by him, and are liable to be dismissed at his pleasure. *Sawyer v. Corse*, 17 Gratt. (Va.) 230; 94 Am. Dec. 445.

1. *People v. Langdon*, 40 Mich. 673; *Kavanaugh v. State*, 41 Ala. 399; *Opinion of Judges*, 3 Me. 481; *Olmstead v. Mayor*, etc., of N. Y., 42 N. Y. Super. Ct. 481; *State v. Board of Public Works*, 51 N. J. L. 240; *Smith v. Mayor*, etc., of N. Y., 67 Barb. (N. Y.) 223; *Lindsey v. Attorney-Gen'l.*, 33 Miss. 308; *U. S. v. Smith*, 124 U. S. 525; *Armstrong v. U. S.*, Gilp. (U. S.) 399.

A person who receives no certificate of appointment as an officer, is not required to take any oath, has no term or tenure, and neither discharges duties nor exercises powers depending directly on authority of law, but serves upon the request of a public board, being responsible only to them, is not an officer, although his duties may in-

volve high professional skill, and duties of dignity and importance in connection with public affairs, such as those of the superintending architect of public works. *Olmstead v. Mayor*, etc., of N. Y., 42 N. Y. Super. Ct. 289.

A person in the employment of the public service of the United States, who was appointed pursuant to law and whose compensation is fixed by law, when the vacation of the office of his superior would not have affected the tenure of his place, his duties being continuing and permanent, and not occasional or temporary, however, is a public officer, though his duties are only such as his superior in office should prescribe. *U. S. v. Hartwell*, 6 Wall. (U. S.) 385.

A deputy clerkship of a county court is not such an office as cannot be filled by a woman. *Jeffries v. Harrington*, 11 Colo. 191.

2. *Opinion of Judges*, 3 Me. 481; *People v. Middleton*, 28 Cal. 605; *Smith v. Mayor*, etc., of N. Y., 67 Barb. (N. Y.) 223; *Olmstead v. Mayor*, etc., of N. Y., 42 N. Y. Super. Ct. 481; *State v. Gardner*, 43 Ala. 234; *State v. Platt*, 4 Harr. (Del.) 154; *McArthur v. Nelson*, 81 Ky. 67; *Doyle v. Raleigh*, 89 N. Car. 133; 45 Am. Rep. 677; *State v. Board of Public Works*, 51 N. J. L. 240; *Walker v. Cincinnati*, 21 Ohio 14; 8 Am. Rep. 24; *Bunn v. People*, 45 Ill. 397; *U. S. v. Smith*, 124 U. S. 525.

Firemen and officers of the fire department are not officers, but mere agents of the municipality. *People v. Pinckney*, 32 N. Y. 377.

The chief clerk in the office of the assessor of the city of Detroit, is not an officer, even though he is independent of the assessor in the tenure of his position. *People v. Langdon*, 40 Mich. 673.

A road supervisor is not a public officer. *State v. Putnam*, 35 Iowa 561; nor is a police jurymen, *State v. Montgomery*, 25 La. Ann. 138; nor is the medical superintendent of the asylum for the insane at Ward's Island. *Macdonald v. Mayor*, etc., of N. Y., 32 Hun (N. Y.) 89; nor a bridge tender. *State*

the public, whose sanction is necessary to give the acts performed the power and authority of law;¹ or an employment for a special and single object, in which there is no enduring element;² or an agency, the duties of which when completed, though years may be required for their performance, terminates the employment³ or the duties of which are not continuing and permanent but occasional and intermittent⁴ is not an office but a mere employment, and the incumbent is not an officer but a mere employé.⁵

v. Board of Public Works, 51 N. J. L. 240.

1. Opinion of Judges, 3 Me. 481; and see *Lindsey v. Attorney Gen'l.*, 33 Miss. 508; *Sheboygan Co. v. Parker*, 3 Wall. (U. S.) 93.

The *enrolling clerk* of the House of Representatives is not an officer, but a mere employé. *State v. Gardner*, 43 Ala. 234.

An *assistant postmaster* is merely a servant or agent of the postmaster who is therefore liable for the former's negligence. *Coleman v. Frazier*, 4 Rich. (S. Car.) 14; 53 Am. Dec. 727.

2. *Bunn v. People*, 45 Ill. 397; *Kavanaugh v. State*, 41 Ala. 399; *Greaton v. Griffin*, 4 Abb. Pr. N. S. (N. Y.) 310; *People v. Nichols*, 52 N. Y. 478; 11 Am. Rep. 734; *Shepherd v. Com.*, 1 S. & R. (Pa.) 1; *Auffmordt v. Hedden*, 30 Fed. Rep. 360; and see *Kavanaugh v. State*, 41 Ala. 399.

A *guardian of an infant* is not a public officer within the meaning of the statutes prescribing the time within which actions upon the bonds of public officers shall be brought. *Peelle v. State*, 118 Ind. 512; *Owen v. State*, 25 Ind. 107.

The *board of supervisors* of a county is not such a public officer as is contemplated by the statute referring to double costs on final determination in its favor of a trial upon mandamus. *People v. Niagara Co.*, 50 How. Pr. (N. Y.) 353.

3. *Bunn v. People*, 45 Ill. 397; *McArthur v. Nelson*, 81 Ky. 67; *Walker v. Cincinnati*, 21 Ohio St. 14; 8 Am. Rep. 24; *David v. Portland Water Committee*, 14 Oregon 98; *Greaton v. Griffin*, 4 Abb. Pr. N. S. (N. Y.) 310.

A *road supervisor* is not such an officer as is referred to in the statute making resistance to officers in the service of process, or in the discharge of their duties, a crime. *State v. Putnam*, 35 Iowa 561.

4. *U. S. v. Germaine*, 99 U. S. 508;

State v. Board of Public Works, 51 N. J. L. 240; *Olmstead v. Mayor*, etc., of N. Y., 42 N. Y. Super. Ct. 431; *Com. v. Lehman*, 3 S. & R. (Pa.) 149; *U. S. v. Hatch*, 1 Pin. (Wis.) 182; *Auffmordt v. Hedden*, 30 Fed. Rep. 360; *Sheboygan Co. v. Parker*, 3 Wall. (U. S.) 93.

A *pilot* is not a public officer. *Dean v. Healy*, 66 Ga. 503.

Commissioners appointed under the statutes of *Louisiana*, providing for the liquidation of banks are not public officers. *Conrey v. Copland*, 4 La. Ann. 307.

Persons licensed under the revenue laws of the United States to trade with officers, soldiers, and the inhabitants of the surrounding country in war time, are not officers of the United States. *State v. Bell*, Phill. (N. Car.) 76.

An act of Congress empowering justices of the peace to arrest and commit persons charged with violation of the criminal laws of the United States, does not make justices of the peace exercising such power officers of the Federal government. *Ex parte Gist*, 26 Ala. 156.

5. See *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; and see cases above cited.

The legislature has full power to appoint and employ all such agents as might be deemed necessary by them to perform duties, not of a permanent, but of a transient or incidental character, and such employés are never exalted to the position of a public officer, though their duties might require months or years for their full performance. *Bunn v. People*, 45 Ill. 397.

While a *public printer* is not usually a public officer, it is entirely competent for the legislature to make him one. *Walker v. Dunham*, 17 Ind. 483; *Ellis v. State*, 4 Ind. 1. And see *Brown v. Turner*, 70 N. Car. 93; *Com.*

Compensation or emoluments is a usual incident to office,¹ but it is not a necessary element² and public officers are usually though not universally required to take an oath.³ The duty of appointing others to office constitutes of itself a public office,⁴ the power of appointment and removal of officers and filling of vacancies which may occur in offices being a high public function and trust, and persons vested with such power hold and exercise a public franchise and office.⁵

That the duration of the tenure of the place is for a short or indefinite period is immaterial,⁶ and the official or unofficial character of a position is not to be determined by its name, nor by

v. Binns, 17 S. & R. (Pa.) 219. His clerks and employes, however, are not officers. *Clapp v. U. S.*, 7 Ct. of Cl. 351.

Where the public printing is by law to be contracted for, the person doing it is not a public officer. *Brown v. Turner*, 70 N. Car. 93.

The word employé is more extensive than "clerk" or "officer," signifying any one in place, or having charge or using a function, as well as one in office. *Stone v. U. S.*, 3 Ct. of Cl. 260.

1. *State v. Kennon*, 7 Ohio St. 546; *State v. Wilson*, 29 Ohio St. 347; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *People v. Nostrand*, 46 N. Y. 375; *State v. Stanley*, 66 N. Car. 59; 8 Am. Rep. 488; *State v. Tate*, 68 N. Car. 547; *Hall v. Wisconsin*, 103 U. S. 5.

The existence of a statutory provision providing for emoluments is a ground, which, taken with others, will constitute an office. See *U. S. v. Hartwell*, 6 Wall. (U. S.) 393; *Ellis v. State*, 4 Ind. 1; *People v. Nostrand*, 46 N. Y. 375; *Ricketts v. Mayor*, etc., of N. Y., 67 How. Pr. (N. Y.) 320.

2. *State v. Kennon*, 7 Ohio St. 546; *State v. Anderson*, 45 Ohio St. 347; *State v. Stanly*, 66 N. Car. 59; 8 Am. Rep. 488.

3. *State v. Stanley*, 66 N. Car. 59; 8 Am. Rep. 488; *In re Wood*, 2 Cow. (N. Y.) 29, note; and see *State v. Brandt*, 41 Iowa 593; *Kavanaugh v. State*, 41 Ala. 399; *Lindsey v. Attorney Genl.*, 33 Miss. 508; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *State v. Wilson*, 29 Ohio St. 347; *Sawyer v. Corse*, 17 Gratt. (Va.) 230; 94 Am. Dec. 445; *Hall v. Wisconsin*, 103 U. S. 5; *Sweeny v. Mayor*, etc., of N. Y., 5 Daly (N. Y.) 274; *affirmed* 58 N. Y. 625.

In *Collins v. Mayor*, etc., of N. Y., 3

Hun (N. Y.) 680, it was held that the true test to distinguish officers from mere servants or employes, probably is in the obligation to take the oath prescribed by law. See also *Worthy v. Barrett*, 63 N. Car. 199.

In *David v. Portland Water Committee*, 14 Oregon 98, it was suggested that an act providing for the appointment of a committee, need not require the members of the committee to take an oath of office and still be valid, even if they came under the denomination of officers under the Constitution. See also *State v. Stanley*, 66 N. Car. 59; 8 Am. Rep. 488; *State v. Tate*, 68 N. Car. 547.

4. *State v. Stanley*, 66 N. Car. 59; 8 Am. Rep. 488; *State v. Tate*, 68 N. Car. 547; *Bunn v. People*, 45 Ill. 397; *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632; *State v. Kennon*, 7 Ohio St. 546; *U. S. v. Tinklepaugh*, 3 Blatchf. (U. S.) 425; and see *State v. Anderson*, 45 Ohio St. 196.

5. *Bunn v. People*, 45 Ill. 397; *State v. Kennon*, 7 Ohio St. 546.

6. *Com. v. Evans*, 74 Pa. St. 124; *Vaughn v. English*, 8 Cal. 39; *People v. Comptroller*, 20 Wend. (N. Y.) 595; *State v. Stanley*, 66 N. Car. 64; 8 Am. Rep. 488. And see *David v. Portland Water Committee*, 14 Oregon 98.

All persons who, by authority of law are intrusted with the receipt of public money, or through whose hands money due to the public may pass to the treasury, are public officers, whether the service be general or special, transient or permanent. *Brown v. Turner*, 70 N. Car. 93; *Com. v. Evans*, 74 Pa. St. 124; and see *People v. Nostrand*, 46 N. Y. 375.

In *Ellis v. State*, 4 Ind. 1, however, it was held that the fact that the tenure of office was prescribed by statute was a ground for holding it to be an office.

the presence or absence of an official designation.¹ It is the duty of an officer, and the nature of that duty which makes him a public officer, and not the extent of his authority;² office importing the discretionary exercise of some sovereign function, whether great or small within the limits prescribed by law.³

III. KINDS OF OFFICES AND OFFICERS.—Public offices and public officers may be divided with reference to the nature and character of the duties devolving upon them, into executive, legislative, judicial and ministerial offices and officers, and some or all of these may be again divided with reference to the governmental departments within which they fall, into civil, military and naval

1. *State v. Kennon*, 7 Ohio St. 547; *Bunn v. People*, 45 Ill. 397; *U. S. v. Mouat*, 124 U. S. 303; *U. S. v. Hendee*, 124 U. S. 309.

In *Lindsey v. Attorney-Gen'l*, 33 Miss. 508, however, it was held that the very name of a pension agency imports that it is an agency as contradistinguished from an office, and in *State v. Wilson*, 29 Ohio St. 347, the fact that the law creating an office denominated the incumbent an officer and called the place an office, was held to be an indication of his being an officer. And see also *People v. Hayes*, 7 How. Pr. (N. Y.) 249; *People v. Comptroller*, 20 Wend. (N. Y.) 595; *People v. Langdon*, 40 Mich. 373.

It has been held that the designation of a place as an "office" in the statute providing for it, is a reason for determining it to be an office. *Bradford v. Justices*, 33 Ga. 332; *State v. Wilson*, 29 Ohio St. 347; *Urket v. Coryell*, 5 W. & S. (Pa.) 60; *U. S. v. Tinklepaugh*, 3 Blatchf. (U. S.) 430; *People v. Comptroller*, 20 Wend. (N. Y.) 595; *State v. Wharton*, 24 La. Ann. 7.

2. *Vaughn v. English*, 8 Cal. 39; *Bunn v. People*, 45 Ill. 397; *People v. Bedell*, 2 Hill (N. Y.) 199; *State v. Kennon*, 7 Ohio St. 547; and see *Lorillard v. Monroe*, 11 N. Y. 392; 62 Am. Dec. 120.

County commissioners are officers. *Hummell's Case*, 9 Watts (Pa.) 416.

Municipal officers are none the less civil officers under the State, because their functions are confined to the local administration, where the offices are created, and the officers are appointed, and their powers given, and their duties defined, and their salaries fixed direct by act of the legislature. *State v. Valle*, 41 Mo. 29.

A school trustee deriving his official

character from general law, and the election of the people of a given district, is as much a public agent, as if he were the immediate agent of the State, or of one of its political divisions. *Ogden v. Raymond*, 22 Conn. 379; 58 Am. Dec. 429.

In *Com. v. Lehman*, 3 S. & R. (Pa.) 144, however, it was held that places, the duties of which are temporary and local, are not embraced in a general provision of the constitution giving to the governor power to appoint to offices established by law.

A position without duties is not an office. *Com. v. Gamble*, 62 Pa. St. 343; 1 Am. Rep. 422, the court by *Thompson, C. J.*, saying: "It seems like solecism to regard that to be an office in this country to which there are no duties assigned."

3. Opinion of Judges, 3 Me. 481.

Legislators are officers. *Morrill v. Haines*, 2 N. H. 246; *State v. Boody*, 53 N. H. 610; *In re Newport Charter*, 14 R. I. 655; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659; *Hill v. Boyland*, 40 Miss. 619.

Persons to whom judicial powers are intrusted are public officers. *Poeple v. Ransom*, 58 Cal. 558; *Bishop v. Oakland*, 58 Cal. 572; *Com. v. Gamble*, 62 Pa. St. 343; 1 Am. Rep. 422.

So are persons exercising executive functions, whether under United States, State, or municipal government, including marshals and their deputies, sheriffs and their deputies, and other subordinate officers, besides the executive heads of government. See *U. S. v. Martin*, 17 Fed. Rep. 150; *U. S. v. Tinklepaugh*, 3 Blatchf. (U. S.) 428; *McCoy v. Curtice*, 9 Wend. (N. Y.) 17; 24 Am. Dec. 114; *Dayton v. Lynes*, 30 Conn. 351; *Eastman v. Curtis*, 4 Vt. 616.

In *North Carolina*, however, members of the legislature are not considered

offices and officers, and still another division of the whole may be made with reference to the qualification and compensation of the incumbent of the office into offices of trust, offices of profit, and honorary offices, while officers may be considered with reference to the legality and character of their title to the offices occupied by them, as officers *de jure*, officers *de facto*, and usurpers or intruders.¹

1. **Executive Officers**.—(See also GOVERNOR;² PRESIDENT OF THE UNITED STATES).—Executive officers are those whose duties are mainly to cause the laws to be executed.³

2. **Legislative Officers**.—Legislative officers are those whose duties relate mainly to the enactment of laws, such as members of Congress, and of the several State legislatures.⁴

3. **Judicial Officers**.—(See also COURTS;⁵ JUDGE⁶).—Judicial officers are those whose duties are to decide controversies between individuals, and accusations made in the name of the public against persons charged with a violation of the law.⁷

to be officers. Theirs are places of trust and profit, but not offices of trust and profit. Worthy *v.* Barrett, 63 N. Car. 199; Doyle *v.* Raleigh, 89 N. Car. 133; 45 Am. Rep. 677.

1. **Political offices** are such as are not connected immediately with the administration of justice, or the execution of the mandates of a superior officer. The offices of the President of the United States, of the heads of the departments, and of the members of the legislature, are of this number. Bouv. L. Dict.

2. Vol. 8, p. 1400.

3. Bouv. L. Dict.; People *v.* San Francisco, 4 Cal. 127.

Executive power is the power to execute the laws, and is vested in the governor of the State; the administrative officers of the State, counties, townships, towns, and cities. State *v.* Hyde, 121 Ind. 20.

Executive duties are such as concern the execution of existing laws. Peterson *v.* Mayor, etc., of N. Y., 17 N. Y. 449.

4. Bouv. L. Dict.

Legislative power is the power to enact, alter, and repeal laws. Hovey *v.* State, 119 Ind. 395; State *v.* Hyde, 121 Ind. 20; Hawkins *v.* Governor, 1 Ark. 570; 33 Am. Dec. 346; Lafayette, etc., R. Co. *v.* Geiger, 34 Ind. 185; Greenough *v.* Greenough, 11 Pa. St. 489; 51 Am. Dec. 567; Wayman *v.* Southard, 10 Wheat. (U. S.) 1; State *v.* Denny, 118 Ind. 449; *In re* Canada Southern R. Co., 7 Fed. Rep. 653.

And see Merrill *v.* Sherburne, 1 N. H. 199; 8 Am. Dec. 52.

The legislative department prescribes what the law shall be in future cases arising under it. Sinking Fund Cases, 99 U. S. 700; Evansville *v.* State, 118 Ind. 426.

The power of the legislature is not judicial. It is limited to the making of laws, not to the exposition or execution of them. DeChastellux *v.* Fairchild, 15 Pa. St. 18; 53 Am. Dec. 570.

5. Vol. 4, p. 447.

6. Vol. 12, p. 2.

7. Bouv. L. Dict.; Black's L. Dict.; Lewis *v.* Webb, 3 Me. 326; Merrill *v.* Shurburne, 1 N. H. 199; 8 Am. Dec. 52.

Judicial power is the power to construe and interpret the constitution and laws, and to render judgments, and make decrees determining private controversies. Hovey *v.* State, 119 Ind. 395; State *v.* Hyde, 121 Ind. 20.

Whatever emanates from a judge as such, or proceeds from courts of justice, is judicial. *In re* Cooper, 22 N. Y. 67.

The judicial department determines what the law is, and what the rights of parties are, with reference to transactions already had. Sinking Fund Cases, 99 U. S. 700; Evansville *v.* State, 118 Ind. 426.

To declare what the law shall be is a legislative power. To declare what it is or has been, is judicial. Dash *v.* Van Kleeck, 7 Johns. (N. Y.) 498; 5 Am. Dec. 291; People *v.* Keeler, 99 N. Y. 463.

4. **Ministerial Officers.**—Ministerial officers are those whose duty it is to execute the mandates, lawfully issued, of their superiors,¹ officers of justice charged with the execution of the law,² a ministerial duty being one in respect to which nothing is left to the discretion of the officer.³

5. **Civil Officers.**—Civil, as contrasted with military officers, include all who are engaged in the service of government, distinct from those engaged in the military or naval service.⁴ Under the Constitution, all officers of the United States who hold their appointments under the National Government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers of the army or navy, are civil officers.⁵

6. **Military Officers**—(See also MILITARY LAW⁶).—Military officers are those who have command in the army,⁷ military offices being such as are held by soldiers and sailors for military purposes.⁸

7. **Naval Officers.**—Naval officers are those who are in command in the navy.⁹

8. **Offices of Trust.**—An office, the duties and functions of which require the exercise of discretion, judgment, experience, and skill, is an office of trust, and it is not necessary that the officer should have the handling of public money or property, or the care and oversight of some pecuniary interest of the government.¹⁰

1. Bouv. L. Dict.

2. Black's L. Dict.

3. *Mississippi v. Johnson*, 4 Wall. (U. S.) 498; *Pennington v. Streight*, 54 Ind. 376.

4. See And. L. Dict., tit. Civil; 1 Story Const., § 791; *State v. Valle*, 41 Mo. 29.

Civil officers embrace only those officers in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations or the control of the general interests of such is confided. *U. S. v. Hatch*, 1 Pin. (Wis.) 182.

5. And. L. Dict., tit. Officers; Black's L. Dict., tit. Civil Officers; 1 Story Const., § 792; *Mechem Pub. Off.*, § 24; and see *Crawford v. Dunbar*, 52 Cal. 36; *State v. Valle*, 41 Mo. 29.

Where the services of persons employed by the government are special, being rendered to it as a government, and whose salary or pay is directly or indirectly fixed and limited by law, such persons are in the "civil service of the *United States*," while those whose services are such as might be rendered to an employer, whose wages come under the restrictions of no statute, and who receive for their services

whatever such services may be worth in the place where they happen to be rendered, are not in the civil service. *Baker's Case*, 4 Ct. of Cl. 227.

The post of treasurer of a public corporation, such as the city of Wilmington, in Delaware, is not a civil office within the meaning of the constitutional exclusion of the clergy from civil office. *State v. Wilmington*, 3 Harr. (Del.) 294.

6. Vol. 15, p. 390.

7. Bouv. L. Dict.

Officers of the army, as used in the *United States* statutes, refer to commissioned officers. Non-commissioned officers are not officers in the sense in which the latter term is generally used. *Babbitt v. U. S.*, 16 Ct. of Cl. 202.

8. Bouv. L. Dict.

The office of colonel or volunteer in the military service of the *United States*, as now organized, is not an office in the militia. *Kerr v. Jones*, 19 Ind. 351.

9. Bouv. L. Dict.

10. *Mechem's Pub. Off.*, § 16; citing *In re Corlies*, 11 R. I. 638; 23 Am. Rep. 538; *Doyle v. Raleigh*, 89 N. Car. 133; 45 Am. Rep. 677; and see *Ellis v. State*, 4 Ind. 1; *People v.*

9. Offices of Profit.—An office of profit or a lucrative office is one to which there is attached a compensation for services rendered; the word lucrative meaning yielding lucre; gainful; profitable.¹ The lucrativeness of an office, however, does not depend upon the amount of compensation affixed to it.²

All offices of profit are necessarily offices of trust and must therefore be included in those of the latter description,³ but offices of trust are not necessarily offices of profit.⁴

10. Honorary Offices.—Where no salary or fees are annexed to an office, it is a naked or honorary office, and is supposed to be accepted merely for the public good.⁵

Nichols, 52 N. Y. 478; 11 Am. Rep. 734; State v. De Gress, 53 Tex. 387; McGregor v. Balch, 14 Vt. 428; 39 Am. Dec. 231.

In *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538, the court, speaking of the office of commissioner of the United States Centennial Commission, said: "We think it is an office of trust. It is true that originally the United States had no pecuniary interest in the exhibition. The commissioners, however, were to be intrusted with a large supervisory and regulative control of the property sent for exhibition, and from time to time the government gave its sanction to the exhibition. The honor and reputation of the United States were pledged for its proper management to its own citizens, and to foreign nations. From that time the honor and reputation of the United States were largely in the keeping of the commissioners, and in this view there was a very delicate and important trust reposed in them. It would be a narrow, and, we think, an improper interpretation to hold that an office is an office of trust only when the officer has the handling of public money or property, or the care and oversight of some pecuniary interest of the government."

1. State v. Kirk, 44 Ind. 401; 15 Am. Rep. 239; Foltz v. Kerlin, 105 Ind. 221; 55 Am. Rep. 197; People v. Whitman, 10 Cal. 38; State v. Valle, 41 Mo. 29. And see Doyle v. Raleigh, 89 N. Car. 133; 45 Am. Rep. 677; Castle v. Lawlor, 47 Conn. 340.

An office is not an office of profit under the United States, when the officer is not entitled to any pay from the United States, nor to any perquisite or emolument under any law of the United States. *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538.

As to what particular offices are

offices of trust and profit, see *Ellis v. State*, 4 Ind. 1; *Howard v. Shoemaker*, 35 Ind. 111; *Kerr v. Jones*, 19 Ind. 351; *Dailey v. State*, 8 Blackf. (Ind.) 329; *Dickson v. Brown*, 17 Ill. 191; *Doyle v. Raleigh*, 89 N. Car. 133; 45 Am. Dec. 677; *Crawford v. Dunbar*, 52 Cal. 36; *People v. Whitman*, 10 Cal. 38; *State v. Valle*, 41 Mo. 29; *State v. DeGress*, 53 Tex. 387; *McGregor v. Balch*, 14 Vt. 428; 39 Am. Dec. 231; *Leigh's Case*, 1 Munf. (Va.) 468.

2. *Dailey v. State*, 8 Blackf. (Ind.) 329; *Dickson v. Brown*, 17 Ill. 191; *State v. Kirk*, 44 Ind. 401; 15 Am. Rep. 239.

The office of *surveyor-general* is a "lucrative office," and that of *comptroller* an "office of profit," under the constitution of *California*. *People v. Whitman*, 10 Cal. 38.

Officers of the United States on the retired list constitute a part of the army of the United States. They retain the actual rank held by them at the day of their retirement; receive seventy-five per cent. of the pay of that rank; are subject to trial by court-martial, and may be assigned to duty at the soldiers' home. Such an officer holds a lucrative office under the United States—an office of trust or profit in contemplation of the constitution of Texas. *State v. DeGress*, 53 Tex. 387.

The words "lucrative office," as used in the *California* constitution, art. 4, § 20, refer solely to offices under the United States. *People v. Leonard*, 73 Cal. 230.

3. *Doty v. State*, 6 Blackf. (Ind.) 529; and see also *Doyle v. Raleigh*, 89 N. Car. 133; 45 Am. Rep. 677; *State v. Valle*, 41 Mo. 29.

4. See *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538.

5. *State v. Stanley*, 66 N. Car. 59; 8 Am. Rep. 488; *Dickson v. Brown*, 17 Ill. 191.

11. Officers De Jure.—An officer *de jure* is one who is clothed with full legal right and title to the office; though circumstances, such as the intrusion of an unauthorized person, may prevent his performance of the duties of the office.¹

Within the scope of his authority the acts of an officer *de jure* are valid for all purposes.² And where the officer *de jure* is also the officer *de facto* the lawful title and possession are united.³

12. Officers De Facto—(See also DE FACTO OFFICERS⁴).—An officer *de facto* is one who, having some apparent authority or color of title to the office, or who has the reputation of being the officer he assumes to be, is in actual possession of the position, exercising its functions, though his appointment or election may have been irregular, illegal or of undetermined legality.⁵

The distinction between an officer *de jure* and an officer *de facto* is that an officer *de jure* is one who has the lawful right or title without the possession of the office, while an officer *de facto* has the possession and performs the duties under the color of right without being actually qualified in law so to act.⁶ The acts of

The terms offices of honor and offices of trust are used in a synonymous sense in the *Illinois* statute disfranchising the duelist and prescribing the anti-dueling oath, and in the latter, profit and emolument will have the sense of the latter term, as merely enlarging the sense of the former to all offices having pay or perquisites, whether profitable or not. *Dickson v. Brown*, 17 Ill. 191.

In *State v. Valle*, 41 Mo. 29, it was held that a member of the legislature, who receives compensation for his services as a civil officer, holds an office of profit, as well as of honor.

1. Abb. L. Dict.; *Plymouth v. Painter*, 17 Conn. 585; 44 Am. Dec. 574; *Kimball v. Alcorn*, 45 Miss. 151; and see *People v. Staton*, 73 N. Car. 546; 21 Am. Rep. 479.

Some cases apply the term *de jure* to cases only, in which the lawful officer has been ousted or has never actually taken possession of the office. See *Hamlin v. Kassafer*, 15 Oregon 456; 3 Am. St. Rep. 176; *Plymouth v. Painter*, 17 Conn. 585; 44 Am. Dec. 574.

2. *Hamlin v. Kassafer*, 15 Oregon 456; 3 Am. St. Rep. 176; *McCraw v. Williams*, 33 Gratt. (Va.) 510.

3. *Hamlin v. Kassafer*, 15 Oregon 456; 3 Am. St. Rep. 176.

4. Vol. 5, p. 92.

5. Abb. L. Dict.; *McCraw v. Williams*, 33 Gratt. (Va.) 510; *Jeffords v. Hine* (Ariz. 1886), 11 Pac. Rep. 351;

Plymouth v. Painter, 17 Conn. 585; 44 Am. Dec. 574; *Ex parte Strang*, 21 Ohio St. 610; and see *Fitchburg R. Co. v. Grand Junction R. Co.*, 1 Allen (Mass.) 557; Opinion of Justices, 70 Me. 560; and see *Burke v. Cutler*, 78 Iowa 299.

There can be no such thing as a *de facto* officer when there is no office to fill. *State v. Lane*, 16 R. I. 620.

The definition of an officer *de facto*, as given by Lord Ellenborough, in *Rex v. Bedford Level*, 6 East 356, which he generalized from that of Lord Holt, in *Parker v. Kett*, 1 Ld. Raym. 658, is "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." See *Petersilea v. Stone*, 119 Mass. 465; 20 Am. Rep. 335; *State v. Carroll*, 38 Conn. 449; 9 Am. Rep. 409.

6. *Hamlin v. Kassafer*, 15 Oregon 456; 3 Am. St. Rep. 176; *McCraw v. Williams*, 33 Gratt. (Va.) 510; *Plymouth v. Painter*, 17 Conn. 585; 44 Am. Dec. 574; *Wilcox v. Smith*, 5 Wend. (N. Y.) 231; 21 Am. Dec. 213; *Burke v. Elliott*, 4 Ired. (N. Car.) 355; 42 Am. Dec. 142.

The color of right which constitutes one an officer *de facto* may consist in an election or appointment, or in holding over after the expiration of one's term or acquiescence by the public in the acts of such officer for such a length of time as to raise the presumption of colorable right by election or

an officer *de facto* are recognized in law to be valid and effectual so far, and only so far, as they affect the public and third persons,¹

appointment. *Hamlin v. Kassafer*, 15 Oregon 456; 3 Am. St. Rep. 176.

Where the law requires an election to be by joint ballot of two branches, an election by the separate action of each branch is sufficient to give color of title to the office. *Belfast v. Morrill*, 65 Me. 580.

One, who having been elected to an office, assumes to exercise its duties, without having attempted to qualify, is without color of title. *Creighton v. Com.*, 83 Ky. 147.

Two persons cannot be officers *de facto* for the same office at the same time. *Hamlin v. Kassafer*, 15 Oregon 456; 3 Am. St. Rep. 176; *State v. Blossom*, 19 Nev. 312; *McCahon v. Leavenworth Co.*, 8 Kan. 442; *Boardman v. Halliday*, 10 Paige (N. Y.) 432; *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 80; *Conover v. Devlin*, 15 How. Pr. (N. Y.) 1470. And there cannot be at the same time an officer *de jure* and one *de facto*, in possession of the same office. *Boardman v. Halliday*, 10 Paige (N. Y.) 232; *Conover v. Devlin*, 15 How. Pr. (N. Y.) 1470.

One who conceals himself from the public presumably to escape from some criminal charge, who has no place of business, his whereabouts being unknown, and who could not be found after diligent search, and could not be communicated with even by letter addressed to him through the post office, cannot be a *de facto* officer. *Williams v. Clayton* (Utah, 1889), 21 Pac. Rep. 398.

A *de facto* court of appeals cannot exist under a written constitution, which ordains one supreme court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them. *Hildreth v. McIntire*, 1 J. J. Marsh. (Ky.) 206; 19 Am. Dec. 61.

1. *Hooper v. Goodwin*, 48 Me. 79; *People v. Sassovich*, 29 Cal. 480; *Morton v. Lee*, 28 Kan. 287; *Hamlin v. Kassafer*, 15 Oregon 456; 3 Am. St. Rep. 176; *Petersilea v. Stone*, 119 Mass. 465; 20 Am. Rep. 335; *Fitchburg R. Co. v. Grand Junction R. Co.*, 1 Allen (Mass.) 558; *Com. v. Kirby*, 2 Cush. (Mass.) 581; *Burton v. Patten*, 2 Jones (N. Car.) 124; 62 Am. Dec. 194; *Quinn v. Com.*, 20 Gratt. (Va.) 138; *Griffin v. Cunningham*, 20 Gratt. (Va.) 31; *McCraw v. Williams*, 33 Gratt.

(Va.) 510; *McGregor v. Balch*, 14 Vt. 428; 39 Am. Dec. 231; *Brown v. Lunt*, 37 Me. 423; *Tucker v. Aiken*, 7 N. H. 113; *Moore v. Graves*, 3 N. H. 408; *Baird v. Bank of Washington*, 11 S. & R. (Pa.) 411; *State v. Carroll*, 38 Conn. 449; 9 Am. Rep. 409; *Plymouth v. Painter*, 17 Conn. 585; 44 Am. Dec. 574; *M'Instry v. Tanner*, 9 Johns. (N. Y.) 135; *Wilcox v. Smith*, 5 Wend. (N. Y.) 231; 21 Am. Dec. 213; *Burgess v. Koontz*, 64 Md. 134; *Nason v. Dillingham*, 15 Mass. 170; *Bucknam v. Ruggles*, 15 Mass. 180; 8 Am. Dec. 98; *Hussey v. Smith*, 99 U. S. 24; *Phillips v. Payne*, 92 U. S. 132; *Bolling v. Lesner*, 91 U. S. 596; *Cocke v. Halsey*, 16 Pet. (U. S.) 71, and numerous other cases. See DE FACTO OFFICERS, vol. 5, p. 92.

Public funds expended by a *de facto* officer for lawful purposes cannot be recovered from him; but not so if they were expended for an unauthorized though a useful purpose. *McCracken v. Soucy*, 29 Ill. App. 619.

One who acts as an officer *de facto* is estopped from denying that he is such officer, even on a criminal prosecution for malfeasance in office. *People v. Bunker*, 70 Cal. 215. And see *Joliet v. Tuohey*, 1 Ill. App. 483.

One who has accepted and exercised an office under a new appointment, is precluded from claiming that his tenure of the office was a continuance of his original tenure. *Farrell v. Bridgeport*, 45 Conn. 191.

In *State v. Durkee*, 12 Kan. 314, the court, by Valentine, J., said: "The interests of the public require that somebody should exercise the duties and functions of the various offices pending a litigation concerning them, and no one has a better right to do so than the various officers *de facto*, who claim to be officers *de jure*."

As a general rule, the acts of an officer *de facto* are invalid as to himself, and afford him no protection whatever. See *Gourley v. Hankins*, 2 Iowa 75; *Patterson v. Caldwell*, 1 Mete. (Ky.) 493; *Blake v. Sturtevant*, 12 N. H. 567; *People v. Hopson*, 1 Den. (N. Y.) 574; *Conover v. Devlin*, 15 How. Pr. (N. Y.) 477; *Green v. Burke*, 23 Wend. (N. Y.) 490; *Keyser v. McKissan*, 2 Rawel (Pa.) 139; *Neal v. Overseers*, 5 Watts (Pa.) 539; *Riddle v. Bedford Co.*, 7 S. & R. (Pa.) 392; *Venable v. Curd*,

and they cannot be collaterally called into question.¹ Nor can the question as to whether he is also an officer *de jure* be settled in proceedings between third parties.²

13. Usurpers or Intruders.—A usurper is one who assumes the right of government by force contrary to and in violation of the constitution of the country,³ or one who intrudes himself into an office which is vacant, or ousts the incumbent without any color of title whatever.⁴ The acts of a mere usurper are utterly void

² Head (Tenn.) 582; U. S. v. Maurice, 2 Brock. (U. S.) 96; Cummings v. Clark, 15 Vt. 653.

But the principle, upon which the acts of officers *de facto* have been held valid, has sometimes been extended so far as to protect them under certain circumstances, when they have been directly proceeded against. In such case, however, they might properly be called upon to show that they acted by virtue of some appointment or election which they had a right to believe valid, even though it were otherwise. State v. Carroll, 38 Conn. 449; 9 Am. Rep. 409; Petersilea v. Stone, 119 Mass. 466; 20 Am. Rep. 335.

¹ Petersilea v. Stone, 119 Mass. 465; 20 Am. Rep. 335; Murphy v. Shepard, 52 Ark. 356; Moore v. Turner, 43 Ark. 243; Twombly v. Kimbrough, 24 Ark. 474; Hooper v. Goodwin, 48 Me. 79; Brown v. Lunt, 37 Me. 423; Coolidge v. Brigham, 1 Allen (Mass.) 333; People v. White, 24 Wend. (N. Y.) 520; McCraw v. Williams, 33 Gratt. (Va.) 510; State v. Bloom, 17 Wis. 521; State v. Carroll, 38 Conn. 449; 9 Am. Rep. 409.

² Hooper v. Goodwin, 48 Me. 79; Brown v. Lunt, 37 Me. 423; Morse v. Calley, 5 N. H. 222; Bean v. Thompson, 19 N. H. 290; 49 Am. Dec. 154; McCraw v. Williams, 33 Gratt. (Va.) 510; People v. Collins, 7 Johns. (N. Y.) 549; Mayor, etc., of N. Y. v. Conover, 5 Abb. Pr. (N. Y.) 179; People v. White, 24 Wend. (N. Y.) 520; Overseers of the Poor v. Farrington, 20 Vt. 473; Leach v. Cassidy, 23 Ind. 449; State v. Jones, 19 Ind. 358; 81 Am. Dec. 403; Braidy v. Theritt, 17 Kan. 471; Com. v. Kirby, 2 Cush. (Mass.) 577; Coolidge v. Brigham, 1 Allen (Mass.) 333; Sheehan's Case, 122 Mass. 445; 23 Am. Rep. 374; McGregor v. Balch, 14 Vt. 428; 39 Am. Dec. 231; Norton v. Shelby Co., 118 U. S. 442.

The rule extends to all offices executive or judicial, and applies alike to

questions of the validity of the original election or appointment, and to questions whether the commission or authority has expired by its own limitation, or by the acceptance of an incompatible office. Sheehan's Case, 122 Mass. 445; 23 Am. Rep. 374; People v. White, 24 Wend. (N. Y.) 527. And see State v. Carroll, 38 Conn. 449; 9 Am. Rep. 409.

An injunction does not lie to restrain an officer *de facto* from performing the duties of his office, upon the ground that by accepting a subsequent office, he has vacated the first. Hagner v. Heyberger, 7 W. & S. (Pa.) 104; 42 Am. Dec. 230.

The only proper mode of trying the question of the validity of an appointment or election to a public office, which a person claims to exercise, under a color or show of right, is by *quo warranto*, or other proper process to which the officer is a party, and in which the title may be definitely and conclusively settled. Coolidge v. Brigham, 1 Allen (Mass.) 333; Fowler v. Bebee, 9 Mass. 231; Com. v. Fowler, 10 Mass. 290; *In re* Strong, 20 Pick. (Mass.) 484; Sudbury v. Stearns, 21 Pick. (Mass.) 148.

In an action directly against the officer, however, where he attempts to justify his acts, under and by virtue of his commission, it is competent to show that his appointment was invalid and afforded him no protection. Coolidge v. Brigham, 1 Allen (Mass.) 333.

³ Bouv. L. Dict.; Black's L. Dict.

⁴ McCraw v. Williams, 33 Gratt. (Va.) 510; Smith v. Causler, 83 Ky. 367; Hooper v. Goodwin, 48 Me. 79; Jester v. Spurgeon, 27 Mo. App. 477; Tucker v. Aiken, 7 N. H. 113; Plymouth v. Painter, 17 Conn. 585; 44 Am. Dec. 574; Hamlin v. Kassafer, 15 Oregon 456; 3 Am. St. Rep. 176.

The law of *Louisiana* authorizing a suit to redress the usurpation of, or intrusion into, a public office, does not

in every respect.¹ A performance of official duties, with the acquiescence of the public, however, for such a length of time as to raise a presumption of colorable right, constitutes him an officer *de facto*.²

IV. ELIGIBILITY TO PUBLIC OFFICE.—The term "eligible" as applied to candidates for office means capable of being chosen; the subject of selection or choice; also implying competency to hold the office if chosen.³ Constitutional and statutory provisions with reference to eligibility, therefore, are sometimes held to refer to capability of being chosen as well as to capability of

apply to one indisputably holding one office who is performing the duties of another former office, on the claim that it has been abolished, and its duties transferred to him. This is not usurping or intruding into the latter office. *State v. Ward*, 27 La. Ann. 659.

The *Ohio* statute prohibiting any person from taking "upon himself to exercise any office without being legally authorized," means such an assumption as imports a willful usurpation; not a holding over, reasonably believing it his duty to do so until his successor is qualified. *Kreidler v. State*, 24 Ohio St. 22.

To maintain an application for a writ of prohibition, there must be a clear usurpation of jurisdiction. *State v. Judge of Dist. Ct.*, 14 La. Ann. 509.

1. *McCraw v. Williams*, 33 Gratt. (Va.) 510; *Hooper v. Goodwin*, 48 Me. 79; *Tucker v. Aiken*, 7 N. H. 113; *Hamlin v. Kassafer*, 15 Oregon 456; 3 Am. St. Rep. 176; *Plymouth v. Painter*, 17 Conn. 585; 44 Am. Dec. 574.

Both as to individuals and as to the public. *Plymouth v. Painter*, 17 Conn. 585; 44 Am. Dec. 574.

One who was appointed to an office without authority, and never performed any official duty as such officer, and never had the reputation of being such officer, is not an officer *de jure* or *de facto*. *Schenk v. Peay*, 1 Dill. (U. S.) 267.

The exact distinction between an usurper or intruder, and an officer *de facto* is that the former has no color of title to the office, and the latter has, by virtue of some appointment or election. *Fitchburg R. Co. v. Grand Junction R. Co.*, 1 Allen (Mass.) 552; *Petersilea v. Stone*, 119 Mass. 465; 20 Am. Rep. 335.

2. *Hamlin v. Kassafer*, 15 Oregon 456; 3 Am. St. Rep. 176; *State v. Carroll*, 38 Conn. 449; 9 Am. Rep. 409; *Wilcox v. Smith*, 5 Wend. (N. Y.) 231;

21 Am. Dec. 213; *Gilliam v. Reddick*, 4 Ired. (N. Car.) 368.

The mere claim to be a public officer is not enough to constitute one an officer *de facto*. *Hamlin v. Kassafer*, 15 Oregon 456; 3 Am. St. Rep. 176; *Wilcox v. Smith*, 5 Wend. (N. Y.) 231; 21 Am. Dec. 213.

When the government is entirely revolutionized, and all its departments usurped by force, or the voice of a majority, then prudence recommends and necessity enforces obedience to the authority of those who may act as the public functionaries; and in such case the acts of a *de facto* executor, a *de facto* judiciary, and of a *de facto* legislature, must be recognized as valid, but this is required by political necessity. *Hildreth v. McIntire*, 1 J. J. Marsh. (Ky.) 206; 19 Am. Dec. 61.

The reason of public policy upon which it is held that the acts of an officer *de facto* are not to be called in question collaterally but are valid as to third persons, may apply even to a case where such officer is a usurper or intruder. *Petersilea v. Stone*, 119 Mass. 465; 20 Am. Rep. 335.

3. *Black's L. Dict.*; *Searcy v. Grow*, 15 Cal. 118; *People v. Leonard*, 73 Cal. 230; *State v. Bemenderfer*, 96 Ind. 374; *Carson v. McPhetridge*, 15 Ind. 327; *Smith v. Moore*, 90 Ind. 294; *Brady v. Howe*, 50 Miss. 626; *State v. Clarke*, 3 Nev. 566. And see *State v. Trumpf*, 50 Wis. 103.

The term "ineligible" means as well disqualification to hold an office as disqualification to be elected to an office. *State v. Murray*, 28 Wis. 96; 9 Am. Rep. 489.

Qualification for office, as defined by the most approved lexicographers, is endowment or accomplishment that fits for an office; having the legal requisite. Endowed with qualities fit or suitable for the purpose. *State v. Seay*, 64 Mo. 89; 27 Am. Rep. 206.

holding,¹ so that the removal of a disqualification after choice but before entry upon the discharge of the duties of the office does not entitle the candidate to hold,² though where the disqualification is one which he has the power to remove at any time the rule is adopted in a number of the States that disqualification does not relate to the choice to, but to the holding of the office.³

The right of eligibility to office is not consecrated as universal and inviolable by the constitution,⁴ but it belongs equally to all persons whomsoever not excluded by constitutional provisions,⁵ and the legislature cannot establish arbitrary exclusions from

1. *State v. Clark*, 3 Nev. 566; *People v. Leonard*, 73 Cal. 230; *Searcy v. Grow*, 15 Cal. 118; *Brady v. Howe*, 50 Miss. 607.

Where a majority of the ballots at an election were for a person not eligible to the office under the constitution, it was held that the ballots cast for such ineligible person were ineffectual, and that the person receiving the greatest number of legal votes, though not a majority of the ballots, was duly elected and entitled to the office. *Gulick v. New*, 14 Ind. 93; 77 Am. Dec. 49.

2. *Territory v. Smith*, 3 Minn. 240; 74 Am. Dec. 749; *State v. Sullivan*, 45 Minn. 309; *State v. Williams*, 99 Mo. 291; 30 Am. & Eng. Corp. Cas. 254; *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538.

Under a provision that no person holding any lucrative office under the government of the United States shall be eligible to any civil office of profit under the State, a party cannot be elected first to a State office and receive a Federal appointment to a lucrative office, and hold both offices at the same time. *State v. Clarke*, 3 Nev. 566. And see *People v. Leonard*, 73 Cal. 230.

3. *State v. Murray*, 28 Wis. 96; 9 Am. Rep. 489; *State v. Trumpf*, 50 Wis. 103; *State v. Smith*, 14 Wis. 497; *People v. Hamilton*, 24 Ill. App. 609; *Smith v. Moore*, 90 Ind. 294; *Vogel v. State*, 107 Ind. 374; *Brown v. Goben*, 122 Ind. 113; *Privett v. Bickford*, 26 Kan. 52; 40 Am. Rep. 301.

The rule in *Indiana* formerly was that the candidate must be eligible at the time of the choice. *Reynolds v. State*, 61 Ind. 392; *Jeffries v. Rowe*, 63 Ind. 593; *Gulick v. New*, 14 Ind. 93; 77 Am. Dec. 49; *Beal v. Ray*, 17 Ind. 554; *Price v. Baker*, 41 Ind. 572; 13 Am. Rep. 346. And see *Howard v. Shoemaker*, 35 Ind. 111.

The ineligibility of a candidate for an office in *Wisconsin* does not render void the votes cast for him, and such votes should be counted by the canvassers, and if such ineligible person has the highest number of votes, the person who has the next highest number will not be thereby elected. *State v. Smith*, 14 Wis. 497. And see *State Giles*, 1 Chand. (Wis.) 112; *State v. Tierney*, 23 Wis. 430; *Wood v. Bartling*, 16 Kan. 109.

In *Huff v. Cook*, 44 Iowa 639, it was held that a person who was not eligible to an office at the time of election, may be made so by a law subsequently passed. Or, in other words, that a retrospective law may cure or legalize any act which the general assembly could, as an original question have authorized.

4. *Barker v. People*, 3 Cow. (N. Y.) 686; 15 Am. Dec. 322.

Eligibility to office is not declared as a right or principle by any express terms of the constitution, but it results as a just deduction from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who is not made ineligible by the constitution. *Barker v. People*, 3 Cow. (N. Y.) 686; 15 Am. Dec. 322.

Where a constitution defines the qualification of an officer, it is not within the power of the legislature to change or superadd to it, unless the power be expressly, or by necessary implication, given to it. *Thomas v. Owens*, 4 Md. 189; *Page v. Hardin*, 8 B. Mon. (Ky.) 648.

5. *Barker v. People*, 3 Cow. (N. Y.) 686; 15 Am. Dec. 322; *People v. Clute*, 50 N. Y. 451; 10 Am. Rep. 508; *In re Foley*, 39 How. Pr. (N. Y.) 356; *Page v. Hardin*, 8 B. Mon. (Ky.) 648.

office or any general regulations requiring qualifications which the constitution has not required,¹ though the right of the legislature to demand such additional qualifications as the nature of the particular office may reasonably require will not be abridged by implication from a constitutional exclusion.² A mere legislative office not of constitutional origin, however, is subject to be controlled and regulated by the legislature,³ though matters of individual conscience, including opinions on political subjects cannot affect a citizen in any of his legal or political rights,⁴ and no

As the people, with respect to certain offices, have seen fit by express constitutional provisions to restrict their freedom of choice, it is a fair inference that, where the constitution is silent, they intended no restriction. *Wright v. Noell*, 16 Kan. 601.

The expression of one thing in the constitution is necessarily the exclusion of things not expressed. Page v. Allen, 58 Pa. St. 338; 98 Am. Dec. 272; *Evansville v. State*, 118 Ind. 426.

1. *Barker v. People*, 3 Cow. (N. Y.) 686; 15 Am. Dec. 322; *In re Foley*, 39 How. Pr. (N. Y.) 356; *Page v. Hardin*, 8 B. Mon. (Ky.) 660; *People v. May*, 3 Mich. 598.

The legislature may not put upon any elector a personal restriction from voting for any officer who may be elected, save such restriction as is imposed by the constitution. But it may, in the exercise of its judgment for the public good, limit the number from whom the electors may select; for thus to legislate is within the general and sovereign power of legislation which it constitutionally possesses. *People v. Clute*, 50 N. Y. 451; 10 Am. Rep. 508.

2. *Darrow v. People*, 8 Colo. 417; *Rogers v. Buffalo*, 123 N. Y. 173; *State v. Covington*, 29 Ohio St. 102.

As a right flowing from the constitution, eligibility cannot be taken away by any law declaring that classes of men, or even a single person not convicted of a public offense, shall be ineligible to public stations. But as a right not expressly secured by the constitution, it may be taken from convicted criminals, if the legislature, in their plenary power over crimes, deems such a deprivation a necessary punishment. *Parker v. People*, 3 Cow. (N. Y.) 686; 15 Am. Dec. 322; *People v. Clute*, 50 N. Y. 451; 10 Am. Rep. 508.

In *Rogers v. Buffalo*, 123 N. Y. 173, the court by Peckham, J., said: "Look-

ing at it as a matter of common sense, we are quite sure that the framers of our organic law never intended to oppose a constitutional barrier to the right of the people through their legislature, to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office, on the part of him who desired to be appointed to such office. So long as the means adopted to accomplish such end are appropriate therefor, they must be within the legislative power. The idea cannot be entertained for one moment that any intelligent people would ever consent to so bind themselves with constitutional restrictions on the power of their own representatives as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in public office."

3. *State v. Davis*, 44 Mo. 129; *Advisory Opinion*, 38 Mo. 419; *Jeffries v. Rowe*, 63 Ind. 592; *Coffin v. State*, 7 Ind. 157; *Prince v. Skillin*, 71 Me. 361; 36 Am. Rep. 325.

4. *Attorney-Gen'l. v. Detroit*, 58 Mich. 217; 55 Am. Rep. 675; *Evansville v. State*, 118 Ind. 426; *Mayor, etc., of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572; *People v. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 103; *Brown v. Haywood*, 4 Heisk. (Tenn.) 357; *Louthan v. Com.*, 79 Va. 196; 52 Am. Rep. 626.

Legislation which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion shall be taken from one party, does not amount to an arbitrary exclusion from office or to a general regulation requiring qualifications not mentioned in the constitution. *Rogers v. Buffalo*, 123 N. Y. 173; though a provision requiring an appointment of a board of officers consisting of two persons chosen from each of the two leading political

religious test shall ever be required as a qualification to any office or public trust under the United States.¹ In the absence of either constitutional or statutory provision, such persons may hold office only, as a general rule, as have themselves a voice in designating by whom the office shall be filled.²

The election of a person to an office who does not possess the requisite qualifications gives him no right to hold the office or claim a certificate of election.³

parties would be so, as it would render members of all other parties ineligible. *Attorney-Gen'l. v. Detroit*, 58 Mich. 213; 55 Am. Rep. 675.

1. U. S. Const., art. 6, § 3; and see *Rogers v. Buffalo*, 123 N. Y. 173.

The same rule would seem to be applicable to offices under the several States. See *Evansville v. State*, 118 Ind. 426; *Mayor, etc., of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572; *Rogers v. Buffalo*, 123 N. Y. 173.

Most, if not all, of the provisions of the Federal and State constitutions, which are of the nature of a bill of rights, were placed therein with reference to English history, and the struggles for liberty which such history recorded. Declarations, oaths, and tests as a condition for holding office had been frequently resorted to by the Parliament of Great Britain for the purpose of promoting the prosperity of one religion, or insuring the downfall of another. *Rogers v. Buffalo*, 123 N. Y. 173.

By the constitutions of the following States, no religious test is permitted as a qualification for office: *Massachusetts*, Amdt. 7; *Maine* 1, 3; *Rhode Island* 1, 3; *New York* 12, 1; *New Jersey* 1, 4; *Ohio* 1, 7; *Indiana* 1, 5; *Illinois* 5, 25; *Michigan* 18, 1; *Wisconsin* 1, 19; *Iowa* 1, 4; *Minnesota* 1, 17; *Kansas* B. of Rts. 7; *Nebraska* 1, 4; *Maryland* Decln. Rts. 37; *Delaware* 1, 2; *Virginia* 5, 14; *West Virginia* 3, 11, and 15; *Tennessee* 1, 4; *Missouri* 2, 5; *Arkansas* 2, 26; *Texas* 1, 4; *California* 20, 3; *Oregon* 1, 4; *Georgia* 1, 1, 13; *Alabama* 1, 4; *Mississippi* 1, 23; *New Mexico* 95, 1; 1851, July 12, § 3. And in the following States, no religious test is permitted as a qualification for any public trust under the State: *Maine*, *New Jersey*, *Indiana*, *Michigan*, *Wisconsin*, *Iowa*, *Minnesota*, *Kansas*, *New Jersey*, *Maryland*, *Delaware*, *Tennessee*, *Missouri*, *Texas*, *California*, *Oregon*, *Georgia*, *Alabama*, *Stim. Stat. L.*, § 45.

By the constitutions of *North Carolina*, *Arkansas*, *Texas*, *South Carolina*, and *Mississippi*, no one can hold office who denies the existence of a supreme being. *Stim. Stat. L.*, § 46.

2. *State v. Smith*, 14 Wis. 497; *State v. Murray*, 28 Wis. 96; 9 Am. Rep. 489; and see *State v. Kilroy*, 86 Ind. 118; *McCarthy v. Froelke*, 63 Ind. 507; *State v. Covington*, 29 Ohio St. 102.

But if the name of an office-holder be struck from the list of registered voters, he will not, for that reason, be removed from his office, when he was before that time, when a qualified and registered voter, duly elected and inducted into office. *McPherson v. State*, 3 W. Va. 564; *Phares v. State*, 3 W. Va. 567; 100 Am. Dec. 777.

In *Darrow v. People*, 8 Colo. 417, it was held that a constitutional provision that no person except a qualified elector shall be elected or appointed to any civil or military office in the State, being negative in form, does not inhibit the legislature by implication from adding a property qualification.

In *Smith v. Moody*, 26 Ind. 299, it was held that the right to vote, and the legal capacity to hold office, are not essential to citizenship.

Under a constitutional provision that no person except a qualified elector shall be elected or appointed to any civil or military office, the word "office" does not include a deputy clerkship of a county court. *Jeffries v. Harrington*, 11 Colo. 191; *Warwick v. State*, 25 Ohio St. 24.

3. *State v. Pierce City* (Mo. 1887), 3 S. W. Rep. 849; *Brady v. Howe*, 50 Miss. 625; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Dillon's Munic. Corp.* (3d ed.), § 196.

In *St. Louis Co. Ct. v. Sparks*, 10 Mo. 117; 45 Am. Dec. 355, however, it is held that statutes prescribing qualifications to office are directory and that the appointment of one not possessing the requisite qualifications is not absolutely void, unless it is so expressly

1. **Qualifications**—*a*. **CITIZENSHIP**.—It is an acknowledged principle of popular government that it is instituted by the citizens for their liberty and protection, and that it is to be administered and its powers and functions exercised by them and through their agency,¹ and that, therefore, an alien is not eligible to office.² When, however, an inhabitant is made eligible to hold an office, he need not necessarily be a citizen.³ And a resident who has declared his intention to become a citizen of the United States and qualified as an elector, thereby becomes eligible to hold office,⁴ and where the right to vote is made the criterion of

enacted; and that where the appointing power appoints a person not having the qualifications required by law, such person becomes an officer *de facto*. See also *Harbaugh v. Winsor*, 38 Mo. 327.

Presumption of Eligibility.—A person appointed in regular form to a public office is presumed to have been eligible to such office, in the absence of proof to the contrary. *State v. Ring*, 29 Minn. 78.

1. *State v. Smith*, 14 Wis. 497; *State v. Murray*, 28 Wis. 96; 9 Am. Rep. 489; *Walther v. Rabolt*, 30 Cal. 186; and see *State v. Trumpf*, 50 Wis. 103.

A citizen is a native or naturalized person. Allegiance on the part of the person, and the duty of protection on the part of the government, constitutes citizenship under the constitution. *State v. Kilroy*, 86 Ind. 118.

Color.—By the present laws of *Georgia* colored persons are not eligible to hold office. *White v. Clements*, 39 Ga. 232.

2. *Walther v. Rabolt*, 30 Cal. 186; *Bouanchaud v. D'Hebert*, 21 La. Ann. 138. And see *Borst v. Becker*, 6 Johns. (N. Y.) 330; *Grubb v. State*, 14 Wis. 434; *Byrne v. State*, 12 Wis. 519; *State v. Trumpf*, 50 Wis. 103.

In *Walther v. Rabolt*, 30 Cal. 185, the court by Sanderson, J., said: "All political power is inherent in the people, and those who are not of the people can have no share in it. The people are such as are born upon the soil, by and for whom, in the first place, the government was ordained, and such persons of foreign birth as may elect to assume the obligation of a citizen by complying with the laws of naturalization as enacted by Congress. If they desire to secure political rights, they must cease to be aliens, and become citizens in the mode there prescribed. Until then they can neither vote nor hold office; they can neither choose nor

be chosen, for that is to exercise political power, and they are not of the people who alone may exercise it."

No person except a natural-born citizen or a citizen of the United States at the time of the adoption of the Constitution shall be eligible to the office of President. Neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States. U. S. Constitution, art. 2, § 1, sub. 5. And no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States. U. S. Constitution, XII Amendment.

Neither a denizen at common law, nor a naturalized citizen under the general statutory law of *England*, could hold office. *Walther v. Rabolt*, 30 Cal. 185.

3. *State v. Kilroy*, 86 Ind. 118.

The constitution does not prohibit the legislature from conferring on a voluntary association of persons who are not citizens of the United States or electors of the city, the power to elect a person to fill an office created by the legislature. *In re Bulger*, 45 Cal. 553.

The word "inhabitant" means one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor. *State v. Kilroy*, 86 Ind. 118; *Cooley's Const. Lim.* 66.

4. *State v. Fowler*, 41 La. Ann. 380; *State v. Abbott*, 41 La. Ann. 1096; *In re Wehlitz*, 16 Wis. 443; *In re Conway*, 17 Wis. 526; *State v. Smith*, 14 Wis. 497.

In the absence of any constitutional or statutory provision on the subject, one who has received a plurality of votes for office, though an alien, and not an elector at the time of his elec-

eligibility, if the candidate is an elector he need not be a citizen.¹

b. RESIDENCE.—It is a common, if not an invariable requirement that candidates for public office, shall, for some period, have been residents of the district or locality to be represented.² This is a part of the principle of local self-government,³ and in the construction of these provisions the words "residence" and "domicile" are deemed to be identical and synonymous.⁴

c. AGE.—Candidates are required to have arrived at a certain designated age, differing in different States, and with reference to different offices, in order to be eligible to hold certain of the more important offices.⁵ And in several of the States no judge can hold office after he has attained the age of seventy years.⁶ Infants are usually either expressly or impliedly prohibited from holding office by statutory or constitutional provision.⁷ And in the absence of such provision, offices in which judgment, discretion and experience are essentially necessary to the proper discharge of the duties they impose, or offices of pecuniary and

tion, may hold his office, if the disability is removed before the commencement of the term for which he is elected. *State v. Trumpf*, 50 Wis. 103.

1. *McCarthy v. Froelke*, 63 Ind. 507; *State v. Kilroy*, 86 Ind. 118. And see *State v. Abbott*, 41 La. Ann. 1096.

A person who is not a citizen of the United States may be elected or constituted a selectman, so that his official acts may bind the town. Opinion of Justices, 70 Me. 560.

2. *Mechem's Pub. Off.*, § 82. And see *Territory v. Smith*, 3 Minn. 240; 74 Am. Dec. 749; *Yonkey v. State*, 27 Ind. 236; *State v. McMillen*, 23 Neb. 385; *People v. Platt*, 50 Hun (N. Y.) 454; *affirmed* 117 N. Y. 159; *People v. Sheffield*, 47 Hun (N. Y.) 481; *People v. Morrell*, 21 Wend. (N. Y.) 563.

The object of these provisions is to secure the actual presence of the officer in the place within which his duties are to be discharged, and to give to each town, city and county, officers selected from its own inhabitants, from those who there have municipal rights and duties, and are there subject to particular burdens. *People v. Platt*, 50 Hun (N. Y.) 454.

3. *People v. Platt*, 50 Hun (N. Y.) 454; *affirmed* 117 N. Y. 159.

4. *People v. Platt*, 50 Hun (N. Y.) 454; *affirmed* 117 N. Y. 159.

Residence is a question of fact for

the jury. *People v. Platt*, 50 Hun (N. Y.) 454.

5. See U. S. Const., art. 2, § 1, sub. 5; U. S. Const., XIII Amend.; U. S. Const., art. 1, § 3, sub. 3; *Stimson's Am. Stat. Law*, §§ 204-207, 562.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not when elected be an inhabitant of the State for which he shall be chosen. U. S. Constitution, art. 1, § 3, sub. 3.

6. *Stimson's Am. St. Law*, § 563.

Surrogates, *People v. Carr*, 100 N. Y. 236; 53 Am. Rep. 161; *justices of the peace*, *People v. Mann*, 97 N. Y. 532; 49 Am. Rep. 556; *Keniston v. State*, 63 N. H. 37; 56 Am. Rep. 486; *Dohring v. People*, 2 Thomp. & C. (N. Y.) 458; and *county commissioners*, *Betts v. New Hartford*, 25 Conn. 180, have been held not to be judges within the prohibition of such provisions.

In *Maryland* a judge may be continued in office by the legislature after the age of seventy, for such further time as they think fit, not exceeding his term of office. *Maryland Rev. Sts.*, ch. 4, § 3.

7. *Rhode Island Const.*, art. 9, § 1; art. 2, § 1; *Stimson's Am. St. Law*, §§ 220, 224; *Green v. Burke*, 23 Wend. (N. Y.) 490; U. S. v. *Bixby*, 9 Fed. Rep. 78; and see *infra*, this title, *Eligibility*.

public responsibility cannot be held by a person under age,¹ though a minor may hold an office the duties of which are purely ministerial and require nothing more than ordinary skill and diligence for their proper performance.²

d. SEX.—At common law no woman under the degree of a queen could take part in the government of the state,³ though women were permitted to fill local offices of an administrative character, the duties attached to which they were competent to perform;⁴ and, while, under our constitution, a woman is undoubtedly a citizen,⁵ she is not, by virtue of her citizenship, vested with any absolute right independent of legislation, to take part in the government either as a voter or as an officer,⁶ her ineligibility depending on some constitutional restriction or upon necessary implication arising either from the nature of the office itself or from the law as existing when the constitution was adopted in the light of which it must be read.⁷ In the absence of a constitutional restriction, the question is within the

1. See *INFANTS*, vol. 10, p. 613; *Tyler v. Tyler*, 2 Root (Conn.) 519; *Moore v. Graves*, 3 N. H. 408; *Golding's Petition*, 57 N. H. 146; 24 Am. Rep. 66; *Barrett v. Seward*, 22 Vt. 176; *U. S. v. Bixby*, 9 Fed. Rep. 78; *New Albany, etc., R. Co. v. Grooms*, 9 Ind. 243.

The acts of an infant as a public officer are binding upon the public until his appointment or election is declared void according to law. *People v. Dean*, 3 Wend. (N. Y.) 438.

2. *Crosbie v. Hurley*, A. & N. (Ir.) 431; *U. S. v. Bixby*, 9 Fed. Rep. 78.

An infant may serve as a notary public, *U. S. v. Bixby*, 9 Fed. Rep. 78; or as clerk of a militia company, *Ex parte Dewey*, 11 Pick. (Mass.) 265.

3. *Robinson's Case*, 131 Mass. 376; 41 Am. Rep. 239; *Schuchardt v. People*, 99 Ill. 501; 39 Am. Rep. 34.

Women could take no part in the administration of justice, even as judges or jurors, with the single exception of inquiries by a jury of matrons upon a suggestion of pregnancy. 2 Inst. 119, 121; 3 Bl. Com. 362; *Chorlton v. Lings*, L. R., 4 C. P. 374; *Robinson's Case*, 131 Mass. 376; 41 Am. Rep. 239.

4. *Opinion of Justices*, 115 Mass. 602; *Robinson's Case*, 131 Mass. 376; 41 Am. Rep. 237.

It would seem that at common law, women are permitted to hold such offices only as might be executed by deputy. *Robinson's Case*, 131 Mass. 376; 41 Am. Rep. 239.

5. *Robinson's Case*, 131 Mass. 376;

41 Am. Rep. 239; and see *Bradwell v. Illinois*, 16 Wall. (U. S.) 130.

6. *Robinson's Case*, 131 Mass. 376; 41 Am. Rep. 239; *Minor v. Happersett*, 21 Wall. (U. S.) 162; *Atchison Co. v. Lucas*, 83 Ky. 451; *Bradwell v. Illinois*, 16 Wall. (U. S.) 130; *Wheeler v. Hall*, 6 Allen (Mass.) 558; *Jackson v. Phillips*, 14 Allen (Mass.) 539.

The right to practice law in the State court, is not a privilege or immunity of a citizen of the United States, within the meaning of the first section of the XIV Amendment of the constitution of the United States. *Bradwell v. Illinois*, 16 Wall. (U. S.) 130.

The statutes permitting a married woman to hold and convey property, to make contracts, to sue and be sued, and be an executrix, administratrix, guardian, or trustee, have in no way enlarged the capacity of any woman, married or unmarried, to hold offices. *Robinson's Case*, 131 Mass. 376; 41 Am. Rep. 239.

7. *Opinion of Justices*, 115 Mass. 602; and see *Robinson's Case*, 131 Mass. 376; 41 Am. Rep. 239; *Opinion of Justices*, 107 Mass. 604.

Under the *Minnesota* constitution and statutes, providing that any woman entitled to vote shall be eligible to hold any office pertaining solely to the management of schools, a woman is eligible to the office of county superintendent of schools, even though the statute has not authorized her to vote for the purpose of filling such office. *State v. Gorton*, 33 Minn. 345.

control of the legislature, which may, if deemed expedient, confer such a right upon women.¹ Constitutional and statutory provisions should be construed as far as possible in favor of equality of rights with a view to promote the public interest which is benefited by every legitimate use of individual ability.² Women have, in some instances, been recognized as eligible to office, under statutes of which the language is merely general and public opinion everywhere approves of such appointments.³

But where the constitution disqualifies a woman from voting, she cannot hold office. *Atchison Co. v. Lucas*, 83 Ky. 451; *Rupp v. Rust*, 4 Ohio Cir. Ct. 329.

Attorneys at Law.—The refusal of a State court to grant a license to practice law upon the ground that the applicant is a female, and that females are not eligible under the laws of that State, violates no provision of the Federal Constitution. The power of a State to prescribe the qualifications for admission to the bar of its own courts, is unaffected by the XIV Amendment to the Constitution; and the courts cannot inquire into the reasonableness or propriety of the rules it may prescribe. *Bradwell v. Illinois*, 16 Wall. (U. S.) 130.

In *Lockwood v. U. S.*, 9 Ct. of Cl. 346, it was held that under the constitution and laws of the United States, a court is without power to grant an application made by a woman for admission as an attorney; and that a woman is without legal capacity to take the office of an attorney.

In the State courts different results have been reached. See *In re Hall*, 50 Conn. 131; 47 Am. Rep. 625; *In re Goodell*, 48 Wis. 693, holding that a woman may become an attorney at law; and see *In re Bradwell*, 55 Ill. 535; *Robinson's Case*, 131 Mass. 376; 41 Am. Rep. 239; *In re Leonard*, 12 Oregon 93; 53 Am. Rep. 323, holding that she cannot.

In a note to *In re Leonard*, 12 Oregon 93; 53 Am. Rep. 323, it is stated that women have been admitted to the bar in the United States, and are engaged in the practice of a profession, or in the work connected with it in the following States: *Iowa, Missouri, Michigan, Utah, District of Columbia, Maine, Ohio, Illinois, Wisconsin, Indiana, Kansas, Minnesota, California, Connecticut, Massachusetts, Nebraska, Washington Territory, Pennsylvania.*

1. *Huff v. Cook*, 44 Iowa 639; Opinion of Justices, 115 Mass. 602; *Atchison*

Co. v. Lucas, 83 Ky. 451; *State v. Gorton*, 33 Minn. 345.

In *Huff v. Cook*, 44 Iowa 639, it was held that the general assembly had a right to confer the right on women to hold offices of an administrative character by retrospective law, passed to confirm or make good an election by the people, which was held in the absence of a positive law authorizing it.

School Offices.—Women have in numerous instances been made eligible to school offices. See *Wright v. Noell*, 16 Kan. 601; Opinion of Justices, 115 Mass. 602; *State v. Gorton*, 33 Minn. 345; *Huff v. Cook*, 44 Iowa 639.

2. *In re Hall*, 50 Conn. 131; 47 Am. Rep. 625; and see *Schuchardt v. People*, 99 Ill. 501; 39 Am. Rep. 34.

In *Jeffries v. Harrington*, 11 Colo. 191, the court by Stallcup, C., said: "We do not think that it was the intention of the framers of our constitution to declare such avenues of employment (referring to the position of a deputy clerk of the county court), closed to women, and until some clear expression to that effect has been made by constitutional or legislative provision, the court should not declare against the employment of women in such positions."

In *Wright v. Noell*, 16 Kan. 601, a woman was held to be eligible to the office of county superintendent of public instruction, upon the ground that the constitution and laws contains no affirmative statement of qualifications which would exclude them, and that it is a fair inference that where the constitution is silent, it intended no restriction.

In *Robinson's Case*, 131 Mass. 376; 41 Am. Rep. 239, however, it was held that no inference of an intention of the legislature to include women in the statute concerning the admission of attorneys can be drawn from the mere omission of the word male.

3. *In re Hall*, 50 Conn. 131; 47 Am. Rep. 625; and see *Schuchardt v. People*, 99 Ill. 501; 39 Am. Rep. 34; *State*

c. MENTAL CAPACITY.—In some of the States ability to read and write is necessary to eligibility to public office,¹ and by the constitutions of several States no insane person or idiot can hold any State office.² Some of the States have required educational qualifications for certain offices, the performance of the duties of

v. Gorton, 33 Minn. 345; *Huff v. Cook*, 44 Iowa 639.

All restriction upon human liberty, all claims for special privileges, are to be regarded as having the presumption of law against them, and as standing upon their defense, and can be sustained, if at all, by valid legislation only, by the clear expression or clear implication of the law. *In re Hall*, 50 Conn. 131; 47 Am. Rep. 625.

The question whether a woman can legally hold a public office is not like the question whether an unnaturalized alien may vote or hold office. The inclinations, interests, and duties of aliens are presumptively with the nation of which they are citizens, and antagonistic everywhere else. But the men and women of our own nation are alike citizens. There is no antagonism. The question whether women shall vote or hold office is one of internal public policy merely. *Wright v. Noell*, 16 Kan. 601.

Women are appointed in all parts of the country as postmasters. The act of Congress of 1825 was the first one conferring upon the Postmaster-General the power of appointing postmasters, and it has remained essentially unchanged to the present time. The language of the act is, that "the Postmaster-General shall establish post-offices and appoint postmasters." Here women are not included except in the general term "postmasters," a term which seems to imply a male person; and no legislation from 1825 down to the present time authorizes the appointment of women, nor is there any reference in terms to women until the revision of 1874, which recognizes the fact that women had already been appointed, in providing that "the bond of any married woman who may be appointed postmaster shall be binding on her and her sureties." Some of the higher grades of postmasters are appointed by the President, subject to confirmation by the Senate, and such appointments and confirmations have repeatedly been made. The same may be said of pension agents. The acts of Congress on the subject have simply

authorized "the President, by and with the advice and consent of the Senate, to appoint all pension agents, who shall hold their offices for the term of four years, and shall give bond," etc. *In re Hall*, 50 Conn. 131; 47 Am. Dec. 625.

1. Mechem's Pub. Off., § 70, citing *New Mexico Laws*, 1889, ch. 12, p. 18; *Arizona Acts of March 21, 1889*.

In Alabama there is a constitutional prohibition against requiring an educational qualification. See *Stimson's Am. Stat. Law*, § 222.

There are many offices, the duties of which absolutely require the ability of reading and writing the English language. There are many electors, who from habit of life and otherwise, are wholly unfit to discharge the duties of many offices. The legislature in such case, in the absence of constitutional prohibition, has power to name such disqualifications for office as shall exclude such persons, and secure such as have the requisite education. This is the case, even though no constitutional provision is made upon the subject, and negative constitutional provisions exist with reference to other subjects. *State v. Covington*, 29 Ohio St. 102.

2. *Stimson's Am. St. Law*, § 223.

The States in which insane persons and idiots are prohibited from holding office are *Alabama, Georgia, and Louisiana*. *Stimson's Am. Stat. Law*, § 223. And in numerous other States such persons are prohibited from voting. *Stimson's Am. St. Law*, § 251; and as an officer is required to be a qualified elector of the State in many of the States. *Stimson's Am. St. Law*, §§ 204, 205, 221; thus as it would appear indirectly disqualifying insane persons and idiots from holding office.

Under the constitution of *Kentucky*, which makes it the duty of the county court to recommend the two oldest magistrates of the county to the governor, that one might be appointed sheriff, the lunacy of one of such magistrates, during his magistracy, unless continuing at the time of the refusal to recommend him, is no ground for a

which requires special or professional knowledge, with reference to fitness for the office,¹ and though no such provision exists, if in the popular understanding and the uniform practice of government, such qualification has been required, such practice and understanding should be held of equal force with judicial and legislative construction.²

f. PROPERTY QUALIFICATIONS.—The constitutions of several States provide that there shall be no property qualification for holding office.³ In the absence of such provision, a requirement by the legislature of a reasonable property qualification, as being a freeholder, or the payment of taxes, is valid and binding,⁴ and the election or appointment of a person who does not possess the required qualifications is simply void.⁵

2. Disqualification—*a. BY HOLDING PRIOR OFFICE.*—It is frequently provided in State constitutions and statutory enactments that a person holding one office shall not be eligible to certain others deemed to be inconsistent or incompatible with the one already held.⁶ These provisions occur most frequently

refusal by the county court to recommend. *Bartlett v. Justices, Sneed (Ky.)* 215.

1. See *Stimson's Am. Stat. Law*, § 562, with reference to judges.

A person must have been a licensed practicing attorney for two years in order to be eligible to the office of district attorney in *Kentucky*. See *Kentucky Const.*, art. 6, § 2; in *Maryland* he must have been admitted to practice in the State and resided two years in the county. *Maryland Const.*, art. 5, § 10; and the constitutions of *South Carolina* and *Tennessee* would probably be construed to render ineligible to that office one not an attorney at law. See *South Carolina Const.*, 4, 29; *Tennessee Const.*, 6, 5.

Construction of Constitution.—A provision, which, like that of *Louisiana Const.* 1845, art. 95, restricts the choice of the people and the area of selection in filling public offices, which are established for their benefit, and not that of the functionaries, should not receive a large construction, so as to take in, by implication, offices requiring professional skill, and not representative in their character. *State v. Blanchard*, 6 La. Ann. 515.

2. *People v. May*, 3 Mich. 598; *Conroy v. Mayor, etc.*, of N. Y., 6 Daly (N. Y.) 490.

In *People v. May*, 3 Mich. 598, the court, by Martin, J., speaking of the office of prosecuting attorney said: "Were it a balanced question, we

should not hesitate to solve it in such manner as to protect the public interest, and especially to preserve the criminal jurisprudence of a State from possible utter prostration."

Disqualification of the Clergy.—No minister or preacher of any religious denomination can be a member of the legislature in *Maryland*, *Delaware*, *Kentucky* or *Tennessee* or be governor in *Kentucky*, or hold any civil office in *Delaware*. *Stimson's Am. Stat. Law*, § 223, sub. 1.

The office of treasurer of a public corporation, such as the city of *Wilmington*, in *Delaware*, is not "a civil office in this State" within the meaning of the constitutional exclusion of the clergy from civil office. *State v. Wilmington*, 3 Harr. (Del.) 294.

3. *Stimson's Am. Stat. L.*, § 222.

These States are *California*, *Delaware*, *Alabama*, *Kansas*, *Mississippi*, *North Carolina* and *South Carolina*.

4. See *Darrow v. People*, 8 Colo. 417; *People v. Sheffield*, 47 Hun (N. Y.) 481.

5. *Spear v. Robinson*, 29 Me. 531; *State v. Swearingen*, 12 Ga. 23; *State v. Gastinel*, 20 La. Ann. 114. And see *ELECTIONS*, vol. 6, p. 255. But see *St. Louis Co. Ct. v. Sparks*, 10 Mo. 117; 45 Am. Dec. 355.

6. *Mechem's Pub. Off.*, § 76. And see *People v. Leonard*, 73 Cal. 230; *Crawford v. Dunbar*, 52 Cal. 36; *Foltz v. Kerlin*, 105 Ind. 221; 55 Am. Rep. 197; *Kerr v. Jones*, 19 Ind. 351; *State v.*

with reference to lucrative offices,¹ but are not confined exclusively to them.² They cannot be defeated by making the incumbent of one office an incumbent *ex officio* of a forbidden office,³ and appointments made in violation of such prohibition are void both for want of capacity in the appointee to accept, and for want of authority in the appointing power to appoint.⁴

Clarke, 3 Nev. 566; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *State v. Taylor*, 12 Ohio St. 130; *McGregor v. Balch*, 14 Vt. 429; 39 Am. Dec. 231; *Dailey v. State*, 8 Blackf. (Ind.) 329; *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538; *State v. De Gress*, 53 Tex. 387; *Davenport v. Mayor*, etc., of N. Y., 67 N. Y. 456; *State v. Valle*, 41 Mo. 29.

1. In *New Hampshire*, *Massachusetts*, *Vermont*, *Indiana*, *Nebraska*, *Maryland*, *West Virginia*, *North Carolina*, *Tennessee*, *Arkansas*, *Texas*, *Oregon*, *Alabama*, *Louisiana*, *Maine*, *New Jersey*, *Illinois*, *Michigan*, *Ohio*, *Iowa*, *Delaware*, *Virginia*, *Kentucky*, *Missouri*, *Colorado*, *South Carolina*, *Georgia*, *Pennsylvania*, *Kansas*, *California*, and *Minnesota*, the prohibition is directed to holding more than one office where one or both of them is lucrative. See *Stimson's Am. Stat. L.*, § 220.

In *Maine*, *New Jersey*, *Ohio*, *Indiana*, *Wisconsin*, *Iowa*, *Minnesota*, *Maryland*, *Delaware*, *Virginia*, *West Virginia*, *Kentucky*, *Texas*, *California*, *Oregon*, *Nevada*, *Alabama*, *Mississippi*, *Louisiana*, the Territories and the *United States*, members of legislative bodies are prohibited from being elected or appointed to offices of profit which may be created or the emoluments of which may be increased during their terms. In most of them, however, they may be elected to any office which is elective by the people. *Stimson's Am. Stat. L.*, § 220.

The words "lucrative office," in the *California* constitution, refer solely to the office "under the *United States*," and one holding such lucrative office is disqualified to hold any State office, no matter how small the emolument of the latter may be. *People v. Leonard*, 73 Cal. 230.

2. In *Rhode Island*, *Illinois*, *Wisconsin*, *North Carolina*, *Kentucky*, *Texas*, *California*, *Nevada*, *Louisiana*, *West Virginia*, *South Carolina*, *Georgia*, *Iowa*, *New Hampshire*, *Massachusetts*, *Maine*, *Oregon* and *Delaware*, the choice to an office of trust, profit or honor of any person

holding office under a foreign power is prohibited. And in *Maine*, *New York*, *Pennsylvania*, *Illinois*, *Wisconsin*, *Kansas*, *Delaware*, *West Virginia*, *Missouri*, *Arkansas*, *Texas*, *Colorado*, *Louisiana*, *Kentucky*, *Tennessee*, *Oregon*, *New Hampshire*, *Massachusetts*, *Rhode Island*, *New Jersey*, *Ohio*, *Indiana*, *Michigan*, *Iowa*, *Nebraska*, *Maryland*, *North Carolina*, *South Carolina*, *Georgia*, *Territories*, *United States*, *California*, *Nevada*, *Minnesota* and *Alabama*, the election to the State legislature of a person holding a lucrative office under the *United States* is forbidden. See *Stimson's Am. Stat. L.*, § 220.

In *Georgia*, *Louisiana*, *South Carolina* and *West Virginia*, a person holding an office under another State is ineligible. *Stimson's Am. Stat. L.*, § 220.

3. *Bouanchaud v. D'Hebert*, 21 La. Ann. 138. And see *Olmstead v. Mayor*, etc., of N. Y., 42 N. Y. Super. Ct. 481.

But in *State v. Somnier*, 36 La. Ann. 267, it was held that *Louisiana* Acts, 1877, No. 44, making the clerk of the district court *ex officio* a member of the jury commission, does not confer upon him an additional office, in violation of the constitution.

In *Wyoming Territory*, two offices are not merged into one by a statute making a person holding one office an *ex officio* officer as to another. The provision of *Wyoming Territory*, Rev. St. 206, art. 2, § 1, that a judge of probate shall be *ex officio* county treasurer, does not render the sureties on his bond as judge liable for his malfeasance as county treasurer. *Ritter v. Wyoming Ter.*, 1 *Wyoming Ter.* 318.

4. *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Brady v. Howe*, 50 Miss. 625; *State v. Taylor*, 12 Ohio St. 130; *McGregor v. Balch*, 14 Vt. 428; 39 Am. Dec. 231.

In *Dailey v. State*, 8 Blackf. (Ind.) 329, however, it was held that a county recorder by accepting the office of county commissioner, vacates his office of recorder.

They do not apply, however, to a mere *de facto* incumbency.¹ Nor to a case in which the officer failed to qualify under the prior election or appointment,² nor do they apply unless so expressly provided where the term of the prior office has fully expired at the time of the commencement of the second one,³ even though the performance of the uncompleted duties of his office may have been imposed upon him.⁴ Some of these constitutional provisions have been held to apply only to constitutional offices, and do not, therefore, prevent a constitutional officer from holding a municipal or other office not of a constitutional origin.⁵

Legislative enactments disqualifying certain public officers from being chosen to fill other designated offices are not unconstitutional,⁶ but they as well as the constitutional provisions

1. *Crawford v. Dunbar*, 52 Cal. 36. And see *People v. Duane*, 55 Hun (N. Y.) 315; *People v. Turner*, 20 Cal. 142.

The authorization of the coroner by statute to perform certain duties appertaining to the office of sheriff, he being disqualified, is no infringement of that clause of the constitution which declares that "No person shall hold or exercise at the same time more than one civil office." *Powell v. Wilson*, 16 Tex. 59.

2. *Pumphrey v. State*, 17 Md. 57; *Smith v. Moore*, 90 Ind. 294.

A person acting as United States inspector of customs under an appointment from the collector of the port of San Francisco, whose appointment, however, had never been legalized and completed by the approval of the Secretary of the Treasury, is eligible to the position of State district judge, and not within the prohibition of the constitution of *California*. *People v. Turner*, 20 Cal. 142.

3. *Smith v. Moore*, 90 Ind. 294; *Vogel v. State*, 107 Ind. 374.

A person holding the office of United States district attorney, on the day of election, is incapable of being chosen to the office of attorney-general of the State. *State v. Clarke*, 3 Nev. 566.

The Constitution of Wisconsin, art. 2, § 12, providing that "No member of the legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the State which shall have been created, or the emoluments whereof shall have been increased, during the term for which he was elected," does not disqualify a member of the legislature

from holding an office, the emoluments of which are increased during his term, but after his election to such office. *State v. Boyd*, 21 Wis. 208.

4. *State v. Somers*, 96 N. Car. 467.

An officer of the United States army, retired from active service on three-quarters' pay on account of age, does not hold office within *New York Laws* 1888, ch. 584, § 1, providing that a person appointed to the office of aqueduct commissioner "shall hold no other Federal, State, or municipal office," though by U. S. Rev. St., § 1094, an officer on the retired list is declared to be a part of the army, and though he may, by other provisions, be appointed to certain duties in connection with the Soldiers' Home, under certain circumstances. *People v. Duane*, 55 Hun (N. Y.) 315.

5. *State v. Montgomery*, 25 La. Ann. 138; *State v. Kirk*, 44 Ind. 401; 15 Am. Rep. 239; *Mohan v. Jackson*, 52 Ind. 599; and see *De Turk v. Com.*, 129 Pa. St. 151; *People v. Duane*, 55 Hun (N. Y.) 315; *State v. Somnier*, 33 La. Ann. 237; *People v. Whitman*, 10 Cal. 38.

A trial justice or justice of the peace and quorum is not within *Maine Const.*, art. 9, § 2, prohibiting justices of courts from holding any legislative office. *Justices' Opinion*, 68 Me. 594.

One who is appointed to print the laws of the United States in his newspaper may, at the same time, be an alderman of Philadelphia. *Com. v. Binns*, 17 S. & R. (Pa.) 219.

6. *People v. Clute*, 12 Abb. Pr. N. S. (N. Y.) 400.

The prohibition is not inoperative until the legislature declares certain

are to be strictly if not literally construed, a restriction upon appointments not applying to elective offices,¹ and in the absence of such provisions, offices the duties of which are not incompatible with each other, may be united in one person.²

Constitutional provisions are sometimes met with prohibiting the occupation of given officers for more than a prescribed number of consecutive terms.³ Under such provisions, any intervening space removes the disqualification.⁴

b. FOR CRIMINAL ACTS.—In many of the States the commission, either of infamous crime⁵ or of criminal acts denoting an unfitness for the performance of the duties imposed,⁶ are constitutional disqualifications for holding office, and in the absence of

offices to be incompatible; but is absolute, and the legislature may declare offices not within the prohibition to be incompatible. *De Turk v. Com.*, 129 Pa. St. 151.

1. *Carpenter v. People*, 8 Colo. 116; *State v. McCollister*, 11 Ohio 46. And see *People v. Duane*, 55 Hun (N. Y.) 315; *De Turk v. Com.*, 129 Pa. St. 151; *U. S. v. Evans*, 4 Mackey (D. C.) 281; *State v. Weston*, 4 Neb. 234.

A retired army officer may hold an office in the executive department and may receive the salary thereof in addition to his retired pay. *Collins v. U. S.*, 15 Ct. of Cl. 22.

There is nothing in the statutes of the United States to deprive a deputy collector of internal revenue of his salary because he holds the office of inspector of tobacco, compensated by fees from those employing him. *Harrison v. U. S.*, 21 Ct. of Cl. 451.

Adoption of New Constitution.—One who was legally elected a State senator in 1860 under the old constitution, and elected Secretary of State in 1862 is not, under the provisions of the new constitution, ineligible to such office by reason of being a senator. *State v. Clendenin*, 24 Ark. 78.

What Are Municipal Corporations.—The board of president and directors of public schools, school districts and corporations organized for the purpose of education only, are not municipal corporations under session act of March 14, 1869, and the acts amendatory thereto which declare that no person shall be eligible to the office of justice of the county court of St. Louis county, who at the time of his election shall hold any office under a municipal or railroad corporation created by the laws of the State of *Missouri*. *Heller v. Stremmel*, 52 Mo. 309.

2. *Troy v. Wooten*, 10 Ired. (N. Car.) 377; and see *State v. Harrison*, 116 Ind. 300.

Under the *Texas* constitution providing that "no person shall hold or exercise at the same time more than one civil office of emolument, except justice of the peace, county commissioner, notary public, and postmaster," a person may hold either of the offices named, and, at the same time, any other office. *Gaal v. Townsend*, 77 Tex. 464.

3. See *Horton v. Watson*, 23 Kan. 229; *State v. Derbes*, 11 La. Ann. 50; *Griebel v. State*, 111 Ind. 369.

Where at a first election held May 11, 1886, a county treasurer was elected, and having been re-elected in November, 1886, he held possession of the office continuously from the first named date to the end of the second term, it was held that he was ineligible to hold the office for the succeeding term under *Kansas Const.*, art. 9, § 3, providing that no person shall hold the office of county treasurer more than two consecutive terms, though two full terms would be four years. *Davis v. Patten*, 41 Kan. 480.

4. *Horton v. Watson*, 23 Kan. 229.

5. See *Stimson's Am. Stat. L.*, § 223, b. c.; *Royall v. Thomas*, 28 Gratt. (Va.) 130; 26 Am. Rep. 335; *State v. Buckman*, 18 Fla. 267; *Anderson v. State*, 72 Ala. 187; *Wenner v. Smith*, 4 Utah 238.

The provision in the charter of Chicago rendering one ineligible as an alderman for conviction of crime, refers to convictions under *Illinois* laws, and not in the Federal courts. *Hildreth v. Heath*, 1 Ill. App. 82.

6. See *Stimson's Am. Stat. L.*, § 223, d. e. f. g. h.; *Royall v. Thomas*, 28 Gratt. (Va.) 130; 26 Am. Rep. 335;

constitutional provision the legislature has power to deprive criminals of their eligibility to office when they deem such deprivation a necessary punishment for their crimes.¹

The constitution of the United States provides that no person shall be a Senator or Representative in Congress, or elector of President or Vice-President or hold any office, civil or military, under the United States or under any State who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof;² and similar provisions are found in the constitutions and statutes of some of the States, in which case they are enforceable in the State courts.³

State v. Buckman, 18 Fla. 267; *Anderson v. State*, 72 Ala. 187.

A conviction of petty larceny disqualifies a person from voting in *Florida*. *State v. Buckman*, 18 Fla. 267; *Anderson v. State*, 72 Ala. 187.

Condonation.—The reappointment of an officer, with knowledge of his previous misconduct in matters involving no moral delinquency, is a condonation thereof, so far as affects the right to remove him therefor. *State v. Common Council*, 9 Wis. 254.

Under a *Texas* constitution providing that every officer before assuming the duties of his office shall take an oath that he has not given, or offered any inducement to procure votes at his election; and that every person shall be disqualified from holding office upon conviction for such offense, merely holding out a promise to serve, for less compensation than the lawful fees in case of his election, does not disqualify one from holding office, nor does such promise disqualify him at common law, unless the number of voters influenced thereby is sufficient to change the result of the election. *State v. Humphreys*, 74 Tex. 466.

The *Colorado* act of March 8, 1877, declares that every qualified elector shall be eligible to office except as provided by the constitution. The constitution does not, in terms, disqualify because of corrupt means resorted to in obtaining the office, as provided by § 6 Edw. VI, ch. 16. Such conduct, therefore, does not disqualify. *People v. Goddard*, 8 Colo. 432.

1. *Barker v. People*, 3 Cow. (N. Y.) 686; 15 Am. Dec. 322; *People v. Clute*, 50 N. Y. 451; 10 Am. Rep. 508.

The declaration of the constitution that each house of legislature shall be judge of the qualifications of its own members, does not take away the right of the legislature to take from a citizen his right to eligibility to those offices as a punishment for a crime of which he has been convicted. *Barker v. People*, 3 Cow. (N. Y.) 686; 15 Am. Dec. 322.

2. Const. U. S. XIV Amendt., § 3. Congress may by a vote of two-thirds of each house, remove such disability. Const. U. S. XIV Amendt., § 3.

In *Hudspeth v. Garrigues*, 21 La. Ann. 684, it was held that the upholding of the office of clerk of a district court, under the Confederate government while in rebellion, was not of itself an act of rebellion which would disqualify the incumbent from holding office, the court by Howe, J., saying: "If, in legislative, or other official capacity, he had been engaged in the furtherance of the unlawful purposes of the insurgents, when the duties of his office necessarily had relation to the support of the rebellion; if he had held a position created for the purpose of more effectually carrying on hostilities, or whose duties appertained to the support of the rebel cause; or if he had in some way misused the office he did hold to forward the designs of the enemies of the United States, the case would have been very different."

3. See *State v. Watkins*, 21 La. Ann. 631; *Hudspeth v. Garrigues*, 21 La. Ann. 684; *Privett v. Stevens*, 25 Kan. 275; *Privett v. Bickford*, 26 Kan. 52; 40 Am. Rep. 301; *Bridgeman v. Mallett*, 1 Winst. (N. Car.) 112; *Worothy v. Barrett*, 63 N. Car. 199.

The provisions found in several of the States that persons liable for public moneys shall not be eligible to any office of trust or profit until they have paid over and accounted, are not *ex post facto* laws, nor are they repugnant to the constitution of the United States,¹ and the provisions existing in many of the States that any person who has engaged in a duel either as a principal or a second, or who has aided or abetted dueling, is disqualified to hold any office, post, or trust under the government,² are constitutional and will be enforced.³

Most of these provisions presuppose that the act or default upon which the disqualification is based must be judicially ascertained and fixed before the ineligibility attaches,⁴ but under some of them no previous conviction is held to be necessary upon the

Under the Florida Constitution, art. 16, § 1, a person who was a member of the secession convention, and afterward aided the enemies of the United States, is not debarred from holding office. *In re Executive Communication*, 12 Fla. 651.

Involuntary Service.—One who has served in the Confederate army, but not voluntarily, is not thereby rendered ineligible to hold the office of sheriff; nor can the question of his ineligibility be determined by an election canvassing board. *Privett v. Stevens*, 25 Kan. 275.

1. *Taylor v. Governor*, 1 Ark. 21; and see *Cawley v. People*, 95 Ill. 249; *Brady v. Howe*, 50 Miss. 607; *Stimson's Am. Stat. L.*, § 234 e.

Mississippi constitution, art. 4, § 16, which disqualifies for office persons liable for public moneys unaccounted for, applies to private citizens as well as public officers. *Hoskins v. Brantley*, 57 Miss. 814.

The admission of the candidate, that he has made no settlement with the school board for school funds, though coupled with the assertion that he has disbursed more than he has received, and that he has filed his vouchers with the State auditor, is an admission of ineligibility, for want of a discharge; but a discharge granted by competent authority cannot be attacked. The only issue is upon the fact of the discharge. *State v. Echeveria*, 33 La. Ann. 709.

Additional Qualifications.—A statute which requires a sheriff elect, who has hitherto been sheriff, to produce his tax receipts from the proper officer, before again being inducted into the office, is not unconstitutional, upon the

ground that it imposes additional qualifications upon the eligibility to office of such sheriff-elect other than those required by the constitution. *State v. Dunn*, 73 N. Car. 595.

2. See *Stimson's Am. Stat. L.*, § 223 h; *Morgan v. Vance*, 4 Bush (Ky.) 323; *In re Dorsey*, 7 Port. (Ala.) 293; *Brooks v. Calloway*, 12 Leigh (Va.) 466; *Moseley v. Moss*, 6 Gratt. (Va.) 534.

3. *Barker v. People*, 3 Cow. (N. Y.) 686; *State v. Dupont*, 3 McCord (S. Car.) 334; and see *Moody v. Com.*, 4 Metc. (Ky.) 1; *Com. v. Jones*, 10 Bush (Ky.) 725; *Royall v. Thomas*, 28 Gratt. (Va.) 130; 26 Am. Rep. 335.

The dueling act of *Alabama*, so far as it prescribes an expurgatory oath, as a condition to the practice of law, is contrary to the scope and design of a free government; and so much of the act on the subject of dueling as requires the test oath to be taken by attorneys and counselors at law, is contrary to the constitution, and void. *In re Dorsey*, 7 Port. (Ala.) 293.

4. *Cawley v. People*, 95 Ill. 249; *Com. v. Jones*, 10 Bush (Ky.) 725; *Brady v. Howe*, 50 Miss. 607. And see *Barker v. People*, 3 Cow. (N. Y.) 686; 15 Am. Dec. 322; *State v. Humphries*, 74 Tex. 466. See also *Morgan v. Vance*, 4 Bush (Ky.) 323.

Previous conviction is required by the language of the provision itself in many instances. See *Stimson's Am. Stat. L.*, § 223.

In *Illinois*, while an officer might be ousted by *quo warranto*, until his default was judicially ascertained, his acts would be valid and binding and his sureties would be responsible for them. *Cawley v. People*, 95 Ill. 249.

ground that the civil and criminal remedies are twofold and have no necessary connection between them.¹

3. Preference to Veterans.—It is provided in several of the States that honorably discharged Union soldiers and sailors shall be preferred in appointment and employment to office or service in every public department and upon all public works therein, or in any of the cities, towns, and villages thereof, age, loss of limb, or other physical impairment which does not in fact incapacitate, not being deemed to disqualify them, provided they possess the business capacity necessary to the discharge of the duties of the position.²

1. *Royall v. Thomas*, 28 Gratt. (Va.) 130; 26 Am. Rep. 335; *Brady v. Howe*, 50 Miss. 607; *Com. v. Walter*, 83 Pa. St. 105; 24 Am. Rep. 154. And see *Brooks v. Calloway*, 12 Leigh (Va.) 466; *Moseley v. Moss*, 6 Gratt. (Va.) 534.

In *Cochran v. Jones*, 14 Am. L. Reg. N. S. 222, the board for the determination of contested elections decided that the disqualification for dueling and offense against the laws are separate subjects; and that the board has jurisdiction to decide the former without reference to a conviction for the latter in a judicial tribunal.

In *Royall v. Thomas*, 28 Gratt. (Va.) 130; 26 Am. Rep. 335, the court, by Staples, J., speaking of the anti-dueling laws, said: "Universal experience has demonstrated the truth of the observation that the practice of dueling could not be restrained by penal laws.

Who can fail to see how utterly valueless is all this legislation if the disabilities depend upon a previous criminal conviction? If no man can be excluded from office for violating the constitution until a jury can be found to convict, and a court to sentence him to an infamous punishment, the statute of 1810, and all the succeeding laws on the subject, are the merest mockeries. The juries have heretofore set at defiance the penal laws relating to dueling; is it supposed that they would be more inclined to hang offenders by the neck, or to put them in the penitentiary, when it comes to be understood this is the only way to exclude them from office."

In *Pennsylvania* though an officer might be removed by *quo warranto* for obtaining his election by bribery, without having first been convicted of the offense on an indictment, the defendant would have the right to have the issues of fact raised upon the *quo warranto* tried by a jury. *Com. v.*

Walter, 83 Pa. St. 105; 24 Am. Rep. 154.

2. *New York Laws*, 1884, ch. 312, § 1, as amended by *Laws 1887*, ch. 464; *New York Laws*, 1884, ch. 410, § 4, as amended by *Laws 1886*, ch. 29, § 1; *Massachusetts Stats.*, 1887, ch. 437; *Massachusetts Stats.*, 1884, ch. 320; and see *Opinion of Justices*, 145 Mass. 587; *Sullivan v. Gilroy*, 55 Hun (N. Y.) 285; *People v. Wallace*, 55 Hun (N. Y.) 149; *People v. Durston* (Supreme Ct.), 3 N. Y. Supp. 522; *People v. Bardin* (Supreme Ct.), 7 N. Y. Supp. 123; *People v. French*, 51 Hun (N. Y.) 345.

The *New York* provision also applies to non-competitive examinations under the civil service laws, rules or regulations whenever they apply. *New York Laws* (1884), ch. 312, § 1, as amended by *Laws 1887*, ch. 464.

Under the *Massachusetts* statutes, persons who served in the army or navy of the United States, in the War of the Rebellion, and were honorably discharged, cannot be preferred for appointment to office or employment, without having made application for appointment to office, or employment to the civil service commissioners as required by statute and the rules of the commissioners made thereunder. *Opinion of Justices*, 145 Mass. 587.

Under the *New Jersey* statute (Pamph. L. 1885), no person holding a position in any city or county of the State, whose term of office is not fixed by law, and receiving a salary from such city, county, or State, who is an honorably discharged soldier or sailor, having served in the War of the Rebellion, shall be removed from such position, except for good cause shown after a hearing, but such person shall hold his position during good behavior, and shall not be removed for political reasons. *State v. Board of Public Works*, 51 N. J. L. 240.

These provisions apply to all such appointments or employments in which the applicant is not required, under the civil service laws, to submit to competitive examination as to their fitness and qualification to fill the positions for which they apply,¹ and as the legislature may provide for the doing of public work in such manner and with such agencies as it deems proper, their constitutionality is reasonably free from doubt,² though they cannot be permitted to interfere with the constitutional freedom of a superior officer or head of a department to select and appoint his deputies and subordinates, or the exercise of his judgment in determining the fitness and propriety of contemplated appointments;³ and in any event, the determination of competency

In *New York* all officials or other persons having power of appointment to, or employment in the public service, are charged with the faithful compliance with the provisions, giving preference to soldiers and sailors, both in letter and spirit; failure therein being declared to be a misdemeanor. *New York Laws* (1884), ch. 312, § 2, and as amended by Laws 1887, ch. 464.

1. *People v. Wallace*, 55 Hun (N. Y.) 149.

The provisions of this law embrace the employment of ordinary laborers. *Sullivan v. Gilroy*, 55 Hun (N. Y.) 285.

The act applies to New York city, though previous statutes, also applicable to New York, with other cities, provided for appointments and promotions only on an examination as to fitness. *McGuire v. Byrnes* (Supreme Ct.), 2 N. Y. Supp. 760.

A statute giving honorably discharged soldiers and sailors a preference of appointment and employment, applies to veterans in office at the time of the passage of the act, as well as to those appointed under it. *People v. French*, 52 Hun (N. Y.) 464.

But the preference of veterans under the laws of *New York* is confined to appointment only and does not include promotions. Promotions of officers and members of the police force in the State of *New York*, therefore, are still to be determined upon grounds of meritorious police service and superior capacity. *In re McGuire*, 50 Hun (N. Y.) 203; *McGuire v. Burns* (Supreme Ct.), 2 N. Y. Supp. 760.

2. *Sullivan v. Gilroy*, 55 Hun (N. Y.) 284; *In re Wortman* (Supreme Ct.), 2 N. Y. Supp. 324; *People v. Bardin* (Supreme Ct.), 7 N. Y. Supp. 123.

These provisions do not seek to abridge rights guaranteed by the constitution, nor do they discriminate as to eligibility to, or qualification for the office. They simply regulate the agency for service, upon the public works of the municipality. *Sullivan v. Gilroy*, 55 Hun (N. Y.) 285.

The proper remedy of one having a clear right to a preference under the statute is by writ of mandamus to secure and enforce the right. *Sullivan v. Gilroy*, 55 Hun (N. Y.) 285; *People v. Bardin* (Supreme Ct.), 7 N. Y. Supp. 123.

The act was intended to relieve veterans from the disqualification of age, and as a consequence, the power of police commissioners to remove a veteran from the position of policeman, because he had reached the age of sixty years, was thereby abrogated, and a policeman who has been removed for this cause being a veteran, is entitled to be reinstated. *People v. French*, 52 Hun (N. Y.) 464.

Where four clerks are appointed to a temporary position for no definite term, one of whom was a soldier and had the preference in the appointment, and afterwards the duties of the position were reduced and the soldier was discharged, it was held that the soldier should have been discharged last of the four temporary clerks, and that he was entitled to be reinstated. *People v. Adams*, 53 Hun (N. Y.) 141.

3. *People v. Angle*, 109 N. Y. 564; *People v. Durston* (Supreme Ct.), 3 N. Y. Supp. 522; and see *People v. Goething* (Supreme Ct.), 8 N. Y. Supp. 742.

When a person applies to a public officer for appointment and employment under these provisions, it is incumbent upon him to furnish satisfac-

and sufficient business capacity, being a judicial act, cannot be controlled or reviewed by mandamus.¹

4. **Civil Service Examinations.**—Provisions are found in some of the States directing examinations for the purpose of ascertaining the fitness of candidates for office or public employment in respect to character, knowledge, and ability for the branch of service into which they seek to enter, and requiring the places to be filled by selection from among those graded highest as a result of such examinations,² and promotions from a lower to a higher grade of service are to be made on the basis of merit and competition.³ The civil service laws are constitutional and valid,⁴ but do not apply to laborers or workmen or the subordi-

tory evidence that he belongs to the class of persons intended to be benefited by the law, and officers cannot be charged with violating its provisions, and be held to be guilty of a misdemeanor in refusing employment to an applicant, by declining to act upon the mere assertion of the applicant, if he does not know, as a matter of fact, from other sources, that the statement of the applicant is true. *People v. Wallace*, 55 Hun (N. Y.) 149; *People v. Knapp* (Supreme Ct.), 4 N. Y. Supp. 825.

The applicant is required to establish the fact of his qualification by the affidavits of others, and not by their mere written recommendations. *People v. Knapp* (Supreme Ct.), 4 N. Y. Supp. 825.

1. *People v. Little Falls* (Supreme Ct.), 8 N. Y. Supp. 512; *People v. Summers*, 56 Hun (N. Y.) 644; and see *People v. Adams*, 51 Hun (N. Y.) 583; *People v. Wallace*, 55 Hun (N. Y.) 149; *People v. Saratoga Springs* (Supreme Ct.), 7 N. Y. Supp. 125; *People v. Knapp* (Supreme Ct.), 4 N. Y. Supp. 825.

It is a universal rule in respect to all subordinate tribunals, clothed with the exercise of judgment and discretion, that they cannot be compelled by mandamus to decide in any particular way. *People v. Saratoga Springs* (Supreme Ct.), 7 N. Y. Supp. 125.

The act giving preference to honorably discharged soldiers and sailors, does not entitle a veteran whose office is abolished, to displace another officer to whose duties the duties of the office so abolished have been added. *People v. Adams*, 51 Hun (N. Y.) 583.

2. See *New York Laws*, 1883, ch. 354; and amendments, *Laws*, 1884, ch. 357, 410; *Laws* 1886, ch. 29; *Massachusetts Stats.* 1884, ch. 320; *Opinion*

of Justices, 145 Mass. 587; *Peck v. Rochester* (Supreme Ct.), 3 N. Y. Supp. 872; *Rogers v. Buffalo*, 123 N. Y. 173.

In *Peck v. Rochester* (Supreme Ct.), 3 N. Y. Supp. 872, the court by Angle, J., said: "Civil service examinations, as a prerequisite to entering upon the duties of office, appear to have been known to the common law of England more than five hundred years ago. In the city of London, in a tower which is thought to have been one of the earliest portions of Westminster Abbey, is a room where there are six horseshoes and sixty-one nails, which, by ancient custom, the sheriffs of London were compelled to count when they were sworn in. In the time of Edward II, when this custom was established (1308-1327), it was a proof of education, as only well-instructed men could count up to sixty-one. At the same time it was ordained that the sheriff, in proof of his strength, should cut a bundle of sticks. This custom (the abolition of which has been vainly attempted) still exists, but a bundle of matches is now provided. The original knife is always used. 2 Hare Walks in London (N. Y. ed. 1878) 272, 273.

3. *New York Laws*, 1883, ch. 354, § 2.

The statute is not restricted to officers, but includes generally all clerks and persons in the civil service of the government. *People v. Civil Service Board*, 41 Hun (N. Y.) 287.

4. *Rogers v. Buffalo*, 51 Hun (N. Y.) 637; *People v. Angle*, 109 N. Y. 564; *Rogers v. Buffalo*, 123 N. Y. 173. And see *In re Wortman* (Supreme Ct.), 2 N. Y. Supp. 324.

No law involving any test other than fitness and ability to discharge the duties of the office, can be legally en-

nates of an officer for whose errors the superior officer is financially responsible.¹ Nor can the constitutional discretion of a superior officer be hampered, restricted, or regulated in its exercise by any extraneous authority whatever,² and the requirements of these laws being in derogation of common-law right, the burden of proof is upon the party seeking to prevent the employment of any person to establish that he comes within a prohibited class.³ An appointment or employment in violation of the civil-service laws is illegal, and the authorities have no right to appropriate the public moneys to the payment for services rendered in pursuance of such illegal appointment or employment.⁴

acted under cover of a purpose to ascertain or prescribe such fitness. *Rogers v. Buffalo*, 123 N. Y. 173.

A statute like that of *New York* providing that not more than two of the three persons constituting the civil service commission shall be adherents of the same political faith is not unconstitutional. *Rogers v. Buffalo*, 123 N. Y. 173.

1. *Rogers v. Buffalo* (Supreme Ct.), 2 N. Y. Supp. 326; *Rogers v. Buffalo*, 51 Hun (N. Y.) 637.

The fact that the council is vested with power to reject an applicant nominated for the office of street inspector, and that if it saw fit, it might even reject an indefinite number of duly qualified applicants, does not indicate that the legislature did not intend the civil-service rules to apply to such officer, *Rogers v. Buffalo*, 51 Hun (N. Y.) 637.

A lamp inspector, whose duties are to keep a record of the number and location of all the street lamps in the city; the number unlighted each night, and the reason therefor; to investigate all complaints relating to such lamps, and make report to the council—is not a subordinate officer, clerk, or assistant required to be examined by *New York* Laws, 1883, ch. 354, § 8, as amended by *New York* Laws, 1884, ch. 410, § 2, for appointment under the civil-service rules. *Peck v. Belknap*, 55 Hun (N. Y.) 91.

2. *People v. Angle*, 109 N. Y. 564; *People v. Durston* (Supreme Ct.), 3 N. Y. Supp. 522.

Election officers are exempted from the provisions requiring civil-service examination in the State of *New York*. *People v. French*, 51 Hun (N. Y.) 345.

The provisions of the laws of *New*

York relating to the employment of honorably discharged Union soldiers and sailors are not limited in their application to those departments or works of the State in which the employés are subject to civil-service examination. An officer who is eligible to reappointment, without undergoing a civil-service examination therefor, cannot lawfully be reappointed, if among the other qualified candidates there are honorably discharged Union soldiers or sailors. *People v. French*, 51 Hun (N. Y.) 345.

3. *Peck v. Belknap*, 55 Hun (N. Y.) 91; and see *Rogers v. Buffalo*, 51 Hun (N. Y.) 637.

Although one may have the right to an appointment, after having passed an examination by the civil-service examiners, a complaint for refusal to appoint, which does not charge an omission of duty on the part of the examiners, is insufficient. *Gillen v. Wheeler*, 5 N. Y. St. Rep. 904.

4. *Rogers v. Buffalo* (Supreme Ct.), 2 N. Y. Supp. 327; *Peck v. Rochester* (Supreme Ct.), 3 N. Y. Supp. 852.

Where honorably discharged soldiers who have served in the army or navy of the United States in the late war are certified by the board of examiners as competent, they shall be preferred for appointment to positions in the civil service of the State over all other persons though graded lower than others so examined and reported, provided their qualification and fitness shall have been ascertained as provided by law. *New York* Laws (1884), ch. 410, § 4, as amended by Laws 1886, ch. 29, § 1. And where two or more soldiers or sailors are certified as duly qualified, the appointment shall be made from among those so certified, who are graded highest as the result of the

V. RIGHT TO HOLD OFFICE—HOW CONFERRED.—All political power is inherent in the people,¹ and all officers and functionaries exercising powers of government and control over political action must derive their powers and office either directly from the people or from the agents or representatives of the people,² who have either directly or indirectly through their chosen representatives, created such offices and agencies as they deem to be desirable for the administration of public functions, and declared in what manner and by what persons they shall be exercised.³ The exercise of political functions is an act in its nature public and not private,⁴ and official power cannot exist in any person by his own assumption, or by the employment of another private person.⁵ Public office can be obtained and exercised only by a duly and legally authorized election or appointment.⁶

The powers of government are parceled out by the several constitutions,⁷ and where the manner of filling an office is prescribed by constitution, a different mode cannot be provided by legislative enactment;⁸ but if the manner of filling it is not

examination. *New York Laws* (1886), ch. 29, § 2.

1. *Wright v. Noell*, 16 Kan. 601; *Opinion of Justices*, 70 Me. 560; *Evansville v. State*, 118 Ind. 426; *State v. Denny*, 118 Ind. 449; *State v. Hyde*, 121 Ind. 20; *People v. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 103; *People v. Detroit*, 28 Mich. 228; 15 Am. Rep. 202.

One of the principles lying at the very foundation of our government is that all political power resides with the people; that government is founded on their sole authority and organized for the great purpose of protecting their rights and liberties and securing their independence, and that they have at all times a complete power to alter, reform or abolish their government whenever they deem it necessary. *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77.

2. *Attorney-Gen'l. v. Detroit*, 58 Mich. 213; 55 Am. Rep. 675; *Hovey v. State*, 119 Ind. 395; *Evansville v. State*, 118 Ind. 426; *State v. Denny*, 118 Ind. 449; *People v. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 103; *People v. Detroit*, 28 Mich. 228; 15 Am. Rep. 202.

The government is the fountain of office. *State v. Valle*, 41 Mo. 29.

3. *Mechem's Pub. Off.*, § 501; *State v. Stanley*, 66 N. Car. 59; 8 Am. Rep. 488; *State v. Judges*, 21 Ohio St. 1.

The constitution is the letter of attorney by which alone officers are authorized to act, and in all cases they must be able to show that their acts are

authorized by it. *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77.

4. *Ames v. Port Huron Log, etc., Co.*, 11 Mich. 139; 83 Am. Dec. 731.

5. *Ames v. Port Huron Log, etc., Co.*, 11 Mich. 139; 83 Am. Dec. 731.

The right to choose officers is primarily and inherently in the people. Primarily it is neither an executive nor legislative function except as expressly or impliedly delegated to the executive or legislative department; it resides entirely in electors of the State. Silence on the subject takes no part of the power from the people and vests none in their representatives. *State v. Denny*, 118 Ind. 382.

6. *Ames v. Port Huron Log, etc., Co.*, 11 Mich. 139; 83 Am. Dec. 731; and see *Mayor, etc., of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572; *People v. Bull*, 46 N. Y. 57; 7 Am. Rep. 302.

When it is provided that an office shall be filled by election by law, without expressly or by necessary implication defining the electoral body to whom the power of choosing is committed, the presumption is that the election is to be referred to the people of the civil or political division for which the officer is to be elected. *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663, *citing State v. Irwin*, 5 Nev. 111; *Magruder v. Swann*, 25 Md. 173.

7. *Ames v. Port Huron Log, etc., Co.*, 11 Mich. 139; 83 Am. Dec. 731.

8. *Opinion of Justices*, 117 Mass. 603; *Speed v. Crawford*, 3 Metc. (Ky.)

prescribed, or if it is not an office of constitutional origin, it is competent for the legislature to declare the manner of filling it, either through the agency of an election by the people, or by appointment by such authority as it may deem just and proper,¹ and in like manner to change from time to time the mode of election or appointment.²

1. By Election.—See ELECTIONS.³

2. By Appointment.—Appointment is the selection or designation of a person, by the person or persons having authority therefor, to fill an office of public function and discharge the duties of the same.⁴ As distinguished from an election, an appointment is generally made by one person or a limited number

207; *People v. Raymond*, 37 N. Y. 428; *People v. Albertson*, 55 N. Y. 50; *People v. Blake*, 49 Barb. (N. Y.) 9; *Devoy v. Mayor, etc., of N. Y.*, 35 Barb. (N. Y.) 264; *People v. Keeler*, 29 Hun (N. Y.) 175; *People v. Draper*, 15 N. Y. 532; *Warner v. People*, 2 Den. (N. Y.) 272; 43 Am. Dec. 740; *People v. Bull*, 46 N. Y. 57; 7 Am. Rep. 302; *King v. Hunter*, 65 N. Car. 603; 6 Am. Rep. 754; *State v. Goldstucker*, 40 Wis. 124; *State v. Brunst*, 26 Wis. 412; 7 Am. Rep. 84.

The constitution cannot be evaded by change in the name of an office, nor can an office be divided and the duties assigned to two or more officers under different names, and the appointment to the offices made in any manner except as authorized by the constitution. *People v. Albertson*, 55 N. Y. 50.

Where the new duties imposed upon an officer are such as are calculated to facilitate and the better to enable him to perform the same essential duties performed by an officer before the change, he cannot be considered as a new officer in the sense of the constitution. *People v. Raymond*, 37 N. Y. 428.

It would not be competent for the legislature to create a new civil division of a State, and abrogate the local offices of the several counties that might compose it, and direct the appointment by the governor and Senate of other officers, limited to perform the same local functions only, although distinguished by new and more extended titles. *People v. Pinckney*, 32 N. Y. 377.

1. *People v. Woodruff*, 32 N. Y. 355; *People v. Draper*, 15 N. Y. 538; *People v. Batchelor*, 22 N. Y. 128; *People v. Pinckney*, 32 N. Y. 377;

Sturgis v. Spofford, 45 N. Y. 446; *Board of Revenue v. Barber*, 53 Ala. 589; *Dibble v. Merriman*, 52 Conn. 214; *State v. Gorby*, 122 Ind. 17; *State v. Covington*, 29 Ohio St. 102.

Offices are new and can be altered or abolished by legislation, when they are new in respect to their operative and substantial functions, in a sense that those functions were not, at the time of the adoption of the constitution, performed by persons who were officers under some other name. *People v. Pinckney*, 32 N. Y. 377.

A constitutional provision requiring that county and township officers shall be elected, does not imply that city and village officers shall also be elected. *State v. Covington*, 29 Ohio St. 102.

2. *People v. Woodruff*, 32 N. Y. 355.

A commission issued by the governor to an appointee of the legislature under a void election, which recites that it is issued because of such election, cannot be given the effect of an executive appointment. *State v. Peelle*, 124 Ind. 515.

3. Vol. 6, p. 255.

4. Black's L. Dict.

An appointment to an office is not the same thing in a constitutional sense as an election to office. *Speed v. Crawford*, 3 Metc. (Ky.) 207.

The word "appointment" is sometimes used in a sense to denote the right or privilege conferred by an appointment; thus the act of authorizing a man to print the laws of the United States by authority of a right thereby conveyed, is considered such an appointment, but the right is not an office. Bouv. L. Dict., tit. Appointment.

acting with delegated powers, while an election is made by all of a class.¹

a. THE APPOINTING POWER.—The power to appoint officers is a prerogative of the people,² which belongs where the people choose to place it,³ and can be exercised only by those departments of government to which they have either expressly or impliedly confided it by their constitutions.⁴

Appointments to office, by whomsoever made, are intrinsically executive acts.⁵ And the power to appoint is usually conferred

1. Bouv. L. Dict., tit. Appointment; State v. McCollister, 11 Ohio 46; People v. Lord, 9 Mich. 227. And see Carpenter v. People, 8 Colo. 116; People v. Bull, 46 N. Y. 57; 7 Am. Rep. 302.

Whenever the office is to be conferred by the people or by any considerable body of the people, it is spoken of as an election. Whenever it is to be conferred by an individual, as by the governor, or by a select number of individuals, as by a judicial court, or by the general assembly, it is spoken of as an appointment. State v. McCollister, 11 Ohio 46.

Where the mode of conferring the office is in legal effect an appointment, the fact that the statute prescribing it uses the word "election" does not affect the question. Sturgis v. Spofford, 45 N. Y. 446.

While it is entirely accurate to say that an appointment is not the equivalent of an election in a constitutional sense, in determining the right of an incumbent to hold until his successor is elected, as in Gosman v. State, 106 Ind. 203; or when passing upon title of officers who were appointed when the law required them to be elected, as in Speed v. Crawford, 3 Metc. (Ky.) 207, it is a fundamental error to assume that a selection to office by the general assembly, when that body is expressly authorized to elect, is not an election in the constitutional sense. State v. Harrison, 113 Ind. 434; 3 Am. St. Rep. 663.

2. Hovey v. State, 119 Ind. 395; State v. Hyde, 121 Ind. 20; Evansville v. State, 118 Ind. 426; State v. Denny, 118 Ind. 449; People v. Hurlbut, 24 Mich. 44; 9 Am. Rep. 103; People v. Detroit, 28 Mich. 228; 15 Am. Rep. 202.

The power to fill an office is political, and this power is exercised in common by the legislatures, the governors, and other executive officers of every State

in the Union, unless it has been expressly withdrawn by the organic law of the State. People v. Langdon, 8 Cal. 1.

3. Mayor, etc., of Baltimore v. State, 15 Md. 376; 74 Am. Dec. 572.

The power of appointment is not restricted to bodies or officers representing or responsible to the people. Sturgis v. Spofford, 45 N. Y. 446.

The constitution of California does not prohibit the legislature from conferring on a voluntary association of persons, who are not citizens of the United States or electors, the power to elect a person to fill an office created by the legislature. In re Bulger, 45 Cal. 553.

4. Hovey v. State, 119 Ind. 395; State v. Hyde, 121 Ind. 20; State v. McAdoo, 36 Mo. 453; State v. Swift, 11 Nev. 128; State v. Irwin, 5 Nev. 111.

The power to appoint to office is regarded as a political or executive power, to be exercised by the person authorized to execute it, according to his discretion. Achley's Case, 4 Abb. Pr. (N. Y.) 35.

Appointments to office can be made by the heads of departments of the United States government in those cases only in which Congress has authorized it by law; and therefore the appointment of an agent of fortifications by the Secretary of War, there being no act of Congress conferring that power upon that officer, is irregular. U. S. v. Maurice, 2 Brock. (U. S.) 96.

5. State v. Barbour, 53 Conn. 76; 55 Am. Rep. 65; Taylor v. Coin, 3 J. J. Marsh. (Ky.) 401; Mayor, etc., of Baltimore v. State, 15 Md. 376; 74 Am. Dec. 572; Achley's Case, 4 Abb. Pr. (N. Y.) 35; Greenough v. Greenough, 11 Pa. St. 489; 51 Am. Dec. 567; Wood v. U. S., 15 Ct. of Cl. 151; Perkins v. U. S., 20 Ct. of Cl. 438; Wayman v. Southard, 10 Wheat. (U. S.) 1; Haw-

either expressly or impliedly upon executive officers,¹ though the exclusive right to exercise the power is not included in the general grant of power to the executive department.²

The executive cannot act where other modes of appointment are prescribed by constitution.³ And all independent departments have some appointing power as an incident of the principal power, for without it no department can be independent.⁴ Where an appointment is essential to the proper exercise of a judicial duty, the court concerned has authority to make it.⁵

kings v. Governor, 1 Ark. 570; 33 Am. Dec. 346; *Evansville v. State*, 118 Ind. 426; *Hovey v. State*, 119 Ind. 395; *State v. Denny*, 118 Ind. 449; *State v. Noble*, 118 Ind. 350; *State v. Hyde*, 121 Ind. 20; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185.

It has been so held where the appointment was made by a court. *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 401. Also when made by a common council of a city. *Achley's Case*, 4 Abb. Pr. (N. Y.) 35. And when made by an executive officer. *Marbury v. Madison*, 1 Cranch (U. S.) 137.

The power to fill the office of district attorney *pro tempore* vests in the governor, by virtue of the general law authorizing him to fill vacancies in office. *State v. Garrett*, 29 La. Ann. 637.

1. See *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; *State v. Hyde*, 121 Ind. 20; *State v. Gorby*, 122 Ind. 17; *Hovey v. State*, 119 Ind. 395; *State v. Denny*, 118 Ind. 449; *Evansville v. State*, 118 Ind. 426; *State v. Day*, 14 Fla. 9; *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *Prater v. Strother*, (Ky. 1890), 13 S. W. Rep. 252; *Burton v. Kennebec Co.*, 44 Me. 388; *Watkins v. Watkins*, 2 Md. 341; *State v. Smith*, 82 Mo. 51; *State v. Kennon*, 7 Ohio St. 547; *Speed v. Crawford*, 3 Metc. (Ky.) 207; *In re Bartlett*, 9 How. Pr. (N. Y.) 414; *People v. Bledsoe*, 68 N. Car. 457; *Com. v. King*, 85 Pa. St. 103.

A statute authorizing the governor to fill vacancies in certain offices, is a valid constitutional act, and authorizes the governor to fill all vacancies in the offices provided for. *Falconer v. Robinson*, 46 Ala. 340; and see *Addison v. Saulmer*, 19 Cal. 82; *Gormley v. Taylor*, 44 Ga. 76; *State v. Tucker*, 23 La. Ann. 139; *Brady v. West*, 50 Miss. 68.

Under a constitutional provision that the governor shall "nominate, etc.,

all officers whose appointments are not otherwise provided for," the governor has power to appoint all officers whose appointments are not provided for by the constitution. *People v. Bledsoe*, 68 N. Car. 457. See *People v. Nichols*, 68 N. Car. 429.

2. *Hovey v. State*, 119 Ind. 395; *Mayor, etc., of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572; *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65; *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 401; *State v. Hyde*, 121 Ind. 20; *State v. Irwin*, 5 Nev. 111; *State v. Swift*, 11 Nev. 128; *Achley's Case*, 4 Abb. Pr. (N. Y.) 35; *Biggs v. McBride*, 17 Oregon 640.

It is the nature of the power of appointment which is executive, whether exercised by the governor or a court, as distinguished from those acts of the court that are merely judicial. *Mayor, etc., of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572.

The head of a department has no constitutional prerogative of appointment to office, independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto. *U. S. v. Perkins*, 116 U. S. 483.

3. *Mayor, etc., of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572.

4. *State v. Noble*, 118 Ind. 350; *State v. Hyde*, 121 Ind. 20; *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65; *Achley's Case*, 4 Abb. Pr. (N. Y.) 35.

5. *State v. Noble*, 118 Ind. 350; *State v. Denny*, 118 Ind. 449; *State v. Hyde*, 121 Ind. 20; *State v. Smith*, 15 Mo. App. 412; *In re Janitor*, 35 Wis. 410.

The district court of *Texas* has authority, under *Pasch. Dig.*, art. 191, to appoint a district-attorney *pro tempore* for an indefinite time not to extend beyond the term of the court. *State v. Manlove*, 33 Tex. 798.

The power to appoint officers is

Legislative bodies may elect or appoint the officers of their respective branches and relating to their department of the government,¹ and the governing officers of all benevolent and other institutions which it is the duty of the legislature to establish and maintain, or, at its option, to authorize their appointment by some other department of the government;² and where the people have, by their constitutions, expressly conferred the power of appointment of other officers, upon the legislature, it may properly and lawfully be exercised within the limits so prescribed.³ The legislature has no power to appoint local officers, however; it cannot take from the people of counties, towns and cities the right of local self-government, or the right to control their own purely local affairs in their own way,⁴ though, as an

ministerial, and may be conferred upon persons holding judicial offices. *People v. Morgan*, 90 Ill. 558. And see *Walker v. Cincinnati*, 21 Ohio St. 14; 8 Am. Rep. 24.

The power vested by statute in the judges of certain judicial districts in *California* to appoint police commissioners is not a judicial power, and was not continued in force by the new constitution. *Heinlen v. Sullivan*, 64 Cal. 378.

Temporary Absence.—The circuit court may make a temporary appointment during the absence of the clerk, but such appointment will not continue longer than such absence, and he will be entitled to the office on his return. *Lowry v. Tullis*, 32 Miss. 147.

1. *State v. Denny*, 118 Ind. 449; *State v. Noble*, 118 Ind. 350; *State v. Hyde*, 121 Ind. 20; *Tenney v. State*, 27 Wis. 387.

Power to employ a competent clerk does not authorize a legislative committee to employ legal counsel. *Tenney v. State*, 28 Wis. 387.

2. *Hovey v. State*, 119 Ind. 386; *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; *Washington Co. v. Nesbitt*, 6 Md. 468; *Biggs v. McBride*, 17 Oregon 640.

Offices relating to the State benevolent institutions are not such as any elector may claim a right to hold, solely on the ground that he is a voter, but the legislature may restrict them to competent persons by prescribing particular qualifications. It is within the power of the legislature, by virtue of its general power, to require that the officers of this class shall be selected from different political parties, or that they shall be persons of peculiar skill and experience, and it may provide for

the appointment of women. *Hovey v. State*, 119 Ind. 386.

3. *Mechem's Pub. Off.*, § 106; *Mayor, etc., of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572; *People v. Bennett*, 54 Barb. (N. Y.) 480; *Jones v. Perry*, 10 Yerg. (Tenn.) 59; 30 Am. Rep. 430.

The fact that the constitution may prescribe that the mode of appointing judges shall be by the legislature, does not constitute the legislature the constituent. *Jones v. Perry*, 10 Yerg. (Tenn.) 59; 30 Am. Dec. 430. See *State v. Kennon*, 7 Ohio St. 546.

County commissioners have authority to employ a competent person at a reasonable compensation to examine the accounts of the county treasury, when, in their opinion, it is necessary to do so. *Laws v. Harlam Co.*, 12 Neb. 637.

In several of the States the legislature is prohibited from the exercise of all appointing power. See *State v. Denny*, 118 Ind. 449; *Evansville v. State*, 118 Ind. 426; *State v. Judges*, 21 Ohio St. 1; *Walker v. Cincinnati*, 21 Ohio St. 14; 8 Am. Rep. 24; *State v. Kennon*, 7 Ohio St. 546.

4. *Evansville v. State*, 118 Ind. 426; *State v. Denny*, 118 Ind. 449; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Taylor v. Palmer*, 31 Cal. 252; *Speed v. Crawford*, 3 Metc. (Ky.) 206; *People v. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 103; *Attorney Genl. v. Detroit*, 58 Mich. 213; *People v. Mayor, etc., of Chicago*, 51 Ill. 17; 2 Am. Rep. 278; *State v. Swift*, 11 Nev. 128; *People v. Albertson*, 55 N. Y. 50; *People v. Draper*, 15 N. Y. 532; *Attorney Genl. v. Detroit*, 29 Mich. 108; *People v. Detroit*, 28 Mich. 228; 15 Am. Rep. 202; *Atkins v. Randolph*, 31 Vt. 226;

incident to its right to confer and recall corporate power, it may make provisional or initiatory appointments, to effect a change or put a new system into operation;¹ and it has an unquestionable right to prescribe the general features of local government in subordination to the constitutional purpose.²

The power to direct the manner or mode in which an act shall be done, however, and the authority to do the act itself, are not identical or equivalent to each other,³ and the power of prescribing the manner of making appointments to office falls naturally and properly to the legislative department,⁴ and may be exer-

State *v.* Goldstucker, 40 Wis. 124; Bull *v.* Conroe, 13 Wis. 233.

The theory of the constitution is that counties, cities, towns or villages, are of right entitled to choose who they will have to rule over them, and that this right cannot be taken from them, and the electors and inhabitants divulge by any act of the legislature or of any, or of all, the departments of the government combined. People *v.* Albertson, 55 N. Y. 50.

The power of the legislature over municipal corporations in the absence of constitutional restriction is unlimited, however, except so far as they are invested with rights incident to a private corporation. David *v.* Portland Water Committee, 14 Oregon 98.

The legislature may, in creating a municipality, confer the taxing power on authorities to be appointed by some functionary or individual, and submit the charter to the people, and if they adopt the same, the adoption will be an assent by the people to the appointment of such officers by such functionary. People *v.* Morgan, 90 Ill. 558.

1. People *v.* Hurlbut, 24 Mich. 44; 9 Am. Rep. 103; People *v.* Detroit, 28 Mich. 228; 15 Am. Rep. 202; Mayor, etc., of Baltimore *v.* State, 15 Md. 376; 74 Am. Dec. 572; State *v.* Benedict, 15 Minn. 198; State *v.* Swift, 11 Nev. 128; State *v.* Irwin, 5 Nev. 111. And see Collins *v.* State, 8 Ind. 344; State *v.* McGregor, 44 Ohio St. 628.

Offices which had been filled by executive appointment, and which under amendments, to the constitution were afterwards to be filled by a vote of the people, are properly filled during the interval elapsing, before the elected officers could act by virtue of their election by executive appointment. Burton *v.* Kennebec Co., 44 Me. 388.

Where selectmen, having authority to appoint a person to act for a special occasion only, appointed him to act

generally, he can legally act on such special occasion, the appointment being good *pro tanto*. Hartshorn *v.* Schoff, 51 N. H. 316.

2. Attorney-Gen'l. *v.* Detroit, 29 Mich. 108.

It belongs to the legislature to arrange and distribute the administrative functions of government, committing such portion as it may deem suitable to local jurisdictions, and retaining the other portions to be exercised by officers appointed by the central power, and changing the arrangement from time to time as convenience and efficiency of administration and the public good may seem to require. People *v.* Draper, 15 N. Y. 532.

The function of the legislature is, not to run and operate the machinery of local government, but to provide for and put it in motion. It corresponds to the authority which constitutional conventions sometime find it needful to exercise, when they prescribe the agencies by means of which the new constitutions they have adopted are to be made to displace the old. People *v.* Hurlbut, 24 Mich. 44; 9 Am. Rep. 103.

3. State *v.* Kennon, 7 Ohio St. 546; State *v.* Denny, 118 Ind. 449; Evansville *v.* State, 118 Ind. 426; State *v.* Peelle, 121 Ind. 496.

Where an office is of legislative creation, the legislature can modify, control, or abolish it, and within these powers is embraced the right to change the mode of appointment to the office. Davis *v.* State, 7 Md. 151; 61 Am. Dec. 331.

4. State *v.* Kennon, 7 Ohio St. 546; State *v.* Covington, 29 Ohio St. 102; State *v.* Crow, 20 Ark. 209; State *v.* Hyde, 121 Ind. 20; State *v.* Denny, 118 Ind. 449; Hovey *v.* State, 119 Ind. 395; Brady *v.* West, 50 Miss. 68; State *v.* Swift, 11 Nev. 128; People *v.* Draper, 15 N. Y. 532; *In re* Whiting,

cised by it in the absence of constitutional provision,¹ as well as where the constitution provides for the appointment to be made in a manner prescribed by law.² And the legislature may make a new distribution of the powers of government and provide for new offices in the interest of the people, provided it does not violate any provisions of the constitution or disturb any existing arrangement made by it,³ plenary power in the legislature for all purposes of civil government being the rule, and a prohibition to exercise a particular power being the exception.⁴

1 Edm. Sel. Cas. (N. Y.) 498; and see *Bridges v. Shallcross*, 6 W. Va. 562.

Where the legislature creates an office, it can designate by whom and in what manner the person who is to fill the office shall be appointed, and if it is silent on this subject, the governor makes the appointment the same as if he were specially authorized by the act to do so. *Davis v. State*, 7 Md. 151; 61 Am. Dec. 331.

The office of tax commissioners in *New York* was created after the adoption of the constitution of 1846; and it is, therefore, competent for the legislature to declare the manner of the appointment of such commissioners. *People v. Woodruff*, 32 N. Y. 355.

1. *State v. Crow*, 20 Ark. 209; *State v. Sorrels*, 15 Ark. 674; *People v. Stevens*, 15 How. Pr. (N. Y.) 103; *People v. Draper*, 15 N. Y. 538; *People v. Batchelor*, 22 N. Y. 128.

Retroactive Authorization.—The *Louisiana* legislative act of March 9, 1874, changing the mode of appointing certain officers, cannot be construed so as to make it retroactive. It must be understood to apply to parishes where appointments to such offices had not been made by the police juries, or where vacancies existed. *State v. Parlange*, 26 La. Ann. 548.

2. *State v. Kennon*, 7 Ohio St. 546; *State v. Hyde*, 121 Ind. 20; *State v. Peelle*, 121 Ind. 496; *Bridges v. Shallcross*, 6 W. Va. 562.

Where the constitution authorizes the mode of appointment to certain offices to be directed by the legislature, any subsequent legislature is authorized to act upon the subject. *Com. v. Clark*, 7 W. & S. (Pa.) 127.

3. *People v. Draper*, 15 N. Y. 532; *Metropolitan Board of Health v. Hiestler*, 87 N. Y. 661; *People v. Shepard*, 36 N. Y. 285; *People v. Porter*, 90 N. Y. 68; *People v. Detroit*, 28 Mich. 228; 15 Am. Rep. 202; *State v. Noble*, 118 Ind. 350; *State v. Hyde*, 121 Ind.

20; *Sill v. Corning*, 15 N. Y. 297; *Warner v. People*, 2 Den. (N. Y.) 272; 43 Am. Dec. 740; *People v. Maynard*, 14 Ill. 419; *State v. Covington*, 29 Ohio St. 102.

The provision of the *New York* constitution giving the legislature the authority to establish inferior local courts, refers simply to local courts as historically known, that is, courts established within one of the recognized territorial divisions of the State. It does not authorize it to carve out from a territory of the State a district for judicial purposes not appointed by county, town, city, or village lines, and erect therein a local court. *People v. Porter*, 90 N. Y. 68.

Under the *Indiana* constitution, the legislature may establish courts, but it does not invest the courts with judicial power. The constitution alone can do that, for all judicial power comes from that instrument, and is vested by it in the courts and judges. *State v. Noble*, 118 Ind. 350; *Evansville v. State*, 118 Ind. 426.

4. *People v. Draper*, 15 N. Y. 532; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Hovey v. State*, 119 Ind. 395; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185; *Bridges v. Shallcross*, 6 W. Va. 562.

Independent of constitutional limitations, the legislative power is omnipotent within its proper sphere. The legislature in this respect is the direct representative of the people, and the delegate and depositary of their power. *People v. Draper*, 15 N. Y. 532; *Evansville v. State*, 118 Ind. 426; *Hedderich v. State*, 101 Ind. 569; 51 Am. Rep. 768; *McComas v. Krug*, 81 Ind. 327; 42 Am. Rep. 135; *Wright v. Wright*, 2 Md. 429; 56 Am. Dec. 723.

But like other departments of the government, it can only exercise such powers as have been delegated to it, and when it steps beyond that boundary, its acts, like those of the most hum-

b. EXERCISE OF THE POWER TO APPOINT.—The choice of a person to fill an office constitutes the essence of the appointment,¹ and the selection must be the discretionary act of the officer clothed with the power of appointment.² This choice may be manifested and carried out by the designation of the person to be appointed, by the person or persons having authority to appoint,³ or by ballot of the parties authorized to make the appointment,⁴ or by resolution naming the officer and voted for by those having the appointing power.⁵ Or, in the absence of any statute prescribing a particular form of writing, it may be in any form, provided the language be sufficient to show that the officer intended thereby to exercise his power and to discharge his duty of appointment.⁶ This choice, however, must be evi-

ble magistrate in the State who transcends his jurisdiction, are utterly void. *Evansville v. State*, 118 Ind. 426; *citing Taylor v. Porter*, 4 Hill (N. Y.) 140; 40 Am. Dec. 277; *Pumpelly v. Owego*, 45 How. Pr. (N. Y.) 219; *Campbell's Case*, 2 Bland (Md.) 209; 20 Am. Dec. 360.

In inquiring whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. *People v. Draper*, 15 N. Y. 532; *Bridges v. Shallcross*, 6 W. Va. 562.

1. *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50; *Hoke v. Field*, 10 Bush (Ky.) 144; 19 Am. Rep. 582; *People v. Fitzsimmons*, 68 N. Y. 514; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Craig v. Norfolk*, 1 Mod. 122.

2. *People v. Murray*, 70 N. Y. 521; *People v. Fitzsimmons*, 68 N. Y. 514; *Marbury v. Madison*, 1 Cranch (U. S.) 137.

A majority of the appointing power may lawfully determine beforehand and by a caucus for whom they will vote for an appointive office at the regular meeting of such appointing power. Such prior determination will not invalidate a subsequent appointment made thereto. *People v. Stowell*, 9 Abb. N. Cas. (N. Y.) 456.

An appointment made by drawing lots is illegal. *Com. v. Philadelphia Comrs.*, 5 Binn. (Pa.) 534.

Self-appointment.—It is contrary to the policy of the law for an officer to prostitute his official position by using his official appointing power to place himself in office. *State v. Hoyt*, 2 Oregon 246. And see *Kinyon v. Duchene*, 21 Mich. 498; *Com. v. Douglass*, 1 Binn. (Pa.) 77.

Where the power to make an appoint-

ment to office is vested in three justices, they cannot appoint one of their own number. *People v. Thomas*, 33 Barb. (N. Y.) 287.

3. See *People v. Murray*, 5 Hun (N. Y.) 42; *People v. Van Slyck*, 4 Cow. (N. Y.) 324; *Hoke v. Field*, 10 Bush (Ky.) 144; 19 Am. Rep. 58.

A nomination in writing signed by the appointing officer, and addressed to a body having power to confirm the appointment, is a sufficient appointment and no further commission is necessary. *People v. Murray*, 70 N. Y. 521; *People v. Fitzsimmons*, 68 N. Y. 514.

Where several offices of a different class are to be filled by appointment, and the appointment fails to designate the class of the appointees, the first-named appointee should be regarded, as appointed to the place of first class. *People v. Richmond Co.*, 20 N. Y. 252.

4. *Sturges v. Spofford*, 52 Barb. (N. Y.) 436; *reversed* on other grounds in 45 N. Y. 446. And see *State v. Chapman*, 44 Conn. 595; *State v. Dillon*, 125 Ind. 65; *Putnam v. Langley*, 133 Mass. 204.

Where a city charter does not prescribe the number of votes necessary to an election of a presiding officer by the council, the votes of a majority of a quorum elect. *Cadmus v. Farr*, 47 N. J. L. 208.

5. *Sturges v. Spofford*, 52 Barb. (N. Y.) 436; *reversed* on other grounds in 45 N. Y. 446; and see *Achley's Case*, 4 Abb. Pr. (N. Y.) 35.

6. *People v. Fitzsimmons*, 68 N. Y. 514; *People v. Murray*, 5 Hun (N. Y.) 42; *People v. Van Slyck*, 4 Cow. (N. Y.) 324.

The fact that the appointing officer used the word nomination instead of appointment, is of no moment. The

denced by some open, unequivocal act,¹ and the authority that appoints must not only have power, but must exercise it in the mode defined by the law by which it is authorized.² The rule in some of the States is that an appointment to office can only be made verbally and without writing, when permitted by the terms of the statute conferring the power,³ though in others it is held that where the manner in which the appointment is to be made is not prescribed, it need not be in writing.⁴

An appointment is complete when the last act required of the

words nominate, select, designate, or choose would either of them answer the purpose in such case if used in the sense of appoint. *People v. Fitzsimmons*, 68 N. Y. 514.

1. *Marbury v. Madison*, 1 Cranch (U. S.) 57; *Hoke v. Field*, 10 Bush (Ky.) 144; 19 Am. Rep. 58; *People v. Murray*, 70 N. Y. 521.

2. *Kimball v. Alcorn*, 45 Miss. 151; *People v. Murray*, 70 N. Y. 521; *People v. Gates*, 56 N. Y. 387; *State v. Peelle*, 124 Ind. 515; *State v. Guiney*, 26 Minn. 313; *State v. Mayor*, etc., of Paterson, 35 N. J. L. 190; *State v. Michellon*, 42 N. J. L. 405; and see *Bridges v. Shallcross*, 6 W. Va. 562; *Launtz v. People*, 113 Ill. 137; 55 Am. Rep. 405; *State v. Kenny*, 45 N. J. L. 251; *State v. Dillon*, 125 Ind. 65.

Where the statute empowers the Secretary of the Treasury to appoint twenty special agents, and no more, an appointment in excess of that number is void as to the excess, and although the appointee takes the oath of office and renders service, he is not entitled to the compensation fixed by law. *Weeks v. U. S.*, 21 Ct. of Cl. 124.

But where the mayor's power of nomination of inspectors of weights and measures for New York city existed to the extent of two officers, it was held that the selection of four persons did not invalidate its exercise. *People v. Kneissel*, 58 How. Pr. (N. Y.) 404.

The provision of the *New York* law, 1850, ch. 140, § 28, subd. 6, that commissioners to ascertain the point of intersection of railroads shall "be appointed by the court, as is provided in this act in respect to acquiring title to real estate," refers merely to the manner of appointment and practice of the court. *In re Buffalo*, etc., R. Co., 15 Hun (N. Y.) 365.

3. *People v. Murray*, 70 N. Y. 521; *People v. Willard*, 44 Hun (N. Y.) 580; *People v. Fitzsimmons*, 68 N. Y. 514.

Affecting the public and not merely private rights, and being done under the authority of the sovereign power and not under individual authority, it should be authenticated in a way that the public may know when and in what manner the duty has been performed. *People v. Murray*, 70 N. Y. 521.

In *People v. Murray*, 5 Hun (N. Y.) 42, it was held that no deed or writing is requisite to give validity to an appointment to an office, unless the statute prescribes that formality, and that commissioners of excise may be appointed by parol.

The *New York* statutes requiring that commissions of all officers, where no special provision is made by law, shall be signed by the presiding officer of the board or body, or by the person making the appointment, thus making the signing of a commission essential to complete an appointment, embraces only public officers of the State other than militia and town officers. *People v. Murray*, 5 Hun (N. Y.) 42, citing *People v. Molineux*, 53 Barb. (N. Y.) 9; *aff'd* 40 N. Y. 113.

4. *Hoke v. Field*, 10 Bush (Ky.) 144; 19 Am. Rep. 58; *People v. Murray*, 5 Hun (N. Y.) 42; *Saunders v. Owen*, 2 Salk. 467; 12 Mod. 200.

In *Hoke v. Field*, 10 Bush (Ky.) 144; 19 Am. Rep. 58, it was held that an appointment made in the presence of the tribunal charged with the duty of taking the bond and administering the oath of office to the appointee made by an oral announcement by the appointing officer of his determination, was sufficient.

An appointment in the general sense of the term may be by deed, or in writing without seal, or verbally, depending upon the subject-matter of the appointment, and the terms of the authority under which it is made. *People v. Murray*, 70 N. Y. 521.

appointing power has been performed.¹ Where a commission is required, the signature and sealing of the commission by the appointing power is the last act which completes the appointment,² the commission being a matter of form, which may or may not be necessary, according as usage and positive statute may or may not render it indispensable,³ though where the issue of the commission is to be performed by some other than the appointing power, it constitutes no part of the appointment.⁴ And a nomination in writing made by the appointing officer to the body authorized to confirm it will answer the purpose of a commission,⁵ though if the concurrence or consent of some other body or officer is required, the act of the appointing officer becomes complete and effective only when such concurrence is manifested.⁶

1. *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65; *People v. Cazneau*, 20 Cal. 503; *Conger v. Gilmer*, 32 Cal. 75; *Jefferson Co. v. Clark*, 1 T. B. Mon. (Ky.) 82; *Achley's Case*, 4 Abb. Pr. (N. Y.) 35; *People v. Stowell*, 9 Abb. N. Cas. (N. Y.) 456; *People v. Fitzsimmons*, 68 N. Y. 514; *U. S. v. Le Baron*, 19 How. (U. S.) 73; *U. S. v. Stewart*, 19 How. (U. S.) 79.

2. *Marbury v. Madison*, 1 Cranch (U. S.) 137; *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65; *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346; *Conger v. Gilmer*, 32 Cal. 75; *People v. Cazneau*, 20 Cal. 503; *People v. Whiteman*, 10 Cal. 38; *Jefferson Co. v. Clark*, 1 T. B. Mon. (Ky.) 82; *People v. Murray*, 70 N. Y. 521; *People v. Fitzsimmons*, 68 N. Y. 514; *People v. Murray*, 5 Hun (N. Y.) 42; *U. S. v. Le Baron*, 19 How. (U. S.) 73.

The transmission of the commission to the officer is not essential to his investiture of the office. If by any inadvertence or accident it should fail to reach him, his possession of the office is as lawful as if it were in his custody. *U. S. v. Le Baron*, 19 How. (U. S.) 73.

A commission bears date, and the salary of the officer commences from his appointment, not from the transmission or acceptance of his commission. *Marbury v. Madison*, 1 Cranch (U. S.) 137.

3. *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50. And see *Newcum v. Kirtley*, 13 B. Mon. (Ky.) 515.

The commission forms no part of the appointment; it is only evidence of it. *People v. Murray*, 5 Hun (N. Y.) 42; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Billy v. State*, 2 Nott & M. (S. Car.) 357.

It is not necessary to produce a commission from the governor to entitle a party to an office, where the statute requiring the issue of a commission had been repealed before the motion to qualify was made. *Newcum v. Kirtley*, 13 B. Mon. (Ky.) 515.

4. *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *People v. Stowell*, 9 Abb. N. Cas. (N. Y.) 456.

Such formal acts in such cases are mere ministerial acts. *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65.

Where the governor has signed and sealed the commission of an officer, and delivered it to the Secretary of State to be attested and recorded, the duties of the secretary being in that behalf purely ministerial, the court will, by mandamus, compel him to perform them. *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346.

The Secretary of State cannot lawfully withhold a sealed and executed commission, though directed so to do by the President of the United States. *Marbury v. Madison*, 1 Cranch (U. S.) 137.

5. *People v. Fitzsimmons*, 68 N. Y. 514; *People v. Murray*, 70 N. Y. 521.

6. *Dyer v. Bayne*, 54 Md. 88; *People v. Bissell*, 49 Cal. 407; *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65; *Marbury v. Madison*, 1 Cranch (U. S.) 137.

In case of an appointment made by the President, by and with the advice and consent of the Senate, which is to be evidenced by no act but the commission itself, it would seem that the commission and the appointment are inseparable, it being almost impossible to show an appointment otherwise

Until the last act to be performed by the appointing power is performed, the appointment is inchoate and may be revoked;¹ but when the appointment is once made and completed, where the officer is not removable by the appointing power, it is irrevocable and cannot be annulled, and the power of the appointing officer or body over the office is terminated.² The act of appointment exhausts the appointing power, and until the removal or dismissal of the incumbent in a manner prescribed by law, any re-exercise of the power would be void.³ Where, through mistake or otherwise, however, a commission has been improperly issued to one person to fill an office when it ought to have been issued to another, the error may be corrected by issuing one to the person legally entitled thereto,⁴ and where an appointment

than by proving the existence of a commission. *Marbury v. Madison*, 1 Cranch (U. S.) 137.

In *People v. Fitzsimmons*, 68 N. Y. 514, it was held that the choice of an officer made by the appointing power, and certified to a body erroneously supposed to have the power of confirmation of the appointment, was a sufficient appointment. The court, by Earl, J., said: "After he had thus selected the members and named them for the office as his final act, it matters not as to the potency of that act that he also erroneously supposed that something more was to be done by some other body or persons."

1. *People v. Murray*, 70 N. Y. 521; *Conger v. Gilmer*, 32 Cal. 75; *Wood v. Cutter*, 138 Mass. 149; *Baker v. Cushman*, 127 Mass. 105; *Putnam v. Langley*, 133 Mass. 204; *Miller v. Foster*, 7 N. J. L. 101; *State v. Van Buskirk*, 40 N. J. L. 463; *State v. Justice*, 24 N. J. L. 413.

The supreme court has no power to award a mandamus to the governor to compel him to grant a commission. *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346.

2. *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Hill v. State*, 1 Ala. 559; *People v. Mizner*, 7 Cal. 519; *People v. Cazneau*, 20 Cal. 503; *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65; *State v. Chapman*, 44 Conn. 595; *Jefferson Co. v. Clark*, 1 T. B. Mon. (Ky.) 82; *State v. Phillips*, 79 Me. 506; *People v. Murray*, 70 N. Y. 501; *People v. Stowell*, 9 Abb. N. Cas. (N. Y.) 456; *Achley's Case*, 4 Abb. Pr. (N. Y.) 35; *People v. Mills*, 32 Hun (N. Y.) 459; *Jeter v. State*, 1 McCord (S. Car.) 233; *State v. Van Buskirk*, 40 N. J. L. 463; *State v. Hamilton Co.*, 7 Ohio 134.

Some point of time must be taken when the power of the executive over an officer not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised, and this power has been exercised when the last act required from the person possessing the power has been performed. *Marbury v. Madison*, 1 Cranch (U. S.) 37; *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65.

Such final determination may be evinced by public promulgation of the result, or by subsequent action inconsistent with the purpose of further review. *State v. Van Buskirk*, 40 N. J. L. 463.

3. *Thomas v. Burrus*, 23 Miss. 550; 57 Am. Dec. 154; *People v. Cazneau*, 20 Cal. 503; *People v. Reid*, 11 Colo. 138; *State v. Chapman*, 44 Conn. 495; *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50; *People v. Stowell*, 9 Abb. N. Cas. (N. Y.) 456; *People v. Woodruff*, 32 N. Y. 355. And see *People v. Comptroller*, 20 Wend. (N. Y.) 595.

An office, when once filled, cannot be considered vacant till the term of service expires, or till the death, removal, or resignation of the person appointed. *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50.

A commission issued to an officer by the governor, who erroneously supposed that the office was vacant, confers no title in the office to the person who received the appointment under misapprehension. *State v. McNeely*, 24 La. Ann. 19.

4. *Gulick v. New*, 14 Ind. 93; 77 Am. Dec. 49; *State v. Johnson*, 17 Ark. 407; *State v. Chapman*, 44 Conn. 595; *State v. Capers*, 47 La. Ann. 747; *Putnam v. Langley*, 133 Mass. 204. And see *Collins v. State*, 8 Ind. 344.

is illegally made or fraudulently obtained, a subsequent appointment legally made will be valid.¹ Under a direction to appoint at a designated time, upon failure to appoint at the prescribed time, it may be afterwards lawfully done; the duty to appoint being paramount and essential, the provision in regard to time must be construed as merely directory,² unless the nature of the appointment or the language of the requirement shows that the designation of the time was intended as a limitation upon the appointing power.³ In the absence of a law forbidding it, a prospective appointment to fill an anticipated vacancy may be legally made by a body or officer empowered to fill such vacancy when it arises;⁴ but an outgoing board or officer cannot fill an office which will not become vacant during the term of their or his own official life.⁵

Where the authority under which an officer, who makes an appointment, assumes to act shows on its face that it emanates from a power not authorized to make it, it is void; but where the appointment is regular on its face, and emanates from a source which has the legal right to bestow it, and it requires a reference to facts not disclosed in the commission or order of appointment to show that the power of appointment has been illegally or irregularly exercised, the appointment is voidable only. *Thompson v. State*, 21 Ala. 48.

The title to an office is not affected by the fact that a resolution declaring the election lost, and declaring the ballot void by reason of errors which did not in fact exist, and declaring another person elected was adopted. *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65.

1. See *Com. v. Philadelphia Comrs.*, 5 Binn. (Pa.) 534; *Com. v. Douglass*, 1 Binn. (Pa.) 77; *People v. Reid*, 11 Colo. 138.

The presumption that all persons know the law does not render a commission issued by the governor to an appointee of the legislature, under an unauthorized election, an appointment by the executive under the power vested in him, on the ground that the governor must be presumed to have known that the power of appointment was in him, and not in the legislature. *State v. Peelle*, 124 Ind. 515.

Confirmation of Invalid Appointments.
—*New Jersey Pamph. Laws*, 1881, p. 19, confirming the title of all incumbents of the office of commissioners of road boards, is constitutional and makes valid an appointment made un-

der an unconstitutional law. *Poiner v. State*, 44 N. J. L. 433.

If the validity of an election for officers or managers of a corporation is not assailed by a direct proceeding during their continuance in office, and they are permitted to act throughout their term, the legality of the next or any subsequent election cannot be questioned on account of any irregularity in the first. *Dillard v. Webb*, 55 Ala. 468.

2. *In re Census Superintendent*, 15 R. I. 614; *Dyer v. Bayne*, 54 Mich. 87; *People v. Allen*, 6 Wend. (N. Y.) 486; *People v. Wheeler*, 18 Hun (N. Y.) 540; *People v. Board of Police*, 46 Hun (N. Y.) 296.

Where the power is given to appoint successors to public officers "at" the expiration of their respective terms, an appointment is not invalid because made on the day on which the term expired. *People v. Blanding*, 63 Cal. 333.

3. *People v. Allen*, 6 Wend. (N. Y.) 486; *People v. Board of Police*, 46 Hun (N. Y.) 296.

4. *State v. VanBuskirk*, 40 N. J. L. 463; *Haight v. Love*, 39 N. J. L. 14; *Smith v. Dyer*, 1 Call (Va.) 562.

The contrary cases: *Biddle v. Willard*, 10 Ind. 63; *Nove v. Bradley*, 3 Blackf. (Ind.) 158, and *People v. Wetherell*, 14 Mich. 48, were decided upon the construction of local statutes. *State v. VanBuskirk*, 40 N. J. L. 463.

An appointment to a new office to take effect at a future day, when the act creating such office is to go into effect, is a good appointment. *State v. Irwin*, 5 Nev. 111.

5. *State v. Meehan*, 45 N. J. L. 189; *Haight v. Love*, 39 N. J. Eq. 14; *Ivy*

c. **APPOINTMENT BY CONCURRENT ACTION OF TWO OR MORE OFFICERS OR BODIES.**—Under provisions of law requiring an appointment to be confirmed by, or made by and with the advice and consent of some body or board other than the appointing power, an appointment can be made in no other way, when such body or board is in session at the time the vacancy occurs;¹ and the officer thus appointed must receive a majority of the votes of the members voting in order to confirm his nomination.² When the act of the appointing officer becomes complete and effective with the concurrence of the confirming body, however, it relates back to and becomes complete from the time of the nomination.³ If a vacancy is accidental and occurs previous to or during the recess of the confirming body, and the concurrence of that body has not been had, the appointment is temporary and contingent upon confirmation,⁴ and if it is not confirmed either because the name was not sent in, or was rejected, the appointment becomes inoperative from the moment of adjournment or

v. Lusk, 11 La. Ann. 486; and see *People v. Reid*, 11 Colo. 138.

Conditional Appointments.—An appointment to a public office, coupled with a condition that was never performed, becomes a valid appointment when the appointing power subsequently having authority to do so dispenses with the condition. *State v. Ring*, 29 Minn. 78.

1. *State v. Rareshide*, 32 La. Ann. 934; *People v. Bissell*, 49 Cal. 407; and see *Kimball v. Alcorn*, 45 Miss. 151; *Baker v. Port Huron*, 62 Mich. 327.

The fact that the legislature wrongfully assumed to take from the governor the appointment of directors in a certain company relieves him from the necessity of sending nominations to those offices to the senate for its "advice and consent." *State v. Tate*, 68 N. Car. 546.

In *People v. Bissell*, 49 Cal. 408, it is held that if the term of the incumbent of an office filled by an appointment of the governor, requiring the confirmation of the senate, has expired, but the incumbent still continues to discharge its duties, there is no such vacancy in office as will authorize the governor to fill it without the consent of the senate. And see *State v. Rareshide*, 32 La. Ann. 934.

2. *Com. v. Allen*, 128 Mass. 308; and see *Baker v. Port Huron*, 62 Mich. 327; *Com. v. Read*, 2 Ashm. (Pa.) 261; and see *People v. Walker*, 23 Barb. (N. Y.) 304; 2 Abb. Pr. (N. Y.) 421.

Irregular Appointment.—Where the power of nomination existed to the

extent of two officers, and four officers were nominated and confirmed by the body having the power of confirmation, it was held that the irregularity did not render the appointment absolutely void, and that the two persons first appointed and confirmed would be legally entitled to the offices. *People v. Knessel*, 58 How. Pr. (N. Y.) 404.

3. *Dyer v. Bayne*, 54 Md. 87; *Shepherd v. Haralson*, 16 La. Ann. 134; and see *U. S. v. Bradley*, 10 Pet. (U. S.) 364.

An appointment to fill a vacancy in an office required to be filled by appointment by the governor and confirmation by the senate, is completed so far as the governor is concerned upon the delivery of the commission, and the governor cannot, after the commission is issued, revoke the appointment, or by any act affect the right of the appointee to the office, until the governor and senate proceed to fill it as prescribed by law. *People v. Cazneau*, 20 Cal. 503.

4. *State v. Rareshide*, 32 La. Ann. 934; *State v. Dubuc*, 9 La. Ann. 237; *People v. Mizner*, 7 Cal. 519.

If an office filled by appointment of the governor, requires the confirmation of the senate, such a vacancy therein as will authorize the governor to fill it without the concurrence of the senate, can be caused only by the death or resignation of the incumbent, or by the happening of some other event by reason of which the duties of the office are no longer discharged. *State v. Rareshide*, 32 La. Ann. 934.

of its rejection, as the case may be.¹ The time of the origin of the vacancy, however, is immaterial, the officer being allowed to fill it when the vacancy happens to exist during the recess of the confirming body, even though the office became vacant during or prior to its session.²

The power of an executive officer to fill an office originally filled by legislative action is usually limited to the period within which the legislative body cannot act, and when the period during which it can act arrives, his power ceases and the right of appointment returns to the original appointing power.³ Where

The approval of an appointment made during vacation is not equivalent to an appointment for the remainder of an unexpired term, and the officer holds only to the end of the session, unless renominated and confirmed during that session. *Kroh v. Smoot*, 62 Md. 172; and see *Gould v. U. S.*, 19 Ct. of Cl. 503.

1. *State v. Rareshide*, 32 La. Ann. 934; *State v. Board of Assessors*, 24 La. Ann. 410; *People v. Osborne*, 7 Colo. 605; *Kroh v. Smoot*, 62 Md. 172; *Com. v. King*, 85 Pa. St. 103.

A vacancy having occurred when the senate was not in session, the nomination to fill the same was properly made at the called session, which was the "next session" after the vacancy occurred. To fill this vacancy, the governor had the power to nominate whom he pleased without regard to any appointment he had made during the recess. *State v. Van Tromp*, 27 La. Ann. 569.

In *California* where the appointment to an office is vested in the governor, with the advice and consent of the senate, and the term of the incumbent expires during the recess of the senate, the governor has power to fill such vacancy, and his appointment vests in the appointee the right to hold and discharge the duties of such office for the full term, subject only to be defeated by the non-concurrence of the senate. *People v. Addison*, 10 Cal. 1.

2. *In re Farrow*, 3 Fed. Rep. 112; *State v. Kuhl*, 51 N. J. L. 191.

William Wirt, Attorney General of the United States under President Monroe, in giving his opinion (1 A. G. Op. 631), said: "In reason, it seems to me perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate or during their recess, it equally requires to be filled. The Constitution does not look to the moment of the origin

of the vacancy, but to the state of things at the point of time at which the President is called on to act. Is the Senate in session? Then he must make a nomination to that body. Is it in recess? Then the President must fill the vacancy by a temporary commission."

Practically the same opinion has been given by a large number of the Attorney-Generals of the United States. See *In re Farrow*, 3 Fed. Rep. 112.

In some of the States, it is held that the power of the executive to fill vacancies happening during the recess of the legislative body, does not extend to cases of vacancies occurring previous to, or during the session of that body. *State v. Rareshide*, 32 La. Ann. 934; and see *People v. Forquer*, 1 Ill. 104.

In *Kimball v. Alcorn*, 45 Miss. 151, the court, by Simrall, J., said: "A vacancy might occur by death or other casualty, so shortly before the adjournment of the legislature that the body might adjourn without notice of it. If the governor could not appoint, great public inconvenience would ensue; yet such a vacancy was as complete during the session as if it had happened the first day or the first week. But upon this point it is not necessary that we should express an opinion, and we do not, therefore, commit ourselves upon it."

3. *People v. Fitch*, 1 Cal. 519; *Kimball v. Alcorn*, 45 Miss. 151; *People v. Crissey*, 91 N. Y. 616; and see *State v. Peelle*, 121 Ind. 496; *Calvert Co. v. Hellen*, 72 Md. 603.

In order to establish that an appointment made by the governor during a recess of the senate, was only to fill a vacancy, it must be shown first, that a vacancy existed; and, second, that no other mode of filling it was provided. *People v. Mizner*, 7 Cal. 519.

a subsequent session of the legislative body passes without the office being filled, therefore the executive officer cannot make a valid appointment to such office during the recess.¹

Where an appointment is required to be made by the joint action of two or more bodies, a majority of all constitutes a quorum, and is able to decide any matter on which the whole body had authority to act,² even though one of the bodies should leave before the vote is taken.³ And an appointment required to be made by the concurrent action of several bodies, and in case of disagreement, then by joint ballot to decide the matter, if the bodies fail to concur, an appointment by a majority of the whole number of both bodies is a valid appointment,⁴ even though all the members of one of the bodies leave the joint meeting and refuse to take part in the appointment.⁵

d. FILLING VACANCIES.—The power to appoint to an office includes, by implication, the power to fill a vacancy in it, and all necessary authority to carry out the original power and prevent its becoming inoperative.⁶ It is a condition precedent to the

The power of the governor to fill a vacancy during a recess of the senate being exercised, he has no further control over the office, until the appointee has been rejected by the senate. *People v. Mizner*, 7 Cal. 519.

1. *Schenck v. Peay*, 1 Dill. (U. S.) 267. And see *Merrill v. Board of School Comrs.*, 70 Md. 269; *Calvert Co. v. Hellen*, 72 Md. 603.

The contrary is held under the *New Jersey* statute. *State v. Kuhl*, 51 N. J. L. 191.

A provision by which all civil officers appointed by the governor and senate are required to be nominated to the senate within fifty days from the commencement of the session of the legislature, has no application to appointments made under laws passed during that session. *Calvert Co. v. Hellen*, 72 Md. 603. And see *Merrill v. Board of School Comrs.*, 70 Md. 269.

2. *People v. Walker*, 23 Barb. (N. Y.) 304; *Gildersleeve v. Board of Education*, 17 Abb. Pr. (N. Y.) 201; *Canniff v. Mayor, etc.*, of N. Y., 4 E. D. Smith (N. Y.) 430; *Beck v. Hanscom*, 29 N. H. 213; *Kimball v. Marshall*, 44 N. H. 465.

Where the law requires an election to be by joint ballot of two bodies, an election by the separate action of each body is sufficient to give, at least, color of title to the office. *Belfast v. Morrill*, 65 Me. 580.

3. *Gildersleeve v. Board of Education*, 17 Abb. Pr. (N. Y.) 201; *Kimball v. Marshall*, 44 N. H. 465. And see

People v. Walker, 23 Barb. (N. Y.) 304.

Where the law gives the power of appointment to two different, distinct bodies, each exhausts its whole power when it performs its part in the transaction. The non-action of the one cannot enlarge or extend the power of the other. Either performing its part in the whole act is *functus officio*, and cannot resume its power. *People v. Mizner*, 7 Cal. 519.

4. *Ex parte Humphrey*, 10 Wend. (N. Y.) 612; *Whiteside v. People*, 26 Wend. (N. Y.) 634.

But if the two bodies fail to concur and do not proceed to elect by joint ballot, no appointment can be made. *Randlett v. Rice*, 141 Mass. 385.

If neither board should nominate, there can be no appointment; if both nominate and agree the appointment is *ipso facto* made; if they disagree, then a ballot decides the matter. *Ex parte Humphrey*, 10 Wend. (N. Y.) 612.

5. *Whiteside v. People*, 26 Wend. (N. Y.) 634.

In *Ex parte Humphrey*, 10 Wend. (N. Y.) 612, it was held that a refusal to make a nomination is equivalent to a nomination in fact.

6. *People v. Fitch*, 1 Cal. 519; *People v. Campbell*, 2 Cal. 135.

The power of appointment to fill vacancies is given in order to prevent a failure of the public service. *People v. Bissell*, 49 Cal. 407.

In the absence of constitutional restriction, it is competent for the legis-

power to appoint, however, that an actual vacancy shall have occurred;¹ and an appointment made when no vacancy exists, being void at its inception, no act of the appointing power can thereafter give it validity.² An office is vacant in the eye of the law, whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event.³ A newly created office which is not filled by the tribunal which created it, becomes vacant on the instant of its creation,⁴ an existing office without an incumbent being vacant whether it be a new or an old one.⁵

Such a vacancy in an old office as will authorize the place to be filled by appointment, can only be caused by the expiration

lature to provide the manner of making original appointments, the terms of office, and how vacancies shall be filled, and when the term of an incumbent appointed to fill a vacancy shall expire. *People v. Osborne*, 7 Colo. 605.

1. *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; *State v. Peelle*, 124 Ind. 515; *Gosman v. State*, 106 Ind. 203; *Stewart v. State*, 4 Ind. 396; *State v. Wharton*, 25 La. Ann. 2; *Stadler v. Detroit*, 13 Mich. 346; *State v. Irwin*, 5 Nev. 111; *Wenner v. Smith*, 4 Utah 238; and see *Rhodes v. Hampton*, 101 N. Car. 629; *People v. Hall*, 104 N. Y. 170; *People v. Lord*, 9 Mich. 227.

A mandamus to appoint a person to an office should not be granted unless coupled with an application to remove the present incumbent. *People v. Saratoga Springs* (Supreme Ct.), 7 N. Y. Supp. 125.

2. *State v. Peelle*, 124 Ind. 515.

The surrender of an office by the incumbent to one who is appointed when no vacancy existed, amounts to an abandonment of the office, and creates a vacancy, but confers no right upon the person thus illegally appointed. *State v. Peelle*, 124 Ind. 515; and see *Turnipseed v. Hudson*, 50 Miss. 429; 19 Am. Rep. 15.

3. *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; *Stocking v. State*, 7 Ind. 326; *People v. Osborne*, 7 Colo. 605; *State v. McNeely*, 24 La. Ann. 19; *State v. Lusk*, 18 Mo. 333; *State v. Irwin*, 5 Nev. 111; *Com. v. Hanley*, 9 Pa. St. 513; and see *State v. Bemenderfer*, 96 Ind. 374.

The word vacancy has no technical or peculiar meaning. *People v. Osborne*, 7 Colo. 605; *State v. Harrison*, 103 Ind. 434; 3 Am. St. Rep. 663; *Stocking v. State*, 7 Ind. 326; *State v. Irwin*, 5 Nev. 111

4. *State v. Hyde*, 121 Ind. 20; *Collins v. State*, 8 Ind. 344; *Driscoll v. Jones* (S. Dak. 1890), 44 N. W. Rep. 726; *People v. Mott*, 3 Cal. 502; *State v. Boone Co. Ct.*, 50 Mo. 317; *Rhodes v. Hampton*, 101 N. Car. 629; *Walsh v. Com.*, 89 Pa. St. 419; 33 Am. Rep. 771; and see *Rose v. Knox Co.*, 50 Me. 243.

The Nevada act of 1869, creating the county of White Pine, and providing for its organization, caused a vacancy in the office of sheriff, which the governor was authorized to fill, and the unconstitutionality of the act did not affect the right of the person appointed to the office. *State v. Irwin*, 5 Nev. 111.

In *Collins v. State*, 8 Ind. 344, it was held that where an act creates a new office, and vests the appointment of the officer for the first term in the general assembly, and the assembly fails to exercise its power, that power is not elsewhere vested.

5. *Stocking v. State*, 7 Ind. 326; *State v. Harris*, 1 N. Dak. 190; *State v. Borne Co. Ct.*, 50 Mo. 317; *State v. Irwin*, 5 Nev. 111.

Where an office has been abolished, and the duties imposed upon a different officer, and the office is afterwards restored, it may be filled by appointment, though the officer upon whom the duties were imposed had previously entered upon a new term of office. *Rhodes v. Hampton*, 101 N. Car. 629.

In *Mississippi* the word "vacancy" is held to imply that an incumbent has caused a vacancy by ceasing to hold the office. It does not include the idea of creating an office which never has had an incumbent, and construing the mere filling of the office as a vacancy which has happened. *O'Leary v. Adler*, 51 Miss. 28.

of the term of service, and the right to hold as fixed by law;¹ or by the death, resignation, or removal of the person elected or appointed;² or by the happening of some other event by which the duties of the office are no longer discharged at all.³ An office is not vacant so long as it is supplied in the manner provided by law, with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it.⁴

Under provisions permitting an officer to hold his office for the prescribed term and until his successor shall have been elected and qualified therefor, a failure to fill a position at the expiration of the term, does not create a vacancy which can be filled by appointment;⁵ and the failure through death or other

1. *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663.

In *California* it is held that a public office does not become vacant except upon the happening of one of the events enumerated in the political code as a cause therefor. *Rosborough v. Boardman*, 67 Cal. 116.

When the constitution clearly enumerates the events which shall constitute a vacancy in a particular office, all other causes of vacancy must be supposed to be excluded, especially when this construction can lead to no injurious results. *People v. Whitman*, 10 Cal. 38.

2. *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50; *People v. Langdon*, 8 Cal. 1; *People v. Bissell*, 49 Cal. 407; *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; *State v. Seay*, 64 Mo. 89; 27 Am. Rep. 206; *State v. Newark*, 27 N. J. L. 185; *State v. Johns*, 3 Oregon 533.

A law which confers power to supply by appointment a place vacated by death or disability authorizes an appointment to be made, where the vacancy is occasioned by resignation. *State v. Newark*, 27 N. J. L. 185.

An order of court appointing an attorney *pro tempore*, which merely states that the regular attorney, having been of counsel for the accused, was incompetent to perform his office, does not state a reason for the appointment of another, under the constitutional provision that "in all cases where an attorney for any district fails or refuses to attend and prosecute according to law, the court shall have power to appoint an attorney *pro tempore*." *Pippin v. State*, 2 Sneed (Tenn.) 43.

3. *People v. Bissell*, 49 Cal. 407; *State v. Jones*, 19 Ind. 356; 81 Am. Dec. 403; *State v. Howe*, 25 Ohio St. 588; 18 Am. Rep. 321.

The insanity of a county treasurer, not shown to be incurable, will not authorize the permanent appointment of another person in his place; and an appointment, in such case, only during the insanity of the officer, will cease on his recovery. *State v. Pidgeon*, 8 Blackf. (Ind.) 132.

4. *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; *Stewart v. State*, 4 Ind. 396; *People v. Whitman*, 10 Cal. 38; *State v. Seay*, 64 Mo. 89; 27 Am. Rep. 206; *State v. Hadley*, 64 N. H. 473; *People v. Lacombe*, 34 Hun (N. Y.) 409; *People v. Van Horne*, 18 Wend. (N. Y.) 518; *Tappan v. Gray*, 9 Paige (N. Y.) 507; *State v. Howe*, 25 Ohio St. 588; 18 Am. Rep. 321; *State v. McNeely*, 24 La. Ann. 19; *Com. v. Hanley*, 9 Pa. St. 513.

A vacancy does not exist, when, on *quo warranto*, judgment of ouster against the incumbent of the office was obtained on the ground that relator had a superior title. It is a vacancy only where no one has any title to the office. *State v. Ralls Co. Ct.*, 45 Mo. 58.

In *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663, the court by Mitchell, C. J., said: "Of course it is not to be understood that an office cannot become vacant as respects the appointing power, so long as it remains in the actual physical occupancy of some one who asserts a claim thereto. An office is legally vacant, unless the occupant has an unexpired right or title, founded in the constitution or law precisely as a house is vacant of a lawful tenant, in case the lessee, without any provision authorizing him to hold over, refuses to surrender at the expiration of this term."

5. *People v. Tilton*, 37 Cal. 614; *People v. Whitman*, 10 Cal. 46; *People v. Bissell*, 49 Cal. 407; *State v. McMullen*, 46 Ind. 307; *Stewart v. State*,

wise of a duly elected or appointed officer to qualify, does not create a vacancy,¹ the old incumbent continuing to hold not merely as a *de facto* officer but as an officer *de jure*, until the power upon which the duty of election or appointment is devolved can regularly act and a successor is duly elected or appointed and qualified.²

Where a failure to qualify within a prescribed time is expressly declared to create a vacancy, however, the office becomes vacant, and may be filled by appointment.³ And where the duration of the term is limited by the constitution, the office becomes vacant

4 Ind. 396; *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; *Gosman v. State*, 106 Ind. 203; *State v. Hadley*, 64 N. H. 473; *State v. Lusk*, 18 Mo. 333; *Tappan v. Gray*, 9 Paige (N. Y.) 507; *State v. Howe*, 25 Ohio St. 588; 18 Am. Rep. 322; *Ex parte Lawhorne*, 18 Gratt. (Va.) 85; and see *State v. Fagan*, 42 Conn. 32; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274.

The primary object of the framers of the constitution in providing for the holding over of an officer until the qualification of his successor, was to diminish as far as practicable the executive patronage; and, in accordance with this policy, it was thought proper to confine the power of appointment to the single case of a vacancy in office. *Com. v. Hanley*, 9 Pa. St. 513; *People v. Mizner*, 7 Cal. 519.

An officer elected under a law which is silent as to his term of office, but which requires an election to be held every two years, holds until his successor qualifies. *Cordiell v. Frizell*, 1 Nev. 130.

The amendment to the constitution of *Missouri*, ratified in 1851, which made the office of Secretary of State elective, did not create a vacancy in that office but the incumbent continued till the election of his successor pursuant to a law passed under that amendment; but after his successor was thus elected, his term was ended, although the term, under the original constitution had not expired. *State v. Ewing*, 17 Mo. 515. The rule is the same in *Maryland*. See *Watkins v. Watkins*, 2 Md. 341.

1. *Com. v. Hanley*, 9 Pa. St. 513; *People v. Whitman*, 10 Cal. 38; *Central v. Sears*, 2 Colo. 588; *Gosman v. State*, 106 Ind. 203; *State v. Seay*, 64 Mo. 89; 27 Am. Rep. 206. But see *State v. Hopkins*, 10 Ohio St. 509; *State v. Beard*, 34 La. Ann. 273.

The right to hold over continues

until a qualified successor has been elected by the same electoral body as that to which the incumbent owes his selection, or which is by law entitled to elect a successor. *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; citing *Gosman v. State*, 106 Ind. 203; *State v. Lusk*, 18 Mo. 333; *People v. Tilton*, 37 Cal. 614; *Ex parte Lawhorne*, 18 Gratt. (Va.) 85; *Johnson v. Mann*, 77 Va. 265; *State v. Jenkins*, 43 Mo. 261.

In *Gold v. Fite*, 2 Baxt. (Tenn.) 237, it is held that an elected officer who dies before his commission is issued, is deemed to have been in office while he lived, so that his death creates a vacancy.

2. *State v. Howe*, 25 Ohio St. 588; 18 Am. Rep. 321; *Walker v. Ferrill*, 58 Ga. 512; *People v. Tilton*, 37 Cal. 614; *Stratton v. Oulton*, 28 Cal. 44; *People v. Whitman*, 10 Cal. 38; *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; *Elam v. State*, 75 Ind. 518; *Brady v. Howe*, 50 Miss. 607; *Sappington v. Scott*, 14 Md. 40; *Smoot v. Somerville*, 59 Md. 88; *State v. Hadley*, 64 N. H. 473; *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Rep. 50; *In re Carpenter*, 7 Barb. (N. Y.) 30.

So long as the defeasible right to hold over continues, and the incumbent exercises it, the same conditions which would create a vacancy during the prescribed term will be required to create one during the term which he is lawfully holding over. *Gosman v. State*, 106 Ind. 203.

In *State v. Cocke*, 54 Tex. 482, however, it was held that the right of the officer who thus holds over, is by sufferance, rather than by any intrinsic title to the office.

3. *Advisory Opinion* (Fla. 1889), 5 So. Rep. 613; *People v. Crissey*, 91 N. Y. 616; *People v. Wilson*, 72 N. Car. 155; *State v. Cocke*, 54 Tex. 482; *State v. Washburn*, 17 Wis. 658; and see *In re Executive Communication*, 14

upon the expiration of the time limited, even though the legislature has provided that the incumbent shall hold until his successor is duly qualified;¹ and in the absence of a provision entitling an incumbent to hold over, the office becomes at once vacant upon a failure to fill it at the expiration of the term.²

It is the right of the appointing power to determine for its own guidance whether or not a vacancy exists in each particular case,³ but the power to make a valid appointment does not arise until

Fla. 217; *Winneshiek Co. v. Maynard*, 44 Iowa 15; *State v. Matheny*, 7 Kan. 327; *State v. Hunt*, 54 N. H. 431; *State v. Hopkins*, 10 Ohio St. 509.

In *Florida* it is held that such an appointee will hold not for the remainder of the term, but until the qualification of a successor, chosen at the next ensuing general election to be held according to law. Advisory Opinion (Fla. 1889), 5 So. Rep. 613.

It is held in *Wisconsin* that an officer who is elected to fill a vacancy, is entitled to hold during the unexpired term only, which is during that term and until the election or appointment and qualification of a successor. *State v. Washburn*, 17 Wis. 658.

1. *State v. Brewster*, 44 Ohio St. 589; *State v. Howe*, 25 Ohio St. 588; 18 Am. Rep. 321; *Gosman v. State*, 106 Ind. 203; and see *People v. Langdon*, 8 Cal. 1.

It is held in *New York* that although the constitution has prescribed a particular mode of appointing certain officers, and has limited the term of office in particular cases, it is competent for the legislature to provide for a temporary discharge of the duties of the office, until such office can be filled in the manner prescribed by the constitution. *Tappan v. Gray*, 9 Paige (N. Y.) 507.

In *Indiana* it is held that a constitutional limit upon the time of holding an office does not affect the right of an officer to hold over as provided by the constitution. *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663, the court by Mitchell, C. J., saying: "The obvious purpose of the framers of the constitution was to inhibit the right of the general assembly to create any office to which by its authority a tenure or right to hold for a longer period than four years might be fixed. But their purpose to prevent vacancies in office is equally apparent in respect to offices of legislative creation, as in regard to those provided for in the con-

stitution. The result is that the constitution permits a legislative tenure for a fixed term, not longer than four years; and if at the end of that period, owing to the failure of the body charged with the duty of supplying the office by election, or for any other cause, no successor has been elected, the qualified incumbent holds over by paramount right of tenure, which the constitution supplies until he is superseded by a duly qualified successor, who shall have been elected in a manner provided by law."

2. *People v. Baine*, 6 Cal. 509; *King v. McLure*, 84 N. Car. 153.

So of the election or appointment of an unqualified person. *People v. Curtis*, 1 Idaho N. S. 753.

It is obvious that the framers of the constitution of *Virginia* purposely omitted any provision that the persons then performing the duties of office in the State should continue to hold over until their successors should be elected or appointed and qualified; and that they intended that those offices, except where otherwise expressly provided in the constitution, should be immediately, or as soon as convenient, filled by the legislature, either directly or in a mode to be prescribed by law. *Richmond Mayoralty Case*, 19 Gratt. (Va.) 673.

Where a vacancy occasioned by the death of a county clerk is to be filled by appointment of the governor, a statute authorizing a deputy to perform the duties of the office while the vacancy continues, does not constitute him clerk, and his right to perform the duties ceases on an appointment by the governor. *People v. Snedeker*, 14 N. Y. 52.

3. *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; *State v. Gosman*, 106 Ind. 203; *State v. Jones*, 19 Ind. 356; 81 Am. Dec. 403; *Hill v. State*, 1 Ala. 559; *State v. Seay*, 64 Mo. 89; 27 Am. Rep. 206.

A vacant office may be filled by elec-

there is a vacancy in fact. The authority to fill vacancies confers no judicial power, and the existing title of an incumbent cannot be extinguished or affected by the *ex parte* judgment of the executive that the office is vacant.¹

c. EVIDENCE OF APPOINTMENT.—A commission, when one is required, is conclusive evidence of an appointment,² though it is only *prima facie* evidence of the validity of the appointment and the right to exercise the powers and perform the duties of the office.³ The commission does not necessarily constitute any part of the appointment, however;⁴ it is but evidence of those

tion or appointment, before a judicial declaration of vacancy is procured, where it appears *prima facie* that acts or events have occurred subjecting the office to such a declaration of vacancy; but if the person when selected or appointed is resisted by the previous incumbent, when he attempts to take possession of the office, he will be compelled to try the right in some mode prescribed by law. *State v. Jones*, 19 Ind. 356; 81 Am. Dec. 403.

1. *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; *Hill v. State*, 1 Ala. 559; *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *Stokes v. Kirkpatrick*, 1 Metc. (Ky.) 138; *State v. Seay*, 64 Mo. 89; 27 Am. Rep. 206; *State v. Lusk*, 18 Mo. 333; *Dullam v. Wilson*, 53 Mich. 392; 51 Am. Rep. 128; *Honey v. Graham*, 39 Tex. 1; *Com. v. Meeser*, 44 Pa. St. 341.

A person elected or appointed to office, before it is judicially determined to be vacant, may take possession if the office is in fact vacant. And while in possession he will be an officer *de facto*, and should the former officer never contest his right, he will be regarded as having been an officer *de facto* and *de jure*; and if the former incumbent appear, the burden is upon him of proceeding to oust the then actual incumbent. *State v. Jones*, 19 Ind. 356; 81 Am. Dec. 403.

2. *Marbury v. Madison*, 1 Cranch (U. S.) 137; *State v. Peelle*, 124 Ind. 515.

In *State v. Allen*, 21 Ind. 516, it was held that where the title to an office is derived solely from executive appointment, the commission of the executive is the only legal evidence of such title.

Where the judges of the general court of *Virginia* appoint a clerk of a district court, in vacation, their certificate that "he is appointed clerk," etc., signed and sealed by a majority of them, without styling themselves judges of that court, is a sufficient commission, and need not run in the

name of the commonwealth, nor mention that the vacancy happened between term and term, nor state the tenure of the office. *Dew v. Judges*, etc., 3 Hen. & M. (Va.) 1; 3 Am. Dec. 639.

3. *Hill v. State*, 1 Ala. 559; *State v. Chapin*, 110 Ind. 272; *State v. Allen*, 21 Ind. 516. And see *State v. Peelle*, 124 Ind. 515; *Gulick v. New*, 14 Ind. 93; 77 Am. Dec. 49; *Beal v. Ray*, 17 Ind. 554; *State v. Jones*, 19 Ind. 356; 81 Am. Dec. 403.

The commission is conclusive evidence only of its own existence. It is merely *prima facie* evidence at most of the facts recited in it. *Boone Co. v. State*, 61 Ind. 379.

Where the source of title to an office is lodged somewhere else than with the executive, his commission is only *prima facie* evidence of title. *State v. Peelle*, 124 Ind. 515, citing *Boone Co. v. State*, 61 Ind. 379; *Reynolds v. State*, 61 Ind. 392; *Hench v. State*, 72 Ind. 297; *State v. Chapin*, 110 Ind. 272; *Marbury v. Madison*, 1 Cranch (U. S.) 137.

The governor's commission to an officer, whom he had the power to appoint, does not estop a subsequent appointee of the governor to show that the commission was issued only by reason of an unauthorized election of the incumbent by the legislature. *State v. Peelle*, 124 Ind. 515.

Where a certificate of vacancy discloses facts which show that no vacancy exists in the office, the certificate affords no support to a commission based on it. Such a commission is without force for any purpose, and does not confer even a *prima facie* right to the office. *Plowman v. Thornton*, 52 Ala. 559; *Ex parte Harris*, 52 Ala. 87; 23 Am. Rep. 559; *Thompson v. Holt*, 52 Ala. 491.

4. *Marbury v. Madison*, 1 Cranch (U. S.) 137; *U. S. v. Le Baron*, 19

acts of appointment and qualification which constitute title to the office, and which may be proved by other evidence, where the rule of law requiring the best evidence does not prevent.¹ It is a general rule in relation to all public officers that they may establish their official character by proving that they are generally reputed to be, and have acted as such officers, without producing their commissions or other evidence of their appointment.² And where a person has performed various official acts in any public office, they are, both for himself and for others interested, *prima facie* evidence of his due appointment to the office.³

How. (U. S.) 73; *State v. Capus*, 37 La. Ann. 747; *People v. Murray*, 5 Hun (N. Y.) 42; *Billy v. State*, 2 Nott & M. (S. Car.) 357. And see *Beal v. Morton*, 18 Ind. 346.

Possession of the original commission is not indispensably necessary to authorize a person appointed to any office to perform the duties of that office. If it was necessary, then a loss of the commission would be a loss of the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. *Marbury v. Madison*, 1 Cranch (U. S.) 137.

The tenure by which an office is held does not depend upon the commission which the governor may think proper to give. It is only evidence of the appointment. The tenure must depend upon the provisions of the act creating the office, or upon the constitution. *Jeter v. State*, 1 McCord (S. Car.) 233; *State v. Lyles*, 1 McCord (S. Car.) 238; *Hench v. State*, 72 Ind. 297.

The commission of an officer is not void because it does not state the term for which he was appointed; that may be shown by parol. *State v. Fulker-son*, 10 Mo. 681.

1. U. S. v. Le Baron, 19 How. (U. S.) 73; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Bradford v. Justices*, 33 Ga. 332; *State v. Capers*, 37 La. Ann. 747; *People v. Murray*, 5 Hun (N. Y.) 42; *Billy v. State*, 2 Nott & M. (S. Car.) 357; *Jeter v. State*, 1 McCord (S. Car.) 233.

Under the act of Congress permitting the use of a copy of the record of a commission in the office of the Secretary of State, as evidence of an appointment, it is not necessary to prove that the original had been transmitted and afterwards lost to give validity to the copy. The copy would be complete evidence that the original had existed, and that the appointment had

been made. *Marbury v. Madison*, 1 Cranch (U. S.) 137.

2. *McCoy v. Curtice*, 9 Wend. (N. Y.) 17; 24 Am. Dec. 113; *Allen v. State*, 21 Ga. 217; 68 Am. Dec. 457; *Bryan v. Walton*, 14 Ga. 185; *Potter v. Luther*, 3 Johns. (N. Y.) 431; *Ring v. Grout*, 7 Wend. (N. Y.) 341; *People v. Cook*, 14 Barb. (N. Y.) 259; *Colton v. Beardsley*, 38 Barb. (N. Y.) 29; *Tomlinson v. Darnell*, 2 Head (Tenn.) 538.

It is not material how the question arises, whether in a civil or a criminal case, nor whether the officer is or is not a party to the record. *Allen v. State*, 21 Ga. 217; 68 Am. Dec. 457, citing *Greenl. on Ev.*, § 92.

This exception to the general rule requiring the best evidence to be given, is founded upon the strong presumption that arises on the exercise of a public office that the appointment to it is valid, and is made for the reason that it would be attended with general inconvenience to require full and strict proof of the appointment or election of public officers. *Colton v. Beardsley*, 38 Barb. (N. Y.) 29.

3. *Johnston v. Wilson*, 2 N. H. 262; 9 Am. Dec. 50; *Jones v. Gibson*, 1 N. H. 266; *Carter v. Symphon*, 8 B. Mon. (Ky.) 155; *People v. Clingan*, 5 Cal. 389; *State v. Ferguson*, 31 N. J. L. 107; *Taylor v. Skrine*, 3 Brev. (S. Car.) 516; 2 Treadw. (S. Car.) 696; *U. S. v. Bachelder*, 2 Gall. (U. S.) 15; *Fenwick v. Sears*, 2 Cranch (U. S.) 268; *Woodworth v. Hall*, 1 Woodb. & M. (U. S.) 248. And see *Callison v. Hedrick*, 15 Gratt. (Va.) 244; *Barada v. Carondelet*, 8 Mo. 644.

The foundation of the rule of evidence that a person acting as a public officer has been duly appointed to the office which he assumes to exercise, is that all acts done by what appears to be public authority are presumed to be rightly done until the contrary is

They are *prima facie* evidence only, however, and, if practicable, may be rebutted by counter-evidence of any irregularity in the appointment,¹ though where a person has acted in an official capacity, he himself cannot afterwards offer evidence against the validity of his own appointment.²

VI. ACCEPTANCE.—An office cannot be considered as filled until the election or appointment is accepted by the person chosen.³ In the absence of special provision therefor,⁴ the acceptance need not be signified in express terms,⁵ and it is often implied from qualification and entry upon the discharge of the duties of the office.⁶ Consenting to be a candidate, or election or appointment with the knowledge and consent of the candidate, is in no sense an acceptance of the office,⁷ and an express refusal or an

proved. *Com. v. Kane*, 108 Mass. 423; 11 Am. Rep. 373.

If an inspector is commissioned and sworn, and in the actual execution of his office, with the knowledge of the Treasury Department, it is sufficient proof of his being regularly appointed. *U. S. v. Sears*, 1 Gall. (U. S.) 215.

Evidence that a person assaulted was at the time of the assault and with defendant's knowledge, acting as a police officer, and wearing the uniform and badge of such officer, is competent and sufficient evidence of his official capacity to be submitted to the jury. The want of similar proof, as to any other time, might affect the weight but not the competency of this evidence. *Com. v. Tobin*, 108 Mass. 426; 11 Am. Rep. 375.

1. *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50.

Where a person has distinctly admitted or recognized the official capacity of another, he cannot afterwards offer evidence against the validity of his appointment. *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50.

2. *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50.

Where the title of one to an office consisted in written documents, being his appointment, acceptance, and his oaths of office, which are the record of his title to the office, he will not be permitted by parol evidence to falsify the record for the purpose of showing that he was not an officer *de jure*, but only an officer *de facto*. *Crawford v. Dunbar*, 52 Cal. 36.

Foreign Officers.—No different proof of the appointment of an officer in a foreign country is required from that at home; proof of one exercising the office *de facto* is usually sufficient in either case. *Spaulding v. Vincent*, 24 Vt. 501.

3. *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50; *Smith v. Moore*, 90 Ind. 294.

4. For instances of statutory requirements of notices in writing signifying acceptance of office, see *Winnegar v. Rowe*, 1 Cow. (N. Y.) 258; *State v. Weatherby*, 17 Neb. 553; *Bentley v. Phelps*, 27 Barb. (N. Y.) 524.

Acceptance with Whom Filed.—Under *Nebraska Comp. St.*, ch. 79, providing that "all officers whose term of office would otherwise expire upon the first Monday in April, shall continue to exercise the duties of their office until the second Monday in July," the failure of school trustees elected at the annual meeting in April to file their acceptances with the director of the old board instead of with one chosen by them ten days after election, does not prevent them from assuming office after the second Monday in July. *State v. Weatherby*, 17 Neb. 553.

5. *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50.

The fact that the claimant of the office has acted as its incumbent, together with the certificate of election, will raise a presumption that he had executed his bond and taken the oath of office. *People v. Clingan*, 5 Cal. 389.

6. *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50. And see *State v. Weatherby*, 17 Neb. 553; *Hartford v. Bennett*, 10 Ohio St. 441.

In *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50, the court by Woodbury, J., said: "It is often implied from previous conduct, as well as a subsequent receipt of a commission, taking the oath of office, or discharging some of its duties."

7. *Smith v. Moore*, 90 Ind. 294.

Time of Acceptance.—In *Smith v. Moore*, 90 Ind. 294, Elliott, J., dissent-

absolute failure to qualify is equivalent to a refusal to accept,¹ though a failure to qualify in a prescribed time does not of itself annul or avoid the right or title to the office, but merely renders it voidable or defeasible² unless qualification within a prescribed time is expressly made a condition precedent to the right to the occupation of the office.³

At common law, an office was regarded as a burden, which the appointee was bound, in the interest of the community and good government, to bear;⁴ and a person elected to a municipal office was obliged to accept it and perform its duties, and subjected himself to a penalty by refusal.⁵ And to refuse an office in a

ing, it was held that until the consenting party is known to have received a majority vote, there is nothing for him to accept. Elliott, J., in his dissenting opinion, said: "The majority of the court think that acceptance can only come after election and by qualification, and I, that it may come before, as well as after, and that election and qualification are essentially distinct and different things. To my mind it is clear that consent or acceptance may be given as effectually before as after election. That an acceptance is acceptance whensoever made."

The refusal or neglect to file an official oath or bond, must always precede and can never succeed the incumbency. *People v. Taylor*, 57 Cal. 620.

Knowledge of Appointment.—The power to refuse a thing or neglect a duty, must necessarily be based upon a knowledge of the existence of the thing or duty. An appointee, therefore, cannot refuse an appointment or disregard the duty to qualify connected with it, until he receives information of his appointment. *People v. Perkins*, 85 Cal. 509.

1. *State v. Washburn*, 17 Wis. 658; *Smith v. Moore*, 90 Ind. 294; *People v. Taylor*, 57 Cal. 620; *Morrell v. Sylvester*, 1 Me. 248; *People v. Wilson*, 72 N. Car. 155; and see *Bosworth v. Heys*, 46 Ga. 635; *In re Executive Communication*, 14 Fla. 277.

Where a town electing an officer may lawfully require sureties for the faithful discharge of his office, a refusal to find such sureties is a non-acceptance of the trust, even after the person elected has taken the oath of office. *Morrell v. Sylvester*, 1 Me. 248.

2. *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182; *Sprowl v. Lawrence*, 33 Ala. 674; *State v. Peck*, 30 La. Ann.

280; *State v. Texas Co. Ct.*, 44 Mo. 230; *State v. Churchill*, 41 Mo. 41; *People v. Holley*, 12 Wend. (N. Y.) 481; *State v. Toomer*, 7 Rich. (S. Car.) 216; and see *infra*, this title, *Qualification for Office*.

Statutes prescribing a time within which an officer must qualify, are directory in their nature, but the person elected must qualify before taking the office. *State v. Colvig*, 15 Oregon 57.

In *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182, the court by Sheldon, J., said: "It seems reasonable that it is only when the rights of the public, or of third persons, depend upon the exercise of the power or the performance of the duty to which it refers that the statute should be held mandatory, and otherwise but directory. Citing *Kane v. Footh*, 70 Ill. 590.

3. *State v. Matheny*, 7 Kan. 327; *Beebe v. Robinson*, 52 Ala. 67; *Thompson v. Holt*, 52 Ala. 491.

Where a person is duly elected to the office of school treasurer and fails to qualify within twenty days thereafter, but has sufficient cause for such failure, he may afterwards qualify and hold the office. *Carpenter v. Titus*, 33 Kan. 7.

4. *Edwards v. U. S.*, 103 U. S. 471; *State v. Ferguson*, 31 N. J. L. 107.

As every citizen is capable of the benefit of this franchise, so he ought to submit to the charge also. *State v. Ferguson*, 31 N. J. L. 107, quoting *Lord Holt in Vanacker's Case*, Carth. 480; 1 Ld. Raym. 496.

5. *Edwards v. U. S.*, 103 U. S. 471.

When not being exempt or disqualified, a man is duly elected to an office, the court, if the corporation is a public one, and the office of a sufficiently important nature to justify its interference, and in all cases where the office is connected with the adminis-

public corporation connected with local jurisdiction, was a common-law offense punishable by indictment.¹

In this country, where offices of honor and emolument are commonly more eagerly sought after than shunned, a contrary doctrine with regard to such offices, and in some States, with regard to offices in general, may have obtained.² But in some of the States statutes have been enacted imposing a penalty upon an officer for a refusal to accept an office,³ and held to be constitutional.⁴ But where by statute or by the law or policy of the State, an officer has the right to resign, or lay down his office at pleasure, as is usually the case with us, the authority to impose a fine for refusing to serve would probably not exist.⁵ One who has accepted and qualified for and entered upon the discharge of the duties of one office, cannot be compelled to accept another,⁶

tration of local jurisdiction vested in the corporation or the administration of justice, will interfere by mandamus to compel him to take upon him and serve the office. *State v. Ferguson*, 31 N. J. L. 107, *quoting* Grant on Corporations 230.

1. *State v. Ferguson*, 31 N. J. L. 107.

2. *Edwards v. U. S.*, 103 U. S. 471.

In *Hoke v. Henderson*, 4 Dev. (S. Car.) 1; 25 Am. Dec. 677, it was held that the public has a right to the services of all the citizens, and may demand them in all civil departments, as well as in the military.

"We must assume that the common-law rule prevails, unless the contrary be shown." *Edwards v. U. S.*, 103 U. S. 471.

3. See *Winnegar v. Roe*, 1 Cow. (N. Y.) 258; *Haywood v. Wheeler*, 11 Johns. (N. Y.) 432; *Brooklyn v. Scholes*, 31 Hun (N. Y.) 110; *London v. Headen*, 76 N. Car. 72; *Edwards v. U. S.*, 103 U. S. 471.

But one penalty can be recovered for a refusal to accept the office of overseer of highways. *Haywood v. Wheeler*, 11 Johns. (N. Y.) 432.

The penalty for refusal to accept the office of overseer of highways provided for in laws of *New York*, 1821, ch. 128, can be recovered only when the town has been compelled to proceed to a new election. *Winnegar v. Roe*, 1 Cow. (N. Y.) 258.

Although an individual elected to the office of overseer of highways omits to file in the office of the town clerk, a notice of his acceptance of the office, yet coming into office under color of title by a lawful election, if he proceeds to execute the duties of the office, he will be an officer *de facto*,

and his acts as respects the public and third persons, will be valid. *Bentley v. Phelps*, 27 Barb. (N. Y.) 524.

4. *Brooklyn v. Scholes*, 31 Hun (N. Y.) 110; *London v. Headen*, 76 N. Car. 72; *State v. McEntyre*, 3 Ired. (N. Car.) 171.

The fact that a penalty is imposed by statute, for refusing to serve in an office, does not prevent the incumbent from resigning, but he incurs the penalty by such resignation. *Conner v. Mayor, etc.*, of N. Y., 2 Sandf. (N. Y.) 355.

In *Hoke v. Henderson*, 4 Dev. (S. Car.) 1; 25 Am. Dec. 677, the court, by Ruffin, C. J., said: "I cannot doubt that the legislature has the perfect power, if it choose arbitrarily to exercise it, of compelling not, indeed, a particular man designated in a statute by name, but any citizen elected or appointed, as by law prescribed, to serve in any office even against his will. I have mentioned some instances in which it is done, and there is no reason why making due compensation, it may not be done as to all offices."

5. *Dillon on Municipal Corp.* (4th ed.), § 223; *citing* Willc. 133, pl. 308; *Grant*, 221, 222; *Dillon's Munic. Corp.*, § 226, note; *Gates v. Delaware Co.*, 12 Iowa 405; *U. S. v. Wright*, 1 McLean (U. S.) 509; *State v. Ferguson*, 31 N. J. L. 107.

After one has accepted an office, his refusal to serve without good reason is not in itself a forfeiture, but only a cause of forfeiture. *Van Orsdall v. Hazzard*, 3 Hill (N. Y.) 243.

6. *Hartford v. Bennett*, 10 Ohio St. 441; *Smith v. Moore*, 90 Ind. 294.

In *Goettman v. Mayor, etc.*, of N. Y., 6 Hun (N. Y.) 132, it was held that

and it would appear that no man can be compelled to give his time and labor to the duties of an office to which no compensation is attached.¹

VII. QUALIFICATION FOR OFFICE.—Qualification for office means the performance of the acts which the person chosen is required to perform before he can enter into the office,² the term qualified, when used in this connection, importing that the person chosen has complied with the requirements of law by giving bond and taking the oath of office.³

Qualification is usually held to be a condition precedent to the exercise of the functions of an office as an officer *de jure*.⁴ Statutes prescribing the time within which a bond is to be given, or

where a person holding one office is chosen to fill another, for refusing to serve, in which he is liable to a penalty, he may hold both offices, even though the two offices are deemed to be incompatible.

1. *Hinze v. People*, 92 Ill. 406; and see *Hoke v. Henderson*, 4 Dev. (S. Car.) 1; 25 Am. Dec. 677.

When Acceptance Disqualifies.—In *Smith v. Moore*, 90 Ind. 294, the court by Elliott, J., said: "A construction of the constitution that would result in making a man a judicial officer against his will, would put it in the power of those desiring to obstruct his way to other offices to disfranchise him. And this the constitution never intended should occur."

2. *State v. Bemenderfer*, 96 Ind. 374.

To qualify is to prepare one's self for the discharge of duties, or the duties of an office. And. L. Dict.

Condition Precedent.—An officer elect, but who has not qualified and entered upon his office, is not an officer within the meaning of the constitution of *Nevada*. *Cordiell v. Frizell*, 1 Nev. 130.

Time.—Under *Texas* statutes providing that at the expiration of thirty days from an election, and from time to time thereafter, as the officers elect qualify, each county judge shall certify to the Secretary of State a statement showing who were elected, to what offices, and the date of their qualification, county commissioners have at least thirty days in which to qualify. *Cassin v. Zavalla Co.*, 70 Tex. 419.

3. *State v. Neibling*, 6 Ohio St. 40; *People v. Crissey*, 91 N. Y. 616; *Black's L. Dict.*

Being duly qualified in the constitu-

tional sense, and in the ordinary acceptation of the words, unquestionably means that the successor shall possess every qualification. That he shall in all respects, comply with every requisite before entering upon the duties of the office. That in addition to being elected by the qualified electors, he shall be commissioned by the governor, give bond as required by law, and that he shall be bound by oath or affirmation to support the constitution of the commonwealth and to perform the duties of the office with fidelity. *Com. v. Hanley*, 9 Pa. St. 513; *State v. Seay*, 64 Mo. 89; 27 Am. Rep. 206.

4. *State v. Colvig*, 15 Oregon 57; *People v. Taylor*, 57 Cal. 620; *People v. Perkins*, 85 Cal. 509; *State v. Mathemy*, 7 Kan. 327; *Jump v. Spence*, 28 Md. 1; *State v. Perkins*, 24 N. J. L. 409; *Creighton v. Com.*, 83 Ky. 142; *Rounds v. Bangor*, 46 Me. 541; *Rounds v. Mansfield*, 38 Me. 586; *Howard v. Proctor*, 7 Gray (Mass.) 128; *McVeany v. Mayor, etc.*, of N. Y., 80 N. Y. 185; 36 Am. Rep. 600.

In *Thomas v. Owens*, 4 Md. 189, it was held that the qualification of an officer is an indispensable prerequisite to his investiture with the authority and responsibilities of the office. See also *Cordiell v. Frizell*, 1 Nev. 130.

One who, having been elected to an office, assumes to exercise its duties, without having qualified or attempted to qualify, is without color of title and is not a *de facto* officer. *Creighton v. Com.*, 83 Ky. 142.

One elected and serving as a constable, although neglecting to furnish a bond within the time required by statute, the selectmen not having required it, is nevertheless, an officer, *de facto*, if not *de jure*; and the sureties on his bond, given several months after his

an oath of office is to be taken, however, are usually deemed to be directory only,¹ failure to do so within the prescribed time not of itself annulling or avoiding the office, but merely rendering it voidable or defeasible;² and if the State sees proper to excuse the officer's delinquencies by granting him his commission, the defects of his title are cured, and it is converted into a title *de jure*, having relation back to the time of his election.³ The courts

election, are liable for his appropriation of public money to his own use. *Weston v. Sprague*, 54 Vt. 395.

1. *People v. Holley*, 12 Wend. (N. Y.) 481; *McRoberts v. Winant*, 15 Abb. Pr. N. S. (N. Y.) 210; *Cronin v. Stoddard*, 97 N. Y. 271; *Cawley v. People*, 95 Ill. 249; *State v. Porter*, 7 Ind. 204; *Boone Co. v. Jones*, 54 Iowa 699; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75; 32 Am. Dec. 243; *Lowell v. Hadley*, 8 Met. (Mass.) 180; *State v. Peck*, 30 La. Ann. 280; *State v. Churchill*, 41 Mo. 41; *State v. Texas Co. Ct.*, 41 Mo. 230; *Morgan v. Vance*, 4 Bush (Ky.) 323; *Curry v. Stewart*, 8 Bush (Ky.) 560; *Kearney v. Andrews*, 10 N. J. Eq. 70; *State v. Colvig*, 15 Oregon 57; *Com. v. Read*, 2 Ashm. (Pa.) 261; *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64; *Speake v. U. S.*, 9 Cranch (U. S.) 28.

The matter of time is not essential to the validity of the bond, nor a condition precedent to the party's title to the office. The time not being of the essence of the thing required to be done, is not material. *State v. Churchill*, 41 Mo. 41. The essence of the thing to be done—that upon which the rights of the public depend—is the giving of the bond, not the precise time when it is done. *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182.

Where no time is prescribed within which the oath of office must be taken, but the time of filing the bond is prescribed, the oath may be taken at any time, before the office is forfeited by the neglect of the officer to execute his bond, as required by the statute. *People v. McKinney*, 52 N. Y. 374.

2. *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182; *Cawley v. People*, 95 Ill. 249; *State v. Peck*, 30 La. Ann. 280; *People v. Benfield*, 80 Mich. 265; *Horton v. Parsons*, 37 Hun (N. Y.) 42; *People v. Holley*, 12 Wend. (N. Y.) 481; *Foot v. Stiles*, 57 N. Y. 399; *Cronin v. Stoddard*, 97 N. Y. 271; *Kearney v. Andrews*, 10 N. J. Eq. 70; *Clark v. Ennis*, 45 N. J. L. 69.

If no steps are taken to declare and fill a vacancy caused by the failure of an officer to qualify, and the officer subsequently qualifies, he holds the office.

State v. Cronkhite, 8 Ind. 134; *State v. Porter*, 7 Ind. 204; *State v. Findley*, 10 Ohio 51.

A law requiring commissioners for the assessment of a special tax to defray the expense of a certain public improvement, to take an oath before proceeding to the assessment, is sufficiently complied with by their taking the oath after the ordinance requiring the improvement has been passed by the common council, but before its approval by the mayor. *Gurnee v. Chicago*, 40 Ill. 165.

3. *State v. Toomer*, 7 Rich. (S. Car.) 216; *Sprowl v. Lawrence*, 33 Ala. 674; *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182; *Cawley v. People*, 95 Ill. 249; *People v. Benfield*, 80 Mich. 265; *Jones v. State*, 7 Mo. 81; 37 Am. Dec. 180; *McRoberts v. Winant*, 15 Abb. Pr. N. S. (N. Y.) 210; *Cronin v. Grundy*, 16 Hun (N. Y.) 520. And see *Weston v. Sprague*, 54 Vt. 395. But see *Thomas v. Owens*, 4 Md. 189.

Where the statute requires two or more bonds, and the officer gives one bond, and enters upon the discharge of the duties of his office, the subsequent tender and acceptance of the remaining bonds cures the defect. *People v. Smith*, 81 N. Car. 305.

The office, in case of the failure to file an official bond, does not become *ipso facto* vacant, but there must be a direct judicial or other authorized proceeding on the part of the proper authority to enforce the forfeiture. *Foot v. Stiles*, 57 N. Y. 399; *Horton v. Parsons*, 37 Hun (N. Y.) 42; *Cronin v. Grundy*, 16 Hun (N. Y.) 520.

Until then he is practically an officer *de jure* having a defeasible title to the office. *Horton v. Parsons*, 37 Hun (N. Y.) 42; citing *Foot v. Stiles*, 57 N. Y. 399; *People v. Crissey*, 91 N. Y. 635; *Cronin v. Grundy*, 16 Hun (N. Y.) 521; *Clark v. Ennis*, 45 N. J. L.

generally hold that even though the statute expressly provides that upon failure to give a bond within the time prescribed, the office shall be deemed vacant, and may be filled by appointment, the default is likewise a ground for forfeiture only, not a forfeiture *ipso facto*.¹

Under some of the provisions of this class, however, time is held to be of the essence of the thing required to be done, and due qualification to be a condition precedent to the party's title to the office.² This is particularly the case under provisions requiring qualification before the person chosen shall enter upon the duties of his office.³ These provisions have no application where

69; *Plymouth v. Painter*, 17 Conn. 585; 44 Am. Dec. 574; *St. Louis Co. Ct. v. Sparks*, 10 Mo. 117; 45 Am. Dec. 355.

Where an officer is required to file his oath of office with the Secretary of State, and also with the county clerk, but having duly taken the oath and filed it with the Secretary of State, his failure also to file it with the county clerk will not forfeit his office or create a vacancy. *People v. Perry*, 79 Cal. 105.

1. *People v. Benfield*, 80 Mich. 265; *Sprowl v. Lawrence*, 33 Ala. 674; *State v. Ely*, 43 Ala. 568; *State v. Falconer*, 44 Ala. 696; *People v. Smith*, 81 N. Car. 305.

Time, so far as the validity of the bond is concerned, is merely directory, when the statute does not negative its validity, if filed at a later time. The giving of the bond is mandatory; the time when it is to be given is directory. *Duntley v. Davis*, 42 Hun (N. Y.) 229.

Duly elected officers cannot be prevented from holding the offices to which they are elected by conspiracy entered into for the purpose of preventing their qualification by the retiring officers, and no technicalities will be permitted to defeat the will of the electors fairly and honestly expressed in the choice of their officers. *Culver v. Armstrong*, 77 Mich. 194.

2. See *In re Executive Communication*, 14 Fla. 277; *State v. Matheny*, 7 Kan. 327; *People v. Percells*, 8 Ill. 59; *State v. McAdoo*, 36 Mo. 452; *Com. v. Yarbrough*, 84 Ky. 496; *Calloway v. Com.*, 4 Bush (Ky.) 383; *Falconer v. Shores*, 37 Ark. 386; *Thompson v. Holt*, 52 Ala. 491; *Beebe v. Robinson*, 52 Ala. 67; *People v. Perkins*, 85 Cal. 509; *People v. Hartwell*, 67 Cal. 11; *State v. Laughton*, 19 Nev. 202; *People v. Brite*, 55 Cal. 79; *Halbeck v.*

Mayor, etc., of New York, 10 Abb. Pr. (N. Y.) 439.

In *Kansas* failure to qualify is a forfeiture, but may be excused if the officer has sufficient cause for such failure. *Carpenter v. Titus*, 33 Kan. 7. So in *Indiana*. *State v. Johnson*, 100 Ind. 489.

In *Indiana*, though the failure of an officer to give bond within a prescribed time after the receipt of his commission, renders the office vacant, the commission must have been actually received, or the failure must have been under circumstances which will justify an inference that the party did not intend to receive it, or that he intended to postpone the day of giving the bond. *State v. Hadley*, 27 Ind. 496.

In *Flatan v. State*, 56 Tex. 93, it was held that a statute requiring an officer elect to qualify within a prescribed time, will be considered as directory, only where circumstances beyond his control have caused the delay. See also *Ross v. Williamson*, 44 Ga. 501.

3. *Thomas v. Owens*, 4 Md. 189; *State v. Matheny*, 7 Kan. 327; *People v. Perkins*, 85 Cal. 509; *State v. Perkins*, 24 N. J. L. 409; *Johnson v. Mann*, 77 Va. 265; *Vaughan v. Johnson*, 77 Va. 300; *Kilpatrick v. Smith*, 77 Va. 347; *Childrey v. Rady*, 77 Va. 518; *Owens v. O'Brien*, 78 Va. 116.

In *Virginia* the anti dueling oath is a necessary prerequisite to the discharge of the duties of an office. *Branham v. Long*, 78 Va. 352; *Johnson v. Mann*, 77 Va. 265.

In *People v. Taylor*, 57 Cal. 620, it was held that the refusal or neglect of a person duly elected to an office to file his official oath or bond, within the time prescribed by law, creates a vacancy, as soon as the term for which he is elected commences, which may be filled by the proper appointing power.

The omission of a commissioner of

a contest is pending for an office, until the contest has been finally determined.¹

1. **The Oath of Office**—(See also OATH).²—Public officers are usually required to take an oath of office.³ The oath is a mere incident to the office and constitutes no part of it,⁴ and may or may not be indispensable, according to usage and positive statute law.⁵ The oath of office usually required of public officers is, that they will faithfully discharge the duties of their respective offices, and in many instances they are also required to swear that they will support the Constitution of the United States, and of the State under which their offices are held.⁶ No oath can be required to be taken which imposes a religious test,⁷ or which renders a person ineligible to office, because of the commission of an act not punishable as a crime at the time it was committed,⁸

highways to execute and file an official bond, as required by the statute, however, does not render him liable as a trespasser for his official acts. *Foot v. Stiles*, 57 N. Y. 399.

1. *People v. Potter*, 63 Cal. 127; *People v. Mayworm*, 5 Mich. 146; *People v. Miller*, 16 Mich. 56; *Pearson v. Wilson*, 57 Miss. 848; *People v. McManus*, 34 Barb. (N. Y.) 620; *State v. Dahl*, 65 Wis. 510; *Little v. State*, 75 Tex. 616; *State v. Kraft*, 18 Oregon 550.

In *People v. Miller*, 16 Mich. 56, it was held that statutes requiring an oath and bond, within a prescribed time must be construed to apply only to persons holding the certificate of election, those whose rights are admitted by the person holding it, and those who, without having a certificate, have obtained a judicial determination, establishing their right to the office.

A county officer who receives no official notice of his election may qualify within twenty days after the commencement of the term for which he is elected. *Attorney-Gen'l v. Elderskin*, 5 Wis. 300.

2. Vol. 16, p. 1017.

3. *State v. Stanley*, 66 N. Car. 59; 8 Am. Rep. 488.

In the absence of constitutional or statutory provision rendering a candidate ineligible for bribing electors or offering a bribe, his inability to truthfully take the oath of office will not disqualify him. *People v. Thornton*, 25 Hun (N. Y.) 456.

4. *State v. Stanley*, 66 N. Car. 59; 8 Am. Rep. 488; *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50.

An officer who is elected, and by the certificate of the proper authority to

that effect is or has become duly qualified to hold the office, is the rightful officer, although holding by a defeasible title when he does not take the oath of office. *People v. Crissey*, 91 N. Y. 616; *In re Kendall*, 85 N. Y. 305; *Foot v. Stiles*, 57 N. Y. 401; *Weeks v. Ellis*, 2 Barb. (N. Y.) 320.

It is no defense to an action on an official bond that the principal did not take the oath of office. *Board of School Directors v. Judice*, 39 La. Ann. 896.

5. *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50; *State v. Stanley*, 66 N. Car. 59; 8 Am. Rep. 488.

A manifest intention upon the part of the legislature that inferior officers shall not be required to take an oath of office, is a sufficient exemption under a constitutional provision which requires all officers to take an oath of office, except such inferior officers as may be by law exempt. *School Directors v. People*, 79 Ill. 511.

A legally chosen president of the senate may become acting governor, without the administration of any other qualifying oath than that which he has taken in his office of senator. *Opinion of Justices*, 70 Me. 570.

Where a constitution provides that an oath of office shall be taken, a statute providing for an office, need not require the officers to take an oath and still be valid, as the constitution on that subject executes itself and requires no enabling act for that purpose. *David v. Portland Water Committee*, 14 Oregon 98.

6. See *Stimson's Am. Stat. L.*, §§ 224, 225.

7. U. S. Const., Art. VI, § 3.

8. *Cummings v. Missouri*, 4 Wall.

or which imposes upon the officer tests or requirements greater than those which the constitution has declared shall be sufficient.¹

An oath of office need not be in writing if the statute does not in terms require it, if the fact appears that the officer was regularly sworn.² But when the form is prescribed, it must be substantially complied with.³ A departure from a prescribed form in substance, or taking an entirely different oath from that prescribed, leaves the officer without authority and renders all his proceedings absolutely void.⁴

Provisions directing that the oath of office may be taken before particular officers, are merely cumulative or directory, and the oath may be taken before any officer authorized to administer oaths,⁵ and if the certificate does not show that the oath was

(U. S.) 277. And see *Ex parte Stratton*, 1 W. Va. 305.

Such a requirement would be an *ex post facto* law and void, for it would add a new punishment for an old offense. *Cummings v. Missouri*, 4 Wall. (U. S.) 277.

1. *Mechem's Pub. Off.* 259.

The *California* constitution, art. 11, § 3, does not prohibit the legislature from requiring another form of oath of its officers which is not in conflict with the one therein prescribed. *Cohen v. Wright*, 22 Cal. 293.

2. *Davis v. Berger*, 54 Mich. 652.

The governor may certify that the person elected for State librarian has duly taken the oaths according to law, and the certificate is sufficient although the oath is not set out in words, for it will be intended that the proper oaths were administered. *Harwood v. Marshall*, 9 Md. 84. And see *Greene v. Lunt*, 58 Me. 518.

3. *State v. Trenton*, 35 N. J. L. 485; *Bassett v. Den*, 17 N. J. L. 432; *State v. Ayres*, 15 N. J. L. 479; *Hankins v. Calloway*, 88 Ill. 155; *Young v. State*, 7 Gill & J. (Md.) 253.

If the oath of office is signed by the officer with his real name, a mistake in the spelling of the name in the body of the oath will not vitiate it. *Hoagland v. Culvert*, 20 N. J. L. 387.

The very language of the oath prescribed by statute need not be followed if the substance is preserved. *Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479.

Where the oath taken is a complete equivalent for that prescribed, and means the same thing, it is sufficient. *State v. Trenton*, 35 N. J. L. 485.

In *Power's Appeal*, 29 Mich. 504, it

was held that the oath administered to jurors for the condemnation of private property, must be coextensive with the duty prescribed for them by the constitution, and give the measure and limit of their legal action.

The omission of the venue to the oath of office is not important. *Horton v. Parsons*, 3 Hun (N. Y.) 42; *Colman v. Shattuck*, 62 N. Y. 348.

4. *Bohlman v. Green Bay, etc., R. Co.*, 40 Wis. 157; *Bowler v. Perrin*, 47 Mich. 154; *Chapman v. Clark*, 49 Mich. 305; *Halbeck v. Mayor, etc., of N. Y.*, 10 Abb. Pr. (N. Y.) 439; *In re Cambria Street*, 75 Pa. St. 357.

A memoranda "sworn before me this 31st of December, 1857," signed by the officer before whom the oath purported to have been taken, is not sufficient under a statute which requires that the oath shall be in writing, and taken and subscribed by the officers. *Halbeck v. Mayor, etc., of N. Y.*, 10 Abb. Pr. (N. Y.) 439.

5. *Ex parte Heath*, 3 Hill (N. Y.) 42; *People v. Stowell*, 9 Abb. N. Cas. (N. Y.) 456; *Canniff v. Mayor, etc., of N. Y.*, 4 E. D. Smith (N. Y.) 430; and see *Hardesty v. Taft*, 23 Md. 512; 87 Am. Dec. 584.

Where officers required to be sworn, before they enter upon the duties of their offices, are sworn before a person not authorized to administer the oath, their acts are not thereby rendered invalid; the officer being an officer *de facto* whose acts in which others have an interest are valid. *State v. Perkins*, 24 N. J. L. 409.

A foreign consul residing in Mexico has no authority to administer an official oath. *Otterbourg v. Case*, 5 Ct. of Cl. 430.

taken before a proper officer, it may be shown by extrinsic evidence.¹

2. **Official Bonds**—(See also BONDS).²—*a.* **WHEN REQUIRED**.—Public officers who are intrusted with money or property, are generally required to give bond and sureties for the faithful performance of their duties.³ An official bond executed by a public officer which is not required by statute, is void for want of consideration.⁴

b. **SURETIES**.—See SURETYSHIP.

VIII. ENTRY UPON THE DISCHARGE OF THE DUTIES.—No installation is necessary to the entry upon the discharge of the duties of an office; appointment or election, and the qualification of the officer, by taking the required oaths, and giving the required bonds, if any, are all that is necessary to invest him with the office.⁵

IX. TRAFFICKING IN OFFICES AND CONTRACTS CONCERNING OFFICES AND OFFICERS—(See also ILLEGAL CONTRACTS).⁶—1. **Contracts to Secure Election or Appointment**.—Contracts for the buying, selling or procuring of public offices are utterly void as contrary to the soundest public policy, and indeed as a constructive fraud upon the government,⁷ such contracts being void at common law whether prohibited and made void by statute or not.⁸ The right of appointment is not the property of the appointing officer and

1. *State v. Green*, 15 N. J. L. 88; and see *Howard v. Proctor*, 7 Gray (Mass.) 128.

An officer authorized to administer an official oath cannot lawfully refuse to administer it, on account of the ineligibility of the person chosen. *People v. Deas*, 3 Wend. (N. Y.) 438; *Miller v. Sacramento*, 25 Cal. 93.

2. Vol. 2, p. 448.

3. *Dill on Munic. Corp.* (4th ed.), § 214; *Mechem's Pub. Off.*, §§ 263, 264.

4. *State v. Heisey*, 56 Iowa 404; *State v. Bartlett*, 30 Miss. 624; *U. S. v. Humason*, 6 Sawy. (U. S.) 199.

But when an official bond imposes greater obligations than the act of assembly requires, both principal and surety will be held to the full extent of its terms, unless such a construction is forbidden by statute, or a contrary intention on the part of the obligors is shown. *Philadelphia v. Shallcross*, 14 Phila. (Pa.) 135.

5. *Ex parte Smith*, 8 S. Car. 495; and see *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50.

6. Vol. 9, p. 789.

7. *Story's Eq. Jur.* (13th ed.), § 295; *Outen v. Rhodes*, 3 A. K. Marsh. (Ky.) 432; 13 Am. Dec. 193; *Meredith v. Ladd*, 2 N. H. 517; *Becker v. Ten*

Eyck, 6 Paige (N. Y.) 68; *Pilson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422; *Eddy v. Capron*, 4 R. I. 394; 67 Am. Dec. 541; *Ferris v. Adams*, 23 Vt. 136; *Salling v. McKinney*, 1 Leigh (Va.) 42; 19 Am. Dec. 722.

Offices are trusts held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45.

An agreement to pay money in consideration of an exchange of offices is void. *Stroud v. Smith*, 4 Houst. (Del.) 448.

8. *Eddy v. Capron*, 4 R. I. 394; 67 Am. Dec. 541; *Outen v. Rhodes*, 3 A. K. Marsh. (Ky.) 432; 13 Am. Dec. 193; *Gray v. Hook*, 4 N. Y. 449; *Ferris v. Adams*, 23 Vt. 136; *Hopkins v. Prescott*, 4 C. B. 578; 56 E. C. L. 578; *Graeme v. Wroughton*, 32 Eng. L. & Eq. 569; and see *Meredith v. Ladd*, 2 N. H. 517; *Com. v. Callaghan*, 2 Va. Cas. 460.

Were the English common law otherwise, such contracts could not be tolerated by the courts of a country whose government is founded theoret-

he has no right to barter it or dispose of it,¹ and an agreement to appoint is likewise void.² So, promises to use personal effort and personal influence among voters to procure or promote the election of any particular person or ticket are void,³ and an agreement by a person to exert his influence against what he believes to be for the public good is void,⁴ though nothing improper or illegal was done or expected to be done under the contract.⁵ Agreements to procure or control appointments to public office⁶ or agreements to aid another in obtaining an appointment based upon a consideration contingent upon success⁷ or promises

ically on the most pure and exalted public virtue. *Filson v. Himes*, 5 Pa. St. 552; 47 Am. Dec. 422.

1. *Hager v. Catlin*, 18 Hun (N. Y.) 448; *Baldwin v. Bridges*, 2 J. J. Marsh. (Ky.) 7; *Becker v. Ten Eyck*, 6 Paige (N. Y.) 68; *Tappan v. Brown*, 9 Wend. (N. Y.) 175; *Gorton v. Waldoborough*, 11 Me. 306; 26 Am. Dec. 530; *Eddy v. Capron*, 4 R. I. 394; 67 Am. Dec. 541; *Meredith v. Ladd*, 2 N. H. 517; *Cartelon v. Whitcher*, 5 N. H. 196; *Salling v. McKinney*, 1 Leigh (Va.) 42; 19 Am. Dec. 722.

It is the duty of the officer having the power of appointment, to make the best appointment in his power and in his judgment at the time he makes the appointment, and it is against public policy that he should be deprived of the exercise of his best judgment by a contract previously made. If he promised the office to one person, and has since discovered that the public will be better served by another, he must be at liberty to make the better appointment. *Hager v. Catlin*, 18 Hun (N. Y.) 448.

2. *Stout v. Ennis*, 28 Kan. 706; *Baldwin v. Bridges*, 2 J. J. Marsh. (Ky.) 7.

A contract made before election, which provides that if plaintiff would support the defendant for nomination and election, the defendant would, if nominated and elected to the office, employ the plaintiff as his deputy during the term of such office, is illegal and void. *Stout v. Ennis*, 28 Kan. 706.

The case of *Thetford v. Hubbard*, 22 Vt. 440, holding that a note given by a constable to the town upon bidding off the office in town meeting, was legal, and could be collected, and other cases of that character (see also *Alvord v. Collins*, 20 Pick. (Mass.) 418; *Howard v. Proctor*, 7 Gray (Mass.) 128) go entirely upon special provisions of the statute on that subject, which in terms authorize towns to contract with some

person to fill the office. *Meacham v. Dow*, 32 Vt. 721.

3. *Gaston v. Drake*, 14 Nev. 175; 33 Am. Rep. 548; *Meredith v. Ladd*, 2 N. H. 517; *Swayze v. Hull*, 8 N. J. L. 54; 14 Am. Dec. 399; *Ferris v. Adams*, 23 Vt. 136; and see *Martin v. White*, 37 Cal. 168; *Robertson v. Robinson*, 65 Ala. 610; 39 Am. Rep. 17.

An agreement between two parties whereby one was to withdraw from candidacy for an office, and run for another office, on condition that the other who was also a candidate for the former office would pay his past and future expenses, is void; and a promise to repay money subsequently expended in pursuance of such contract, is also void. *Robinson v. Kalbfleisch*, 5 Thomp. & C. (N. Y.) 212.

4. *Nichols v. Mudgett*, 32 Vt. 546; *Liness v. Hesing*, 44 Ill. 113; 92 Am. Dec. 153.

In *New York*, it is unlawful to contribute money to promote the election of any particular person or ticket, except for defraying expenses of printing and circulation of votes, hand-bills, and other papers, and for conveying poor, sick, or infirm electors to the poles. *Foley v. Speir*, 100 N. Y. 552.

5. *Nichols v. Mudgett*, 32 Vt. 546; *Gaston v. Drake*, 14 Nev. 175; 33 Am. Rep. 548.

6. *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Faurie v. Morin*, 4 Mart. (La.) 39; 6 Am. Dec. 701; *Filson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422; *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Meguire v. Corwine*, 101 U. S. 108.

7. *Gray v. Hook*, 4 N. Y. 449; *Hunter v. Nolf*, 71 Pa. St. 282; *Meguire v. Corwine*, 101 U. S. 108.

A party has an undoubted right to use his influence to procure the appointment of another to office, but he has no right to urge such an appointment from any other motive than

to use personal influence to procure an appointment to office¹ are likewise contrary to public policy and void, without reference to whether improper means are contemplated or used in procuring the appointment.²

All contracts based upon sales of, or trafficking in offices of any description,³ or in which such sales or traffic furnish the consideration for the mutual stipulations of the parties,⁴ are also void, and such a contract or a contract for the purchase or sale, or for the procurement of an office, not only furnishes no support for an action,⁵ but the courts will not aid in the recovery of

public good. *Haas v. Fenlon*, 8 Kan. 601.

1. *Filson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422.

A contract made between two applicants for appointment to office that one should have a pecuniary compensation for withdrawing his application by which he probably had driven off competition and contributed to reduce the number of applicants, is void. *Gray v. Hook*, 4 N. Y. 449.

2. *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45.

3. *Eddy v. Capron*, 4 R. I. 394; 67 Am. Dec. 541; *Johnson Co. v. Mullikin*, 7 Blackf. (Ind.) 301; *Haas v. Fenlon*, 8 Kan. 601; *Love v. Buckner*, 4 Bibb (Ky.) 506; *Baldwin v. Bridges*, 2 J. J. Marsh. (Ky.) 7; *Hager v. Catlin*, 18 Hun (N. Y.) 448; *Filson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422; *Glover v. Taylor*, 38 La. Ann. 634; *Meacham v. Dow*, 32 Vt. 721; *Ferris v. Adams*, 23 Vt. 136.

A draft drawn in consideration of the resignation of an office is void, although there was no promise to recommend the drawer's appointment, and although the resigning officer had already removed to another State. *Eddy v. Capron*, 4 R. I. 394; 67 Am. Dec. 541.

The addition of a new consideration, where the covenant is founded on an illegal act, does not cure its illegality. *Gray v. Hook*, 4 N. Y. 449. And where the contract is entire if a part of the consideration is illegal, the whole contract is void. *Carleton v. Whetcher*, 5 N. H. 196.

4. *Outen v. Rodes*, 3 A. K. Marsh. (Ky.) 432; 13 Am. Dec. 193; *Stout v. Ennis*, 28 Kan. 706; *Faurie v. Morin*, 4 Martin (La.) 39; 6 Am. Dec. 702; *Carlton v. Whitcher*, 5 N. H. 190; *Swayze v. Hull*, 8 N. J. L. 54; 14 Am. Dec. 398.

Every new contract seeking to carry

out or enforce any of the unexecuted provisions of a former illegal contract is void. *Gray v. Hook*, 4 N. Y. 449. And even if there be an express contract on entirely different terms than those agreed upon before, it ought to be viewed with a considerable degree of suspicion as an attempt to evade a sound and salutary rule of public policy. *Hunter v. Nolf*, 71 Pa. St. 282.

A promise to pay for services rendered by another as a canvasser at a primary election, to secure the nomination of the promisor to an office, is unlawful and void. *Keating v. Hyde*, 23 Mo. App. 555.

The distinction between a void and valid new contract, in relation to the subject-matter of a former illegal one, depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract, or whether it is based upon a moral obligation, growing out of the execution of an agreement, which could not be enforced by law, and upon the performance of which the law will raise no implied promise. *Gray v. Hook*, 4 N. Y. 449. And *Stout v. Ennis*, 28 Kan. 706.

If a price be put on the illegal part of the consideration, it might be deducted, and the contract apportioned. *Filson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422. And see *Casady v. Woodbury Co.*, 13 Iowa 113.

5. *Faurie v. Morin*, 4 Mart. (La.) 39; 6 Am. Dec. 701; *Martin v. Wade*, 37 Cal. 168; *Haas v. Fenlon*, 8 Kan. 601; *Gaston v. Drake*, 14 Nev. 175; 33 Am. Rep. 548; *Ferris v. Adams*, 23 Vt. 136.

Courts refuse to assist either party to such contracts, and they refuse to hear such cases in the interest of the public, not for the sake of plaintiff or defendant. *Gaston v. Drake*, 14 Nev. 175; 33 Am. Rep. 548.

Representations that a person would be nominated to a position of public

money paid, or for services rendered in pursuance of such a contract.¹

No public policy forbids the purchase of services to be devoted only to advertizing the fact that one is or desires to be a candidate however,² and an officer may make a deputation reserving a portion of the salary or fees to himself and give the balance to his deputy for services,³ or he may give to his deputy all the fees pertaining to the services he may render as such.⁴

2. Contracts for Influencing Official Action.⁵

3. Contracts Respecting Compensation of Officers.⁶

X. POWER AND AUTHORITY OF PUBLIC OFFICERS—1. Its Source and Nature.—All political and governmental power is inherent in the people, and the people are recognized as the fountain of all

trust, as an inducement to a party to make a contract, cannot be given in evidence, however false such representations may have been, or however much the party may have been injured by relying upon them. *Haas v. Fenlon*, 8 Kan. 601.

1. *Groton v. Waldoborough*, 11 Me. 306; 26 Am. Dec. 530; *Martin v. Wade*, 37 Cal. 168; *Liness v. Hesing*, 44 Ill. 113; 92 Am. Dec. 153.

The law will not hear the parties, neither will it entertain causes of action embracing negotiations leading to such a contract, as representations falsely made to bring it about. The law leaves the parties to such a transaction where it found them, and will not attempt to adjust the rights between them. If one party has suffered by the bad faith of another in such a case, he has no redress in the courts. *Haas v. Fenlon*, 8 Kan. 601.

There can be no rescission of a contract which is against public policy. Such a contract is void at its inception, and there is nothing to rescind. *Martin v. Wade*, 37 Cal. 168.

2. *Keating v. Hyde*, 23 Mo. App. 555; *Murphy v. English*, 64 How. Pr. (N. Y.) 362. And see *Foley v. Speir*, 100 N. Y. 552.

The employment of any proper agency calculated to bring the fact of a person's candidacy more prominently before the public eye, is legitimate. The information thus disseminated is essential to the intelligent determination of the voter's choice. But it becomes a very different thing when money is paid or promised from friends to control a voter's free agency in selecting the object of his suffrage. *Keating v. Hyde*, 23 Mo. App. 555.

It is not an offense for a candidate

for a national office, who cannot personally present his individual views and national policy over a wide area of constituency, to employ and compensate a person for that purpose. *Murphy v. English*, 64 How. Pr. (N. Y.) 362.

3. *Gaston v. Drake*, 14 Nev. 175; 33 Am. Rep. 548; *Mott v. Robbins*, 1 Hill (N. Y.) 21; 37 Am. Dec. 286; *Becker v. Ten Eyck*, 6 Paige (N. Y.) 68; *Ferris v. Adams*, 23 Vt. 136.

The courts will discountenance contracts made before election in which one party promises to divide the profits of his office with another in consideration of help in the performance of the duties of the office, on account of their tendency to induce the exertion of improper influence upon the election of public officers. *Gaston v. Drake*, 14 Nev. 175; 33 Am. Rep. 548.

4. *Gaston v. Drake*, 14 Nev. 175; 33 Am. Rep. 548; *Pioneer Printing Co. v. Sanborn*, 3 Minn. 418.

If a deputy be appointed to an office, consisting of uncertain profits, paying any sum whatever out of such profits, the deputation and contract for the payment are good, because the deputy is to be paid out of profits only, and cannot be charged for more than he receives. But if an office consisting of uncertain fees be granted to a deputy, together with all its fees, reserving a certain sum to be paid, at all events, it is a sale of the office and grant of a deputation; and is void. *Becker v. Ten Eyck*, 6 Paige (N. Y.) 68; *Salling v. McKinney*, 1 Leigh (Va.) 42; 19 Am. Dec. 722; *Noel v. Fisher*, 3 Call (Va.) 215.

5. *ILLEGAL CONTRACTS*, vol. 9, p. 879.

6. *ILLEGAL CONTRACTS*, vol. 9, p. 879.

law and authority.¹ The several departments of government are but the depositories of delegated powers more or less limited,² all the power which the people have delegated being what has passed from them by their constitutions.³ The government of the United States can exercise only such powers as are expressly granted to it and such as are necessarily implied from those granted.⁴ The powers not delegated by the constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.⁵ The constitutions of the several

1. *State v. Noble*, 118 Ind. 350; *State v. Hyde*, 121 Ind. 20; *State v. Denny*, 118 Ind. 382; *Evansville v. State*, 118 Ind. 426; *Hovey v. State*, 119 Ind. 395; *State v. Denny*, 118 Ind. 449; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Mayor, etc., of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572; *Campbell's Case*, 2 Bland (Md.) 209; 20 Am. Dec. 360; *Attorney-Gen'l. v. Detroit*, 58 Mich. 213; 55 Am. Rep. 675; *Jones v. Perry*, 10 Yerg. (Tenn.) 59; 30 Am. Dec. 430; *Merrill v. Sherburne*, 1 N. H. 199; 8 Am. Dec. 52; *Dash v. Van Kluck*, 7 Johns. (N. Y.) 477; 5 Am. Dec. 291; *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77; *Enslin v. Bowman*, 6 Binn. (Pa.) 471; *Satterlee v. Mathewson*, 2 Pet. (U. S.) 380; *Van Horn v. Dorrance*, 2 Dall. (U. S.) 311; *Calder v. Bull*, 3 Dall. (U. S.) 386.

The expression that all power is inherent in the people, is nothing more than the expression of a principle that is older than the constitution, which exists by its own innate vitality and vigor. *State v. Denny*, 118 Ind. 382.

The will of the people must be greater than that of their agents, or there can be no constitutional liberty or independence. *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346.

2. *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *State v. Hyde*, 121 Ind. 20; *Campbell's Case*, 2 Bland (Md.) 209; 20 Am. Dec. 360; *Attorney Genl. v. Detroit*, 58 Mich. 213; 55 Am. Rep. 675; *Hoke v. Henderson*, 4 Dev. (N. Car.) 1; 25 Am. Dec. 677.

No constitutional declaration is needed to invest the people with power, but it does require one to take it from them in whole or in part. *State v. Denny*, 118 Ind. 382.

Sovereignty resides in the people, and having delegated to the legislature, to the judiciary, and to the executive the exercise of that portion of

it as co-ordinate departments, which they have considered most fitting to be exercised by each, they retain to themselves the exclusive paramount sovereignty. *Rice v. Parkman*, 16 Mass. 326; *Jones v. Perry*, 10 Yerg. (Tenn.) 59; 30 Am. Dec. 430.

3. *Evansville v. State*, 118 Ind. 426; *State v. Hyde*, 121 Ind. 20; *State v. Denny*, 118 Ind. 449; *Augusta v. Sweeney*, 44 Ga. 463; 9 Am. Rep. 172; *Taylor v. Porter*, 4 Hill (N. Y.) 140; 40 Am. Dec. 274; *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77; *Houston, etc., R. Co. v. Randolph*, 24 Tex. 317.

The constitution is above all the departments of the government, for it creates and preserves them. *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346.

When the authority delegated is exceeded, the act done is null and void. *Houston, etc., R. Co. v. Randolph*, 24 Tex. 317.

Each and all the departments of government are subordinate to the constitution which creates and defines their limits; whatever it commands, is the supreme and uncontrollable law of the land. *Thomas v. Owens*, 4 Md. 189.

4. *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185; *Martin v. Hunter*, 1 Wheat. (U. S.) 304; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316; *Golden v. Prince*, 3 Wash. (U. S.) 313.

All the departments of the government have the right of judging of the constitution, and interpreting it for themselves; but they judge under the responsibilities imposed in that instrument, and are answerable in the manner pointed out by it. *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346.

5. U. S. Const., 10th Amdt.; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185; *Cincinnati, etc., R. Co. v.*

States, however, are not grants of powers to the States, but an imposition of restrictions upon, and an apportionment of powers which the States inherently possess;¹ the people who created State governments having thereby placed such checks, conditions and limitations upon the legislative, executive, or judicial power thus delegated as they deemed proper or expedient.² The restraints of a constitution upon the several departments among which the various powers of government are distributed cannot be lessened or diminished by inference and implication,³ and the delegation of authority to the several departments of government must be deemed to have been made subject to and in contemplation of the fundamental principles of our general framework

Clinton Co., 1 Ohio St. 77; David v. Portland Water Committee, 14 Oregon 98; Golden v. Prince, 3 Wash. (U. S.) 313.

The legislature can exercise all powers not forbidden by the constitution of the State or delegated to the general government, or prohibited by the Constitution of the United States. *McMillen v. Boyles*, 6 Iowa 304. The legislative department represents the independent sovereignty of the people of the State, and is supreme and unlimited in all legitimate subject-matters of legislation, and is controlled only by such restrictions as are imposed by the organic law of the State. *Beals v. Amador Co.*, 35 Cal. 624.

1. *Cooley Const. Lim.* (6th ed.) 11; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185; *Beauchamp v. State*, 6 Blackf. (Ind.) 299; *Doe v. Douglass*, 8 Blackf. (Ind.) 10; 44 Am. Dec. 732; *David v. Portland Water Committee*, 14 Oregon 98; *Hope v. Henderson*, 4 Dev. (N. Car.) 1; 25 Am. Dec. 677; *Thompson v. Floyd*, 2 Jones (N. Car.) 313; *Lyon v. Aiken*, 78 N. Car. 258; *Golden v. Prince*, 3 Wash. (U. S.) 313; *Day Co. v. State*, 68 Tex. 526.

A prohibition contained in a State constitution against the exercise by the legislature of a specific power in a particular instance, is a recognition of the existence of the power, except as its exercise is thus expressly restrained. *Day Land, etc., Co. v. State*, 68 Tex. 526.

2. *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185; *Doe v. Douglass*, 8 Blackf. (Ind.) 10; 44 Am. Dec. 732; *Campbell's Case*, 2 Bland (Md.) 209; 20 Am. Dec. 360; *Golden v. Prince*, 3 Wash. (U. S.) 313.

As all governmental power originally rested with the people, it must necessarily still be lodged with them, except so far as they have delegated it in their constitutions. *Evansville v. State*, 118 Ind. 426.

Under a general grant of legislative power, however, a State legislature is subject to no restrictions in the enactment of laws except those imposed by the constitution of the State, the Constitution of the United States, and the laws and treaties made in pursuance thereof. *Hovey v. State*, 119 Ind. 395; *People v. Keeler*, 99 N. Y. 463; *Bank of Chenango v. Brown*, 26 N. Y. 469; *People v. Daton*, 55 N. Y. 380; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185.

The inquiry is not whether the power to enact a law is to be found in the State constitution, but whether such legislation is prohibited or restrained by that instrument, or by the Constitution of the United States. *People v. Keeler*, 99 N. Y. 463.

The legislature acting within the sphere of its powers in the making of laws, judges, and judges finally, upon all questions of policy and equity. *Sheley v. Detroit*, 45 Mich. 431.

In *Wright v. Wright*, 2 Md. 429; 56 Am. Dec. 723, it was held that granting a divorce is within the regular exercise of legislative power, and that it is not within the jurisdiction of the judiciary to pronounce the act null and void. And see *Crane v. Meginnis*, 1 Gill & J. (Md.) 403; 19 Am. Dec. 237.

3. *People v. Albertson*, 55 N. Y. 50.

Constitutions are to receive a strict construction. *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185. And see *Hoke v. Henderson*, 4 Dev. (N. Car.) 1; 25 Am. Dec. 676; *State v. Moss*, 2 Jones (N. Car.) 66; *Galloway v. Jenkins*, 63 N. Car. 147.

of government,¹ a constitution being required to be interpreted according to its spirit and the intent of its framers as indicated by its terms.²

The organic law of every State of the Union as well as of the United States distributes all governmental powers into three departments: the legislative, the executive, including the administrative, and the judicial.³ In the legislative department the sovereign body is represented by the general assembly, in the executive department it is represented by the executive and administrative officers, and in the judicial department it is represented by the courts,⁴ and the legislature makes the laws, the judiciary expounds them, and the executive sees that they

Different Departments.—There can be no difference in the powers of the same character of officers whether performing their duties under the general or the State governments. *Hawley v. Butler*, 54 Barb. (N. Y.) 490.

1. *People v. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 103; *People v. Detroit*, 28 Mich. 227; 15 Am. Rep. 202; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *State v. Denny*, 118 Ind. 382; *State v. Denny*, 118 Ind. 449. *Campbell's Case*, 2 Bland Ch. (Md.) 209; 20 Am. Dec. 360; *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77.

The legislative, executive, and judicial departments are all responsible for an abuse or usurpation of power in the mode pointed out by the constitution. *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346.

2. *People v. Albertson*, 55 N. Y. 50; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Lewis v. Webb*, 3 Me. 326; *People v. Blodgett*, 13 Mich. 138.

We should read a constitution with a view to finding out the facts intended to be expressed. *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Twitchell v. Blodget*, 30 Mich. 138.

A thing within the intent of a constitution or statutory enactment, is for all purposes to be regarded as within its words and terms. *People v. Albertson*, 55 N. Y. 50.

3. *Hovey v. State*, 119 Ind. 395; *State v. Noble*, 118 Ind. 350; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185; *State v. Hyde*, 121 Ind. 20; *Waldo v. Wallace*, 12 Ind. 569; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346; *Lewis v. Webb*, 3 Me. 326; *Mayor, etc., of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572; *Denny v. Mattoon*, 2 Allen (Mass.) 361; 79 Am. Dec. 784;

Campbell v. Mississippi Union Bank, 6 How. (Miss.) 625; *Turner v. Althaus*, 6 Neb. 54; *People v. Keeler*, 99 N. Y. 463; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477; 5 Am. Dec. 291; *Lane v. Dorman*, 4 Ill. 238; 36 Am. Dec. 543; *In re Dennett*, 32 Me. 508; *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77; *Mauran v. Smith*, 8 R. 1. 192; 5 Am. Rep. 564; *Kilbourn v. Thompson*, 103 U. S. 168.

This division of power prevents the concentration of power in the hands of one person, or one class of persons. *State v. Hyde*, 121 Ind. 20.

In *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346, the court by Lacy, J., said: "The concentration of all power legislative, executive, and judicial, in the same hands, constitutes the very definition of tyranny that is given by all the early friends and founders of our free institutions."

4. *State v. Noble*, 118 Ind. 350; *State v. Hyde*, 121 Ind. 20; *Hovey v. State*, 119 Ind. 395; *People v. Keeler*, 99 N. Y. 463.

Each of the three departments has all there is of the element assigned it, but it has nothing more. Each department has it is true, incidental rights of a nature intrinsically different from the body of the power distributed to it, but these incidental rights are such only as are necessary to enable it to perform its function as an independent branch of the government, and are, in fact, part of the principal power itself. *State v. Noble*, 118 Ind. 350. And see *People v. Keeler*, 99 N. Y. 464.

The power of obtaining information for the purpose of framing laws to meet supposed or apprehended evils, is one which has from time immemorial been deemed necessary and has been exercised by legislative bodies, though

are faithfully executed.¹ These departments of government are equal, co-ordinate and independent,² and exclusive in respect to the duties assigned to each,³ and within the particular limits assigned to each they are supreme and uncontrollable,⁴ any

judicial action is required in obtaining such information. *People v. Keeler*, 99 N. Y. 463.

1. Mayor, etc., of Baltimore *v. State*, 15 Md. 376; 74 Am. Dec. 572; *Hawkins v. Governor*, 1 Ark. 570; *State v. Hyde*, 121 Ind. 20; *Hovey v. State*, 119 Ind. 395; *People v. Keeler*, 99 N. Y. 463; *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77.

In *Slack v. Jacob*, 8 W. Va. 661, the court by Haymond, P., said: "It is essentially necessary and proper that each department of the government shall be careful in its actions to keep within its legal and constitutional sphere, and not attempt to exercise powers and duties, which, under the constitutional apportionment of power, belongs to the other, or improperly interfere with the exercise of the rights as well as duties of the others.

2. Lafayette, etc., *R. Co. v. Geiger*, 34 Ind. 185; *State v. Denny*, 118 Ind. 382; *State v. Noble*, 118 Ind. 350; *Wright v. Defrees*, 8 Ind. 298; *Hovey v. State*, 119 Ind. 395; *Smith v. Myers*, 109 Ind. 1; 58 Am. Rep. 375; *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346; *Lewis v. Webb*, 3 Me. 326; *Thomas v. Owens*, 4 Md. 189.

In *Lewis v. Webb*, 3 Me. 326, the court by Mellen, C. J., said: "It seems at the present day to be an established principle in our country, as well as in many other parts of the world, that the three great powers of government—the legislative, the executive, and the judicial—should be preserved as distinct from, and independent of each other, as the nature of society, human imperfections, and peculiar circumstances will admit. And the more this independence of each department within its constitutional limits can be preserved, the nearer the system will approach the perfection of civil government and the security of civil liberty.

The line which separates judicial from legislative authority is clear and distinct, and the principle is so well settled and understood that it is seldom called in question, and probably not often violated, except through inadvertence. *Butler v. Saginaw Co.*, 26 Mich. 22; but there is no such thing

as drawing between legislative and executive power such a clear line of distinction as separates legislative from judicial. *People v. Hurlbut*, 24 Mich. 93; 9 Am. Rep. 103.

3. *Wright v. Defrees*, 8 Ind. 298; *State v. Noble*, 118 Ind. 350; *State v. Hyde*, 121 Ind. 20; *Smith v. Myers*, 109 Ind. 1; 58 Am. Rep. 375; *Ex parte Griffiths*, 118 Ind. 83; *Butler v. State*, 97 Ind. 373; *Haley v. Clark*, 26 Ala. 439; *Secombe v. Kittelson*, 29 Minn. 555; *Attorney-Gen'l. v. Brown*, 1 Wis. 513.

It has become an established rule of constitutional law that where general power has been confided to and vested in one department of government, persons intrusted with power in another department will not be permitted to encroach upon the power of, nor exercise functions which pertain and are appropriate to the other department, unless the authority to do so is conferred in express terms, or unless the exercise of the power becomes necessary and appropriate, in order to discharge other constitutional duties and functions expressly permitted to it. *Hovey v. State*, 119 Ind. 395, citing *Kilbourn v. Thompson*, 103 U. S. 168; *People v. Keeler*, 99 N. Y. 463.

In *Maryland* it is held that the Declaration of Rights and the constitution are not to be interpreted as enjoining a complete separation between the several departments. Mayor, etc., of Baltimore *v. State*, 15 Md. 376; 74 Am. Dec. 572. The court, by Tuck, J., saying: "Practically it has never been so in any of the States, in whose fundamental law the principle has been asserted."

4. *Wright v. Wright*, 2 Md. 429; 56 Am. Dec. 723; *State v. Hyde*, 121 Ind. 20; *Smith v. Myers*, 109 Ind. 1; 58 Am. Rep. 375; *Ex parte Griffiths*, 118 Ind. 83; *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346; *Dickey v. Reed*, 78 Ill. 261; *Lane v. Dorman*, 4 Ill. 238; 36 Am. Dec. 543; *In re Dennett*, 32 Me. 508; *Sheley v. Detroit*, 45 Mich. 431; *People v. Keeler*, 99 N. Y. 463; *Western R. Co. v. De Graff*, 27 Minn. 1; *Campbell v. Mississippi Union Bank*, 6 How. (Miss.) 625; *State v.*

assumption of one department of the powers conferred upon another being destitute of authority.¹ But while neither department of government can be made amenable to any other for its action or judgment in discharging the duties imposed upon it, whatever their source or nature,² offices of legislative creation, where legislative authority is not limited or restricted by constitutional provisions, are subject to the will of the legislature with reference to both their tenure and jurisdiction as well as their existence.³

Buchanan, 24 W. Va. 362. And see Mayor, etc., of Baltimore v. State, 15 Md. 376; 74 Am. Dec. 572; Day Land, etc., Co. v. State, 68 Tex. 526.

The departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected, otherwise the government fails. State v. Buchanan, 24 W. Va. 362.

The legislature has no power to interfere with the jurisdiction of the courts in such a manner as to change the decision of cases pending before them, or to impair or set aside their judgments, or take cases out of the settled course of judicial proceedings. Denny v. Mattoon, 2 Allen (Mass.) 361; 79 Am. Dec. 784; Columbus, etc., R. Co. v. Grant Co., 65 Ind. 427.

The legislature itself cannot vest the judicial department of the government with authority to assume jurisdiction over the legislative or executive departments. Smith v. Myers, 109 Ind. 1; 58 Am. Rep. 395; citing Sterling v. Drake, 29 Ohio St. 457; 23 Am. Rep. 762; State v. Nichols, 26 Ark. 74; 7 Am. Rep. 600; State v. Sloss, 25 Mo. 291; 69 Am. Dec. 467; Attorney Genl. v. Brown, 1 Wis. 513; Haley v. Clark, 26 Ala. 439.

No one of the departments is supreme, however, in the strict sense of the word, for the supreme power is in the people. State v. Noble, 118 Ind. 350.

1. Jones v. Perry, 10 Yerg. (Tenn.) 59; 30 Am. Dec. 430; Hawkins v. Governor, 1 Ark. 570; 33 Am. Dec. 346; Smith v. Myers, 109 Ind. 1; 58 Am. Rep. 375; Denny v. Mattoon, 2 Allen (Mass.) 361; 79 Am. Dec. 784; Merrill v. Sherburne, 1 N. H. 199; 8 Am. Dec. 52; Campbell v. Mississippi Union Bank, 6 How. (Miss.) 625; Kilbourn v. Thompson, 103 U. S. 168; State v. Sloss, 25 Mo. 291; 69 Am. Dec. 467; Taylor v. Porter, 4 Hill (N. Y.)

140; 40 Am. Dec. 274; Day Land, etc., Co. v. State, 68 Tex. 526; Columbus, etc., R. Co. v. Grant Co., 65 Ind. 427.

For one department to assume powers or exercise a jurisdiction properly belonging to any other department, is a gross and palpable violation of its own constitutional duty. Hawkins v. Governor, 1 Ark. 570; 33 Am. Dec. 346.

In Butler v. State, 97 Ind. 373, it was held that the courts could not suspend a sentence, because the power to grant pardons and respites was vested in the executive.

2. Western R. Co. v. DeGraff, 27 Minn. 1; and see Houston, etc., R. Co. v. Randolph, 24 Tex. 317; In re Dennitt, 32 Me. 508; Chamberlain v. Sibley, 4 Minn. 309; Pacific R. Co. v. Governor, 23 Mo. 353; 66 Am. Dec. 673. But see State v. Chase, 5 Ohio St. 538; Cotten v. Ellis, 7 Jones (N. Car.) 545.

The court has no power to award a mandamus, either to compel the execution of any duty enjoined on the executive by the constitution, or to direct the manner of its performance. State v. Governor, 25 N. J. L. 331; Hawkins v. Governor, 1 Ark. 570; 33 Am. Dec. 346; Mauran v. Smith, 8 R. I. 102; 5 Am. Rep. 564; Low v. Towns, 8 Ga. 360; People v. Bissell, 19 Ill. 229; 68 Am. Dec. 591; State v. Governor, 25 N. J. L. 331.

The legislature ascertains in its own way the facts on which it bases its action. It is the sole judge whether facts exist to authorize the immediate discharge of a duty, and whatever facts or reasons it may give for such action must be held sufficient. Day Land, etc., Co. v. State, 68 Tex. 526.

3. Prince v. Skillin, 71 Me. 361; 36 Am. Rep. 325; Farwell v. Rockland, 62 Me. 298; Augusta v. Sweeney, 44 Ga. 463; 9 Am. Rep. 172; Bryan v.

Offices provided for or named in the constitution, however, are there regarded as having a known legal character, and though their duties may sometimes be varied by legislation, they cannot be so changed as to destroy the powers of the office, or as to essentially alter it.¹

Under constitutional provisions declaring that judicial powers shall be vested in certain courts, only judicial officers can exercise judicial functions.² The legislature cannot exercise judicial powers.³ Nor can these powers be vested elsewhere than in the

Cattell, 15 Iowa 538; Taft v. Adams, 3 Gray (Mass.) 126; Connor v. Mayor, etc., of N. Y., 5 N. Y. 285; People v. Morrell, 21 Wend. (N. Y.) 563; Com. v. Bacon, 6 S. & R. (Pa.) 322; Com. v. Mann, 5 W. & S. (Pa.) 403; Barker v. Plattsburgh, 4 Pa. St. 49; Territory v. Pyle, 1 Oregon 149; Alexander v. McKenzie, 2 S. Car. 81; State v. Douglass, 26 Wis. 428; 7 Am. Rep. 87; State v. Von Baumbach, 12 Wis. 310; Robinson v. White, 26 Ark. 139; Butler v. Pennsylvania, 10 How. (U. S.) 414.

An appointment under a statute fixing the compensation, is not a contract; and a subsequent statute, reducing the compensation, and providing for the election of new officers by the people who should enter upon their duties before the time fixed by the first statute as the term of office is not unconstitutional, as impairing the obligation of a contract. Butler v. Pennsylvania, 10 How. (U. S.) 402.

The recognition in the constitution of the established division of the State into counties, cities, and towns, does not take from the legislature the power of establishing additional civil divisions for general and permanent objects of government, not inconsistent with the usefulness of existing divisions for the purposes contemplated by the constitution. People v. Draper, 15 N. Y. 532.

1. Allor v. Wayne Co., 43 Mich. 76; Underwood v. McDuffee, 15 Mich. 361; 93 Am. Dec. 194; Chandler v. Nash, 5 Mich. 409; *In re* Head Notes, 43 Mich. 641; State v. Morrill, 16 Ark. 384; People v. Dubois, 23 Ill. 498; Shoultz v. McPheeters, 79 Ind. 373; Little v. State, 90 Ind. 338; 46 Am. Rep. 224; *Ex parte* Griffiths, 118 Ind. 83; Warner v. People, 2 Den. (N. Y.) 272; 43 Am. Dec. 740; King v. Hunter, 65 N. Car. 603; 6 Am. Rep. 754; Com. v. Gamble, 62 Pa. St. 343; 1 Am. Rep. 422; State v. Douglass, 26 Wis. 428; 7

Am. Rep. 87; State v. Messmore, 14 Wis. 163.

The powers, authority and jurisdiction of a constitutional office are inseparable from it. The legislature may diminish the aggregate amount of duties of a judge by the division of his district or otherwise, but must leave the authority or jurisdiction pertaining to the office intact. Com. v. Gamble, 62 Pa. St. 343; 1 Am. Rep. 422.

In *Tennessee*, the provision of the constitution, directing that the different counties shall be laid off in districts and providing for the election of justices of the peace and constables for the different districts, is mandatory, and is to be construed that there shall be at least as many officers as the constitution directs, but does not limit the power of the legislature to increase the number. Britton v. Moody, 2 Coldw. (Tenn.) 15.

2. Gregory v. State, 94 Ind. 384; 48 Am. Rep. 162; Little v. State, 90 Ind. 338; 46 Am. Rep. 224; Shoultz v. McPheeters, 79 Ind. 373; Wright v. Defrees, 8 Ind. 208; Waldo v. Wallace, 12 Ind. 569; Columbus, etc., R. Co. v. Grant Co., 65 Ind. 427; Solomon v. People, 15 Ill. 291; Allor v. Wayne Co., 43 Mich. 76; Chandler v. Nash, 5 Mich. 411; Attorney-Gen'l v. McDonald, 3 Wis. 805; State v. Burton, 11 Wis. 50; Conroe v. Bull, 7 Wis. 408; Gough v. Dorsey, 27 Wis. 119.

There are inherent powers resident in all courts of superior jurisdiction. These powers spring not from legislation, but from the nature and constitution of the tribunals themselves. Little v. State, 90 Ind. 338; 46 Am. Rep. 224; *citing* U. S. v. Hudson, 7 Cranch (U. S.) 32; Sanders v. State, 85 Ind. 318; 44 Am. Rep. 29; Cavanaugh v. Smith, 84 Ind. 380; Nealis v. Dicks, 72 Ind. 374.

3. Shoultz v. McPheeters, 79 Ind. 373; Columbus, etc., R. Co. v. Grant Co., 65 Ind. 427; Young v. State Bank,

tribunals designated or indicated by the constitution,¹ or exercised by officers chosen in a manner different from that prescribed by the constitution,² and powers vested in courts as such do not belong to and cannot be exercised by judges as judges out of court.³

2. How Exercised.—Under a grant of general discretionary power, without qualification, the exercise of the officer's discretion is limited to the evident purposes of the grant, and to what is known as sound and legal discretion, excluding all arbitrary,

4 Ind. 301; 58 Am. Dec. 630; *Doe v. Douglass*, 8 Blackf. (Ind.) 10; 44 Am. Dec. 732; *Dupy v. Wickwire*, 1 D. Chip. (Vt.) 237; 6 Am. Dec. 729; *Hoke v. Henderson*, 4 Dev. (N. Car.) 1; 25 Am. Dec. 677; *Ervine's Appeal*, 16 Pa. St. 256; 55 Am. Rep. 499; *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567; *DeChastellux v. Fairchild*, 15 Pa. St. 18; 53 Am. Dec. 570; *Lane v. Dorman*, 36 Am. Dec. 543; *Merrill v. Sherburne*, 1 N. H. 199; 8 Am. Dec. 52; *Ashuelot R. Co. v. Elliot*, 52 N. H. 387; *Jones v. Perry*, 10 Yerg. (Tenn.) 59; 30 Am. Dec. 430; *Crane v. McGinnis*, 1 Gill & J. (Md.) 463; 19 Am. Dec. 729; *Richards v. Rote*, 68 Pa. St. 255; *Watkins v. Holman*, 16 Pet. (U. S.) 25; *Planters' Bank v. Sharp*, 6 How. (U. S.) 325.

The general assembly, like other departments of government, exercises only delegated authority, and it cannot be doubted that any act passed by it, not falling fairly within the scope of legislative power, is as clearly void as though expressly prohibited. *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77.

1. *Shoultz v. McPheeters*, 79 Ind. 373; *Pennington v. Streight*, 54 Ind. 376; *State v. Jones*, 19 Ind. 356; 81 Am. Dec. 403; *Gulick v. New*, 14 Ind. 93; 77 Am. Dec. 49; *Hall v. Marks*, 34 Ill. 358; *People v. Maynard*, 14 Ill. 419; *Abbott v. Mathews*, 26 Mich. 176; *Chandler v. Nash*, 5 Mich. 409; *Gibson v. Emerson*, 7 Ark. 172; *Woodruff v. Griffith*, 5 Ark. 354; *Beesman v. Peoria*, 16 Ill. 484; *Weeks v. Torman*, 16 N. J. L. 237; *Attorney-Gen'l v. McDonald*, 3 Wis. 805; *Conroe v. Bull*, 7 Wis. 408; *Gough v. Dorsey*, 27 Wis. 119.

The judiciary is a co-ordinate department of the government, and not a mere subordinate branch, depending for existence and power upon the legislative will. Purely judicial powers inherent in courts, as of the essence of

their existence, are not the creatures of legislation, and these powers are inalienable and indestructible. *Little v. State*, 90 Ind. 338; 46 Am. Rep. 224.

Under a constitution vesting all jurisdiction in courts and justices of the peace, a statute authorizing actions in which the judge was interested or prejudiced to be tried by consent of the parties before a counselor of the court, is unconstitutional and absolutely void. *Van Slyke v. Trempealeau, etc., Ins. Co.*, 39 Wis. 390; 20 Am. Rep. 50.

Constitutional provisions requiring all judicial powers to be vested in courts, do not apply to those special tribunals, which the law occasionally calls into existence for particular exigencies, and which cease to exist when the occasion ceases. The exercise of this power and by such tribunals is exceptional and has been recognized and held valid only because it was under statutes in force before the constitution was adopted, and which, it is believed, was not intended to be abrogated by it; or because such proceedings are preliminary and collateral to the principal proceedings which are had in a duly authorized court. *Risser v. Hoyt*, 53 Mich. 185.

2. *Chandler v. Nash*, 5 Mich. 409; *Allor v. Wayne Co.*, 43 Mich. 76; *People v. Maynard*, 14 Ill. 419; *State v. Judge*, 9 La. Ann. 62.

3. *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456; *Risser v. Hoyt*, 53 Mich. 185; *Bowman v. Venice, etc., R. Co.*, 102 Ill. 459; *Field v. People*, 3 Ill. 181; *Waldo v. Wallace*, 12 Ind. 569; *State v. Noble*, 118 Ind. 350.

In *Kentucky*, laws permitting the courts to redress, in a summary way, without the intervention of a jury, injuries resulting from the negligence, misfeasance, or malfeasance of their officers are not unconstitutional. *Harrison v. Chiles*, 3 Litt. (Ky.) 194.

capricious, inquisitorial, and oppressive proceedings.¹ In the exercise of ministerial powers, the officer can do no act but what he is either expressly or by necessary implication authorized to do.² And he has no authority to pause in the execution of his duty, on the suggestion of errors or mistakes in the proceedings, or illegality or unconstitutionality of the authority under which he acts. If the facts upon which he is to act are properly certified to him, he has no discretion but must proceed,³ and a special

1. *U. S. v. Doherty*, 27 Fed. Rep. 731; *State v. Woody*, 17 Ga. 612; *Rose v. Stuyvesant*, 8 Johns. (N. Y.) 426; *In re Holbrook*, 99 N. Y. 539; *Third Great Western Turnpike R. Co. v. Loomis*, 32 N. Y. 126; *U. S. v. Kirby*, 7 Wall. (U. S.) 486; *Rex v. Peters*, 1 Burr. 568; and see *U. S. v. Thurber*, 28 Fed. Rep. 56.

When palpable injustice has been done in a court of inferior jurisdiction in the exercise of a discretionary power, in opposition to settled principles of law and equity, their proceedings may be corrected by *certiorari*. *Brooklyn v. Patchen*, 8 Wend. (N. Y.) 47.

The county court in *North Carolina* is not authorized to bind the county for a loan obtained for the purpose of discharging an illegal indebtedness, in this case for money borrowed in aid of the Rebellion. *Davis v. Comrs. of Stokes*, 74 N. Car. 374.

Where the legislature points out, specifically how an act is to be done, although without it the court or officer under their general powers, would have been able to perform the act, yet, if the legislature imposes special limitations, they must be strictly pursued. Although performed by a discretionary officer, the statute renders the doing of the act ministerial in him performing it, in which no discretion can be indulged. *Hudson v. Jefferson Co. Court*, 28 Ark. 359.

2. *Vose v. Deane*, 7 Mass. 280; *U. S. v. Thurber*, 28 Fed. Rep. 56; *Day Land, etc., Co. v. State*, 68 Tex. 526; *Mitchell v. Rockland*, 41 Me. 363; 66 Am. Dec. 252; *Atkinson v. Minot*, 75 Me. 189; *Parsons v. Monmouth*, 70 Me. 262; *Wilkins v. Benning*, 51 Ga. 9; *Tippacanoe Co. v. Cox*, 6 Ind. 403; *McCaslin v. State*, 99 Ind. 428; *Casady v. Woodbury Co.*, 13 Iowa 113; *Mayor, etc., of Baltimore v. Reynolds*, 20 Md. 1; 83 Am. Dec. 535; *State v. Bank of Missouri*, 45 Mo. 541; *Hite v. Goodman*, 1 Dev. & B. Eq. (N. Car.) 364; and see *Dunwoody v. U. S.*, 22 Ct. of Cl. 269; *Semmes v. Mayor, etc., of Co-*

lumbus, 19 Ga. 471; *State v. Martin*, 27 Neb. 441; *State v. Merry*, 34 Ohio St. 137; *State v. Collins*, 12 R. I. 478; *Paetz v. Dain*, 1 Wilson (Ind.) 149; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Yancey v. Hopkins*, 1 Munf. (Va.) 419; *The Floyd Acceptances*, 7 Wall. (U. S.) 666.

Where the power in trustees of a congressional township to make promissory notes is not expressed in the statute, it cannot in so limited a corporation be implied. *Congressional Tp. No. 11 v. Weir*, 9 Ind. 224.

It is sufficient if there is a law which confers authority to do an official act, and it is wholly unimportant whether the officer intended to act under such law or not. *Davis v. Brace*, 82 Ill. 542.

3. *Waldron v. Lee*, 5 Pick. (Mass.) 323; *Smyth v. Titcomb*, 31 Me. 272; *Attorney Genl. v. Iron Co.*, 64 Mich. 607; *People v. Collins*, 7 Johns. (N. Y.) 549; *Halstead v. Mayor, etc., of N. Y.*, 3 N. Y. 430; *State v. Buchanan*, 24 W. Va. 362; *U. S. v. Marble*, 3 Mackey (D. C.) 32.

Where a board of county commissioners has power to act upon a given matter, its act is valid, even though erroneous, and the auditor cannot refuse to issue his warrant in accordance with it unless such act is legally annulled. *State v. Buckles*, 39 Ind. 272.

When the board of supervisors of the county of New York have, by resolution, directed the county treasurer to pay to the justice of the supreme court the additional compensation allowed him, in pursuance of an act of the legislature, it is the duty of the treasurer to pay it, and on his refusal, a mandamus lies. *People v. Edmonds*, 15 Barb. (N. Y.) 529.

A ministerial officer intrusted with the collection and disbursement of revenue in any department of government has no right to withhold a performance of his ministerial duties merely because he apprehends that others may be injuriously affected thereby. *Smyth v. Titcomb*, 31 Me. 272.

statutory power must be exercised as it is given, and in conformity with the statute conferring it.¹

An authority conferred upon a public, as well as a private agent, is construed to include all the necessary and usual means of executing it with effect.²

A public officer can do no official act, or exercise no official function outside of the district or territory for which he is the official agent,³ and upon the termination of his official capacity he becomes *functus officio*, and incompetent thereafter to do an authoritative act.⁴ It is a well settled rule of law, however—

1. *Green v. Beeson*, 31 Ind. 7; *Petrie v. Doe*, 30 Miss. 698; *New Jersey R., etc., Co. v. Suydam*, 17 N. J. L. 25; *U. S. v. Thurber*, 28 Fed. Rep. 56; and see *Morton v. Comptroller-Gen'l.*, 4 S. Car. 430.

If a resolution by a board of freeholders, for issuance of county bonds in excess of the limit fixed by law, is one of several resolutions passed together, providing for the purchase of lands for which the bonds are the price, all the resolutions are tainted by the illegality, and will be set aside. *State v. Hudson Co.*, 39 N. J. L. 632.

All the power that any State officer has, is given by written law directly or indirectly, and any acts which any officer from the chief executive of the State to the lowest officer in it, may assume to do in excess of the power thus given, is void, and it matters not whether the want of power results from the absence of a law conferring it under any circumstances, or from a law which forbids the exercise of the power in a given case, while the exercise of a like power in other cases would be lawful. *Day Land, etc., Co. v. State*, 68 Tex. 526.

2. *Backman v. Charlestown*, 42 N. H. 125; *Spalding v. Preston*, 21 Vt. 9; 50 Am. Dec. 68; *Feusier v. Mayor, etc., of Virginia City*, 3 Nev. 58.

Under an ordinance conferring power to provide for the suppression of fires, and for the appointment and removal of fire wardens, and prescribing the duties and powers of such fire wardens, and the fire engineers and firemen, it was held that power to purchase engines and apparatus, is necessarily and fairly implied as incident to the power expressly granted. *Green v. Cape May*, 41 N. J. L. 45.

Where there is a substantial compliance with the conditions of a contract, a public corporation cannot take advantage of mere want of form in the acts of its own agents, if the require-

ments of the statute and of the contract have been substantially complied with. *Moore v. Mayor, etc., of N. Y.*, 73 N. Y. 238; 29 Am. Rep. 134.

3. *Share v. Anderson*, 7 S. & R. (Pa.) 43; 10 Am. Dec. 421; *Avery v. Seely*, 3 W. & S. (Pa.) 494; *Mitchell v. Malone*, 77 Ga. 301; *Gittings v. Hall*, 1 Har. & J. (Md.) 14; 2 Am. Dec. 502; *Brown v. McCormick*, 28 Mich. 215; *People v. Burt*, 51 Mich. 199; *Carr v. Phillips*, 39 Mich. 319; *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498; *Page v. Staples*, 13 R. I. 306.

In *Allor v. Wayne Co.*, 43 Mich. 76, it was held that municipal courts cannot be authorized to try extra-municipal crimes, and that justices of the peace in Detroit have power under the general laws of the State to dispose of all criminal business arising in Wayne County outside of the city. And in *Robertson v. Baxter*, 57 Mich. 127, it held that constables as ministers of public justice, are State ministerial officers, some of whose powers are strictly local and some not.

A sheriff having a prisoner in his custody upon a writ of *habeas corpus* has power by virtue of the writ to travel through other counties if necessary in order to take his prisoner to the place where the writ is returnable, and he may also upon fresh pursuit retake a prisoner who has escaped from his custody into another county. *Page v. Staples*, 13 R. I. 306.

A notary public, though required by law to reside in a particular county, may, nevertheless, take acknowledgments in any county in the State. *Maxwell v. Hartmann*, 50 Wis. 660.

An acknowledgment will be presumed to have been taken within the jurisdiction of the officer taking it although there is no averment of the fact in the certificate. *Bradley v. West*, 60 Mo. 33.

4. *State v. Donnewirth*, 21 Ohio St. 216; *Ingerson v. Berry*, 14 Ohio St.

a rule of the common law, recognized and confirmed by statute—that when an executive officer has begun the service, or commenced the performance of a duty, and thereby incurred a responsibility, he has the authority, and, indeed, is bound to go on and complete it, although his general authority as such officer is superseded by his removal, or by the expiration of his term of office.¹

Where a duty imposed upon a body or officer by law has been discharged and completed, the power is exhausted, and the exe-

315; and see *Attorney-Gen'l v. Iron Co.*, 64 Mich. 607.

A former public officer has no authority to certify proceedings had before him while in office. A person who is no longer a public officer has no more right to give copies of papers than any other individual. Faith and credit are attached to his certificate when it makes a part and is given in discharge of the duties appertaining to the office he holds, because the law presumes it is given under the responsibilities attached to that situation, and with reference to the obligations that flow from it. But that presumption no longer exists, when the individual ceases to act in that capacity. *Gaillard v. Aneline*, 10 *Martin* (La.) 479; 13 *Am. Dec.* 338.

The authority of an officer attaches by the commencement of the service he is employed to perform and will be superseded only when it is completed whether it be a longer or shorter time. *Lawrence v. Rice*, 12 *Met.* (Mass.) 527; *Welsh v. Joy*, 13 *Pick.* (Mass.) 477.

In *Attorney-Gen'l v. Iron Co.*, 64 Mich. 607, it was held that officers appointed for the accomplishment of a particular purpose have no right to dissolve and terminate their authority until they have completed their task and exhausted their powers.

1. *Lawrence v. Rice*, 12 *Met.* (Mass.) 527; *People v. Boring*, 8 *Cal.* 406; 68 *Am. Dec.* 331; *Elkin v. People*, 4 *Ill.* 207; 36 *Am. Dec.* 541; *Allen v. Trimble*, 4 *Bibb* (Ky.) 21; 7 *Am. Dec.* 726; *Lemon v. Craddock*, *Litt. Sel. Cas.* (Ky.) 251; 12 *Am. Dec.* 301; *Purl v. Duvall*, 5 *Har. & J.* (Md.) 69; *Am. Dec.* 490; *Clark v. Pratt*, 55 *Me.* 546; *Tukey v. Smith*, 18 *Me.* 125; 36 *Am. Dec.* 704; *State v. Roberts*, 12 *N. J. L.* 114; 21 *Am. Dec.* 62; *Tuttle v. Jackson*, 6 *Wend.* (N. Y.) 224; 21 *Am. Dec.* 306; *American Exch. Bank v. Morris Canal, etc.*, *Co.*, 6 *Hill* (N. Y.) 368; and see

Miner v. Cassat, 2 *Ohio St.* 199; *Doolittle v. Bryan*, 14 *How.* (U. S.) 563.

Where the sheriff at the expiration of his term of office has process in his hands, and dies before the complete execution thereof, his late under-sheriff becomes personally liable for moneys collected by him by virtue of such process, notwithstanding the statute providing that where an under-sheriff executes the office of sheriff, his default and misfeasance shall be a breach of the sheriff's bond as well as his own. *Newman v. Beckwith*, 61 *N. Y.* 205.

Papers executed by a public officer and the record of his proceedings may be amended by him after the expiration of his term, in order to cure informalities in his proceedings or in the record thereof. *Kiley v. Oppenheimer*, 55 *Mo.* 374; *Rugle v. Webster*, 55 *Mo.* 246; *Kiley v. Cranor*, 51 *Mo.* 541; though such amendments must be made by the persons who were in office when the proceedings were had. *Kiley v. Cranor*, 51 *Mo.* 541; *Gibson v. Bailey*, 9 *N. H.* 168.

In *People v. Caledonia*, 16 *Mich.* 63, however, it was held that when commissioners of highways have gone out of office, it is incompetent for them to make any addition or amendment to a return of their proceedings already made.

In *Bank of Tenn. v. Beatty*, 3 *Sneed* (Tenn.) 305; 65 *Am. Dec.* 58, it was held that a sale of real estate made by a sheriff after the expiration of his official term, upon a levy made by him while in office, is utterly void for want of authority, and vests no title in the purchaser; and in *Crane v. Hardy*, 1 *Mich.* 56, it was held that an order made by the court for the sale of real estate taken in an attachment suit goes to the sheriff in office for the time being, and not to his predecessor who served the writ of attachment.

cution of the power is no longer subject to supervision or review or change by the officer to whom it was intrusted.¹

It is a well-settled principle of law that every public officer, acting under the sanction of an oath, or in whom the government reposes a trust, shall be presumed to have done his duty until the contrary be proved;² and courts of general jurisdiction are presumed to have acted within their jurisdiction in matters in which they have assumed to act, until the contrary appears, every presumption being in favor of their jurisdiction.³ An official

1. *Northampton Co. v. Yohe*, 24 Pa. St. 305; *Godschalk v. Northampton Co.*, 71 Pa. St. 324; *Northumberland Co. v. Bloom*, 3 W. & S. (Pa.) 542; *People v. Wayne Co.*, 41 Mich. 4; *State v. King*, 4 Dev. & B. (N. Car.) 521.

In *Godschalk v. Northampton Co.*, 71 Pa. St. 324, it was held that the board of auditors has no power to re-examine and resettle the commissioner's accounts, even if there were errors in them. But that a third person, who was not a party to the audit, is not bound or concluded by it.

2. *Hickman v. Boffman*, Hard. (Ky.) 356; *National Bank v. Herold*, 74 Cal. 603; *Guy v. Washburn*, 23 Cal. 111; *Den v. Den*, 6 Cal. 81; *Todmier v. Aspinwal*, 43 Ill. 401; *Mercer v. Doe*, 6 Ind. 80; *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405; *Jenkins v. Parkhill*, 25 Ind. 473; *Dollarhide v. Muscatine Co.*, 1 Greene (Iowa) 158; *Terry v. Bleight*, 3 T. B. Mon. (Ky.) 270; 16 Am. Dec. 101; *Ellis v. Carr*, 1 Bush (Ky.) 527; *Phelps v. Ratcliff*, 3 Bush (Ky.) 334; *Buckner v. Bush*, 1 Duv. (Ky.) 394; *Dunlap v. Sims*, 2 La. Ann. 239; *Squier v. Stockton*, 5 La. Ann. 120; 52 Am. Dec. 583; *New Orleans v. Halpin*, 17 La. Ann. 185; *U. S. v. Earhart*, 4 Sawy. (U. S.) 245; *Templeton v. Morgan*, 16 La. Ann. 438; *Red v. Augusta*, 25 Ga. 386; *Hutchings v. Van Bokkelen*, 34 Me. 126; *Bullen v. Arnold*, 31 Me. 583; *Lowell v. Flint*, 20 Me. 401; *Conolly v. Riley*, 25 Md. 402; *Davany v. Koon*, 45 Miss. 71; *Murray v. Smith*, 28 Miss. 31; *Lea v. Polk Co. Copper Co.*, 21 How. (U. S.) 493; *Clapp v. Cedar Co.*, 5 Iowa 15; 68 Am. Dec. 678; *Salter v. Applegate*, 23 N. J. L. 115; *Miller v. Lewis*, 4 N. Y. 553; *Hartwell v. Root*, 19 Johns. (N. Y.) 345; 10 Am. Dec. 232; *Ward v. Barrows*, 2 Ohio St. 241; *Young v. Thayer*, 11 Greene (Iowa) 196; *Dennison v. Story*, 1 Oregon 273; *Kelly v. Green*, 53 Pa. St. 302; *Farr v. Sims*,

Rich. Eq. Cas. (S. Car.) 122; 24 Am. Dec. 396; *Dawkins v. Smith*, 1 Hill Eq. (S. Car.) 369; *Sennett v. State*, 17 Tex. 308; *Houston v. Perry*, 13 Tex. 390; *Jones v. Muisbach*, 26 Tex. 235; *Stevens v. Kent*, 26 Vt. 503; *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64. And see *People v. Auditor*, 3 Ill. 567; *Brandon v. Snows*, 2 Stew. (Ala.) 255; *Adams v. Jackson*, 2 Aik. (Vt.) 145; *U. S. v. Hayward*, 2 Gall. (U. S.) 485; *Com. v. Slifer*, 25 Pa. St. 23; 67 Am. Dec. 680; *Cooper v. Telfair*, 4 Dall. (U. S.) 14.

The presumption of the due execution of his authority by an officer is equally applicable to a proceeding against the officer and to a proceeding against the rights of an individual derived through the act of the officer. *Hickman v. Boffman*, Hard. (Ky.) 356.

When a State officer does an act which would be a violation of duty unless certain terms or conditions had first been performed, such performance will be presumed as between the individual and the State. *Titus v. Kimbro*, 8 Tex. 210.

A party complaining of a breach of official duty must show every fact necessary to constitute such breach, and without it damages will not be presumed. *Craig v. Adair*, 22 Ga. 373.

For exceptions to this rule see *EMINENT DOMAIN*, vol. 6, p. 509; *TAXATION*.

In *Kentucky*, the rule, that officers will be presumed to have acted correctly until the contrary is proved, does not extend to agents appointed by the legislature, *pro hac vice*, to sell lands for payment of the owner's debts; the correctness of their proceedings must be shown. *Pitman v. Brownlee*, 2 A. K. Marsh. (Ky.) 210.

3. *Butcher v. Bank of Brownsville*, 2 Kan. 70; 83 Am. Dec. 446; *Cook v. Skelton*, 20 Ill. 107; 71 Am. Dec. 250; *Hefferman v. Burt*, 7 Iowa 320; 71 Am.

act is of itself an assertion of authority, upon the part of the officer to make it, and is at least *prima facie* evidence as against him of the existence of such authority;¹ and persons dealing with public officers, as such, are presumed to know and are charged with knowledge of the nature of their duties, and the extent of their powers.² This presumption, however, can never

Dec. 445; Brady v. Malone, 4 Iowa 148; Cooper v. Sunderland, 3 Iowa 114; 66 Am. Dec. 52; Scott v. Coleman, 5 Litt. (Ky.) 350; 15 Am. Dec. 71; Suiter v. Turner, 10 Iowa 526; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Dexter v. Cochran, 17 Kan. 450; Shumway v. Stillman, 4 Cow. (N. Y.) 294; 15 Am. Dec. 374; Jackson v. Rogers, 11 Johns. (N. Y.) 33; Thomas v. Robinson, 3 Wend. (N. Y.) 267; Roderigas v. East River Sav. Inst., 63 N. Y. 460; 20 Am. Rep. 555; Lowry v. Erwin, 6 Rob. (La.) 192; 39 Am. Dec. 556; Coit v. Haven, 30 Conn. 190; 79 Am. Dec. 244; Shepardson's Appeal, 36 Conn. 25; Reynolds v. Stansbury, 20 Ohio 344; 55 Am. Dec. 459; Horan v. Wahrenberger, 9 Tex. 313; 58 Am. Dec. 145; Withers v. Patterson, 27 Tex. 491; 86 Am. Dec. 643; Mitchell v. Menley, 32 Tex. 464; Black v. Epperson, 40 Tex. 179; Adams v. Jeffries, 12 Ohio 253; 40 Am. Dec. 477; Kenney v. Greer, 13 Ill. 432; 54 Am. Dec. 439; Callen v. Ellison, 13 Ohio St. 446; 82 Am. Dec. 448.

A judgment is *prima facie* evidence of jurisdiction. Horton v. Critchfield, 18 Ill. 133; 65 Am. Dec. 701.

Where general jurisdiction is given to a court over any subject, and that jurisdiction depends in the particular case upon facts which must be brought before the court for its determination upon evidence, and where it is required to act upon such evidence, its decision upon the question of its jurisdiction is conclusive until reversed, revoked or vacated so far as to protect its officers and all other innocent persons who act upon the faith of it. Roderigas v. East River Sav. Inst., 63 N. Y. 460; 20 Am. Rep. 555.

1. Shelbyville v. Shelbyville, etc., Turnpike Co., 1 Met. (Ky.) 54; Jones v. Muisbach, 26 Tex. 235; Mayor, etc., of N. Y. v. Exchange F. Ins. Co., 3 Abb. App. Dec. (N. Y.) 261; Dubuc v. Voss, 19 La. Ann. 210; 92 Am. Dec. 526; Landry v. Martin, 15 La. 1; Devall v. Choppin, 15 La. 566; Davis v. Police Jury, 1 La. Ann. 295; Wray v. Doe, 10 Smed. & M. (Miss.) 452;

Houston v. Perry, 3 Tex. 390; Smith v. Low, 5 Ired. (N. Car.) 197. And see Ross v. Reed, 1 Wheat. (U. S.) 482; U. S. v. Arredondo, 6 Pet. (U. S.) 691; Strother v. Lucas, 12 Pet. (U. S.) 410; Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. (U. S.) 448; Delassus v. U. S., 9 Pet. (U. S.) 117; Wilkes v. Dinsman, 7 How. (U. S.) 89; Minter v. Crommelin, 18 How. (U. S.) 87; Russell v. Beebe, Hempst. (U. S.) 704; Den v. Hill, McAll. (U. S.) 480; Dunlap v. Monroe, 7 Cranch (U. S.) 242; Rugles v. Bucknor, 1 Paine (U. S.) 358; Prentiss v. Spalding, 2 Doug. (Mich.) 184; Burt v. Winona, etc., R. Co., 31 Minn. 472.

The averment of neglect of official duty must be supported by some proof, though very little evidence will suffice to shift the burden of proof. Dobbs v. Justices, 17 Ga. 624.

A report or return of the doings of public officers in appraising, granting, and surveying land, although it does not state all they were required to do, is *prima facie* evidence against a stranger that all was rightly done. Allegheny v. Nelson, 25 Pa. St. 332. But persons exercising a special delegated authority must show, upon the face of their proceedings, that they have acted within their prescribed limits. New Jersey R., etc., Co. v. Suydam, 17 N. J. L. 25.

Where the transcript of a paper does not contain the indorsement "Filed" it will be presumed that it was not properly filed, as, if it had been, it was the clerk's duty so to mark it, with the date of the filing. Wooster v. McGee, 1 Tex. 17.

2. Clark v. Des Moines, 19 Iowa 199; 87 Am. Dec. 423; Hull v. Marshall Co., 12 Iowa 142; Wallace v. Mayor, etc., of San José, 29 Cal. 181; Sutro v. Pettit, 74 Cal. 332; 5 Am. St. Rep. 442; Tamm v. Lavalley, 92 Ill. 263; Mitchell v. Rockland, 45 Me. 496; Lowell Five Cents' Sav. Bank v. Winchester, 8 Allen (Mass.) 109; Mayor, etc., of Baltimore v. Reynolds, 20 Md. 1; 83 Am. Dec. 535; Mayor, etc., of Baltimore v. Eschback, 18 Md. 282; State v. Hays,

be invoked to sustain the acts of an officer, outside of, or contrary to the usual and recognized functions and duties of his office.¹ And when any rights are claimed, under or by virtue of the judgment of a court of special and limited jurisdiction, all facts necessary to confer jurisdiction must be affirmatively shown.²

a. DELEGATION OF AUTHORITY.—If discretion and judgment are to be exercised either as to the time, manner, or feasibility of the exercise of an official function, the body or officer intrusted with the duty to decide must exercise it, and cannot delegate it to any other officer, body, or person.³ The grantee of the

52 Mo. 578; *State v. Bank of Missouri*, 45 Mo. 528; *Delafield v. Illinois*, 26 Wend. (N. Y.) 192; *Hodges v. Buffalo*, 2 Den. (N. Y.) 110; *Halstead v. Mayor, etc.*, of N. Y., 3 N. Y. 430; *Demming v. Smith*, 3 Johns. Ch. (N. Y.) 332; *McDonald v. Mayor, etc.*, of N. Y., 68 N. Y. 23; 23 Am. Rep. 144; *Backman v. Charlestown*, 42 N. H. 125; *Day Land, etc., Co. v. State*, 68 Tex. 526; *State v. Hastings*, 10 Wis. 518; *Curtis v. U. S.*, 2 Ct. of Cl. 144; *Lee v. Munroe*, 7 Cranch (U. S.) 370.

1. *Jones v. Muisbach*, 26 Tex. 235; *Houston v. Perry*, 3 Tex. 390.

Where an officer claims rights by virtue of his office, he must show that he is legally qualified to act; that he is the officer *de jure* as well as *de facto*. *Dillon v. Myers, Bright*. (Pa.) 426.

The presumption that an officer has done his duty should not be allowed to sustain a vital jurisdictional fact; but where the main fact is made out by proof, and the question is one of time merely, it may be allowed to govern. *Sheldon v. Wright*, 7 Barb. (N. Y.) 39.

It is not admissible to assume that one officer is in default, upon the mere presumption on behalf of another that the latter has performed his official duty. In such case the presumption applies with like force in favor of each. *Weimer v. Bunbury*, 30 Mich. 201; *Houghton Co. v. Rees*, 34 Mich. 481.

The acts and declarations of an alderman, not representing the city government or the board of health, and not acting in behalf of either, are not legal evidence to affect the rights or liabilities of the corporation. *Mitchell v. Rockland*, 41 Me. 363; 66 Am. Dec. 252.

2. *Mallett v. Uncle Sam Gold, etc.*, Min. Co., 1 Nev. 188; 90 Am. Dec. 488; *McDonald v. Prescott*, 2 Nev. 109; 90 Am. Dec. 517; *Gunn v. Howell*, 27 Ala. 663; 62 Am. Dec. 785; *Smith v. Andrews*, 6 Cal. 654; *Swain v.*

Chase, 12 Cal. 283; *Lowe v. Alexander*, 15 Cal. 296; *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742; *Morrow v. Weed*, 4 Iowa 77; 66 Am. Dec. 122; *Cooper v. Sunderland*, 3 Iowa 114; 66 Am. Dec. 52; *Lowry v. Erwin*, 6 Rob. (La.) 192; 39 Am. Dec. 556; *Spear v. Carter*, 1 Mich. 19; 48 Am. Dec. 688; *Barnes v. Harris*, 4 N. Y. 374; *Bowman v. Russ*, 6 Cow. (N. Y.) 233; *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460; 20 Am. Rep. 555; *Bloom v. Burdick*, 1 Hill (N. Y.) 130; 37 Am. Dec. 299; *Wheeler v. Raymond*, 8 Cow. (N. Y.) 314; *Foot v. Stevens*, 17 Wend. (N. Y.) 485; *Root v. McFerrin*, 37 Miss. 17; 75 Am. Dec. 49; *Piper v. Pearson*, 2 Gray (Mass.) 120; 61 Am. Dec. 438; *Reynolds v. Stansbury*, 20 Ohio 344; 55 Am. Dec. 459; *Adams v. Jeffries*, 12 Ohio 253; 40 Am. Dec. 477; *Horan v. Wahrenberger*, 9 Tex. 313; 58 Am. Dec. 145.

Where the jurisdiction of an inferior and limited court is shown, the same presumption prevails in favor of its proceedings that prevails in favor of those of a superior court. But whatever intendment may be made in favor of the decision, there can be none of the right to decide. *Cooper v. Sunderland*, 3 Iowa 114; 66 Am. Dec. 52.

3. *Birdsall v. Clark*, 73 N. Y. 73; 29 Am. Rep. 105; *People v. Davis*, 15 Hun (N. Y.) 209; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485; 37 Am. Dec. 271; *Brooklyn v. Brislin*, 57 N. Y. 591; *Thompson v. Schermerhorn*, 6 N. Y. 92; 55 Am. Dec. 385; *Davis v. Read*, 65 N. Y. 566; *In re Emigrant Industrial Sav. Bank*, 75 N. Y. 388; *Meuser v. Risdon*, 36 Cal. 239; *Oakland v. Carpenter*, 13 Cal. 540; *Jackson Co. v. Brush*, 77 Ill. 59; *Hydes v. Joyes*, 4 Bush (Ky.) 464; *State v. Hauser*, 63 Ind. 155; *Evansville, etc., R. Co. v. Evansville*, 15 Ind. 395; *State v. Bell*, 34 Ohio St. 194; *Thomson v. Boonville*,

power must himself or itself judge and decide, though subordinate officers or agents may be employed to carry such decision into effect.¹ Where the duties of a public officer are of a ministerial character, however, they may be discharged by deputy,² and the power to delegate the exercise of discretionary powers may be expressly conferred.³ Thus a governing body cannot deputize others to perform its governing functions,⁴ and judges must themselves discharge all the judicial duties of their offices,⁵ and the powers conferred upon the legislature to make

61 Mo. 282; *Sheehan v. Gleeson*, 46 Mo. 100; *State v. Mayor, etc., of Paterson*, 34 N. J. L. 163; *State v. Fiske*, 9 R. I. 94; *Whyte v. Nashville*, 2 Swan (Tenn.) 364; *Clark v. Washington*, 12 Wheat. (U. S.) 54.

The revised statutes of *Indiana* of 1843, ch. 16, §§ 62 and 64, which authorize boards of county commissioners to enter into contracts in writing for building bridges over watercourses, and to appoint one or more persons to superintend the same, do not empower such commissioners to appoint agents to make such contracts. *Potts v. Henderson*, 2 Ind. 327.

1. *Lyon v. Jerome*, 26 Wend. (N. Y.) 485; 37 Am. Dec. 271; *Birdsall v. Clark*, 73 N. Y. 73; 29 Am. Rep. 105; *Hicks v. Dorn*, 42 N. Y. 47; *Edwards v. Watertown*, 24 Hun (N. Y.) 426; *Baltimore v. Porter*, 18 Md. 284; *St. Louis v. Clemens*, 43 Mo. 395.

2. *Abrams v. Ervin*, 9 Iowa 87; *Hope v. Sawyer*, 14 Ill. 254; *Ellison v. Stevenson*, 6 T. B. Mon. (Ky.) 275; *Triplett v. Gill*, 7 J. J. Marsh. (Ky.) 432; *Attorney-Gen'l. v. Detroit*, 58 Mich. 213; 55 Am. Rep. 675; *Ruggles v. Collier*, 43 Mo. 353; *Birdsall v. Clark*, 73 N. Y. 73; 29 Am. Rep. 105; *Powell v. Tuttle*, 3 N. Y. 396; *People v. Davis*, 15 Hun (N. Y.) 209; *Downing v. Rugar*, 21 Wend. (N. Y.) 178; 34 Am. Dec. 223.

A part of a body of ministerial officers may delegate all their authority to others of their body to act as their attorneys, and the delegation need not be in writing; it is good though merely oral. *Downing v. Rugar*, 21 Wend. (N. Y.) 178; 34 Am. Dec. 223; *Gaul v. Groat*, 1 Cow. (N. Y.) 113; *Tullock v. Cunningham*, 1 Cow. (N. Y.) 256.

A public officer may delegate to a deputy the right to subscribe the name of his principal, and the act of the deputy in the name of the principal within the scope of his authority is the act of his principal. *Abrams v. Ervin*, 9

Iowa 87, citing *Parker v. Kett*, 1 Ld. Raym. 658; *Ellison v. Stevenson*, 6 T. B. Mon. (Ky.) 275; *Triplett v. Gill*, 7 J. J. Marsh. (Ky.) 432; *Com. v. Arnold*, 3 Litt. (Ky.) 316; *Hope v. Sawyer*, 14 Ill. 254.

Under the *Maine* statute entitled, "Rules of Construction," however, when the signature of a person is required, he must himself write it or make his mark. *Chapman v. Limerick*, 56 Me. 390.

A county assessor has implied authority to employ necessary clerks. *Roberts v. People*, 9 Colo. 458.

3. See *Lyon v. Jerome*, 26 Wend. (N. Y.) 485; 37 Am. Dec. 271; *State v. Mayor, etc., of Paterson*, 34 N. J. L. 163.

4. *Attorney-Gen'l. v. Detroit*, 58 Mich. 213; 55 Am. Rep. 675; *Edwards v. Watertown*, 24 Hun (N. Y.) 426; *Kramrath v. Albany*, 53 Hun (N. Y.) 206.

But the governing body of a city may delegate its mere business functions. *Kramrath v. Albany*, 53 Hun (N. Y.) 206.

The power of the keeper of a prison to inflict corporal punishment upon a convict for misconduct cannot be delegated to contractors for convict labor. *Cornell v. State*, 6 Lea (Tenn.) 624. And see *Smith v. State*, 8 Lea (Tenn.) 744.

5. *State v. Noble*, 118 Ind. 350; *Ward v. Farwell*, 97 Ill. 593; *Hall v. Marks*, 34 Ill. 358; *Hards v. Burton*, 79 Ill. 504; *Campbell v. Monroe Co.*, 118 Ind. 119; *Wright v. Defrees*, 8 Ind. 298; *Waldo v. Wallace*, 12 Ind. 569; *Allor v. Wayne Co.*, 43 Mich. 76; *Chandler v. Nash*, 5 Mich. 409; *St. Paul, etc., R. Co. v. Gardner*, 19 Minn. 132; 18 Am. Rep. 334; *State v. Jefferson*, 66 N. Car. 309; *Johnson v. Wallace*, 7 Ohio, pt. 2, 62; *Winchester v. Ayres*, 4 Greene (Iowa) 104; *State v. Phillips*, 27 La. Ann. 663; *King v. Hopkins*, 57 N. H. 334; *Van Slyke v.*

laws cannot be delegated by that department to any other body or authority.¹ The body exercising the general legislative functions of the government, however, may delegate to municipal and other public corporations some portion of its own powers for local purposes,² the general rule being that it may authorize

Trempealeau, 39 Wis. 390; Conroe v. Bull, 7 Wis. 408; Gough v. Dorsey, 27 Wis. 119; Milwaukee Industrial School v. Milwaukee Co., 40 Wis. 328.

Even the consent of the parties will not authorize a judge to delegate any portion of his judicial power to another. Hoagland v. Creed, 81 Ill. 506; Andrews v. Beck, 23 Tex. 455.

The people have a right to the judgment of those whom they have made judges, and this right the judges cannot surrender, if they would, without a flagrant breach of a sworn duty. The trust is a personal one, inalienable, and vested in the person selected by the people; and it cannot be delegated by the judges themselves or by any one else for them. State v. Noble, 118 Ind. 350; Van Slyke v. Trempealeau, 39 Wis. 390; 20 Am. Rep. 50.

1. Cooley Const. Lim. (6th ed.) 137; Santo v. State, 2 Iowa 165; 63 Am. Dec. 487; State v. Geebrick, 5 Iowa 591; State v. Weir, 33 Iowa 134; 11 Am. Rep. 115; *Ex parte* Wall, 48 Cal. 279; 17 Am. Rep. 425; Rice v. Foster, 4 Harr. (Del.) 479; People v. Collins, 3 Mich. 343; Farnsworth Co. v. Lisbon, 62 Me. 451; Brewer Brick Co. v. Brewer, 62 Me. 62; Ruggles v. Collier, 43 Mo. 353; State v. Wilcox, 45 Mo. 458; State v. Hudson Co., 37 N. J. L. 269; People v. Stout, 23 Barb. (N. Y.) 343; State v. Mayor, etc., of N. Y., 3 Duer (N. Y.) 119; Thorne v. Cramer, 15 Barb. (N. Y.) 112; Bradley v. Baxter, 15 Barb. (N. Y.) 122; Barto v. Himrod, 8 N. Y. 483; Cincinnati, etc., R. Co. v. Clinton Co., 1 Ohio St. 77; Com. v. M'Williams, 11 Pa. St. 61; Parker v. Com., 6 Pa. St. 507; 47 Am. Dec. 480; Com. v. Judges, 8 Pa. St. 391; Com. v. Painter, 10 Pa. St. 214; Locke's Appeal, 72 Pa. St. 491; Auditor v. Holland, 14 Bush (Ky.) 147; State v. Simons, 32 Minn. 540; Maize v. State, 4 Ind. 343; Meshmeier v. State, 11 Ind. 482; State v. Copeland, 3 R. I. 33; State v. Swisher, 17 Tex. 441; Willis v. Owen, 43 Tex. 41; State v. Parker, 26 Vt. 357; *In re* Oliver, 17 Wis. 681; Little v. Barreme, 2 Cranch (U. S.) 170; People's R. Co. v. Mem-

phis R. Co., 10 Wall. (U. S.) 38; Wayman v. Southard, 10 Wheat. (U. S.) 1; Bank of U. S. v. Halstead, 10 Wheat. (U. S.) 51. And see CONSTITUTIONAL LAW, vol. 3, p. 670.

This inability arises no less from the joint principle applicable to every delegated power, requiring knowledge, discretion, and rectitude in its exercise, than from the positive provisions of the constitution itself. The people in whom the power resided have voluntarily relinquished its exercise, and have positively ordained that it shall be vested in the assembly. To allow the general assembly to cast it back upon them would be to subvert the constitution, and change its distribution of powers, without their action or consent. Cincinnati, etc., R. Co. v. Clinton Co., 1 Ohio St. 77.

A law declaring an offense or providing a punishment, or repealing an existing law, on condition that the governor, or any other individual should consent to it, is plainly unconstitutional. It is the naked veto power. Rice v. Foster, 4 Harr. (Del.) 479; Cincinnati, etc., R. Co. v. Clinton Co., 1 Ohio St. 77.

To repeal a law requires the same exercise of power as to enact it, and the one can no more be delegated than the other. Cincinnati, etc., R. Co. v. Clinton Co., 1 Ohio St. 77.

2. Oakland v. Carpentier, 13 Cal. 540; Bridgeport v. Housatonic R. Co., 15 Conn. 475; Richland v. Lawrence Co., 12 Ill. 1; Talbot v. Dent, 9 B. Mon. (Ky.) 526; Ruggles v. Collier, 43 Mo. 353; St. Louis v. Clemens, 43 Mo. 395; People v. Pinckney, 32 N. Y. 377; Com. v. M'Williams, 11 Pa. St. 61; Cincinnati, etc., R. Co. v. Clinton Co., 1 Ohio St. 77; Nicol v. Mayor, etc., of Nashville, 9 Humph. (Tenn.) 252; Tilley v. Savannah, etc., R. Co., 5 Fed. Rep. 641.

A law altering, abridging, or enlarging the vested powers of corporations aggregate, subject to the consent of the said corporation, or a law giving to school districts a portion of the school fund, on condition that said districts will raise an equivalent or propor-

others to do things which it might properly, yet cannot understandingly or advantageously do itself,¹ though these delegated powers are regarded as trusts confided in the hands in which they are placed and not subject to be delegated by the repositories,² and a legislature may make a law which leaves it to the people or to a municipality or other body or officer to determine some fact or state of things upon which the action of the law may depend.³

tional sum, are instances of proper conditional legislation, even though the assent of the corporators in one case to the change of their charter, or of the district, in the other, to accept the donation and comply with its terms, should be signified by a majority vote. *Rice v. Foster*, 4 Harr. (Del.) 479; *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77.

1. *Tilley v. Savannah, etc., R. Co.*, 5 Fed. Rep. 641; *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77; *State v. Parker*, 26 Vt. 357; *Smith v. Janesville*, 26 Wis. 291.

In accomplishing the lawful purposes of legislation, the choice of means adopted to the end proposed and not prohibited by the constitution, must be left exclusively to the discretion of the legislative body; and the incorporation of private companies for the construction of works of a public character is one of the lawful means that may be employed. *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77.

2. *Oakland v. Carpentier*, 13 Cal. 540; *Menser v. Risdon*, 36 Cal. 239; *Smith v. Morse*, 2 Cal. 524; *Minneapolis Gas Light Co. v. Minneapolis*, 36 Minn. 159; *Darling v. St. Paul*, 19 Minn. 389; *Day v. Green*, 4 Cush. (Mass.) 433; *State v. Hauser*, 63 Ind. 155; *Evansville, etc., R. Co. v. Evansville*, 15 Ind. 395; *Mullarky v. Cedar Falls*, 19 Iowa 21; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Gale v. Kalamazoo*, 23 Mich. 344; 9 Am. Rep. 80; *Ruggles v. Collier*, 43 Mo. 353; *Matthews v. Alexandria*, 68 Mo. 115; 30 Am. Rep. 776; *St. Louis v. Clemens*, 43 Mo. 395; *State v. Mayor, etc., of Paterson*, 34 N. J. L. 163; *State v. Gloucester Co.*, 50 N. J. L. 585; *Brooklyn v. Breslin*, 57 N. Y. 591; *Milhaus v. Sharp*, 17 Barb. (N. Y.) 435; *Thompson v. Schermerhorn*, 6 N. Y. 92; 55 Am. Dec. 385; *State v. Jersey City*, 25 N. J. L. 309; *State v. Bell*, 34 Ohio St. 194; *Whyte v. Nashville*, 2 Swan (Tenn.) 364; *Lord v. Oconto*, 47 Wis. 386; *Lauenstein v. Fond du Lac*, 28

Wis. 336; *Clark v. Washington*, 12 Wheat. (U. S.) 40.

Where a city is authorized by its charter to erect, maintain and regulate public wharves and to regulate wharfage, it cannot lease its wharf or empower any one else to fix its rates of wharfage. *Matthews v. Alexandria*, 68 Mo. 115; 30 Am. Rep. 776.

Cases in which Congress has delegated its powers to the President bear no analogy to those in which a city council delegates power to a mayor. In the one case, by every rule of construction, the corporation is confined within the limits of its chartered powers, in the other case the government is vested with the attributes of sovereignty, and always has resorted and must resort to many things lying within the vast domain of implied power. *Ruggles v. Collier*, 43 Mo. 353.

3. *Rahrer's Case*, 140 U. S. 561; *Lothrop v. Stedman*, 42 Conn. 583; *Walton v. Greenwood*, 60 Me. 356; *Burlington v. Leebrick*, 43 Iowa 252; *Chicago, etc., R. Co. v. Dey*, 4 Ry. & Corp. L. J. (Ill.) 465; *Caldwell v. Reynolds*, 10 Ill. 1; *State v. Kirkley*, 29 Md. 85; *Mayor, etc., of Baltimore v. Clunet*, 23 Md. 449; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *Peck v. Weddell*, 17 Ohio St. 271; *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77; *State v. Parker*, 26 Vt. 357; *State v. Chicago, etc., R. Co.*, 38 Minn. 281; *Bull v. Read*, 13 Gratt. (Va.) 78; *Wayman v. Southard*, 10 Wheat. (U. S.) 46; *Cargo of the Aurora v. U. S.*, 7 Cranch (U. S.) 382.

The true distinction is between delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done: to the latter, no valid objection can be made. *Tilley v. Savannah, etc., R. Co.*, 5 Fed. Rep. 641; and see *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77.

b. EXERCISE OF POWER BY DEPUTY.—See DEPUTY.¹

c. EXERCISE OF JOINT AUTHORITY.—Where a body or board of officers is constituted by law to perform a trust for the public or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done; the act of the majority is the act of the body.²

All of the persons to whom the exercise of the power is committed, however, must confer and act together,³ but where all have due notice of the time and place of meeting in the manner prescribed

A law must be complete when it comes from the hands of the legislature; its operation, however, may be contingent. *Home Ins. Co. v. Swigert*, 104 Ill. 653; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672.

1. Vol. 5, p. 623.

2. *Williams v. School District*, 21 Pick. (Mass.) 75; 32 Am. Dec. 243; *First Nat. Bank v. Mt. Tabor*, 52 Vt. 87; 36 Am. Rep. 734; *Gorton v. Hurlburt*, 22 Conn. 178; *Louk v. Woods*, 15 Ill. 256; *Caldwell v. Harrison*, 11 Ala. 755; *State v. Porter*, 113 Ind. 79; *Curtis v. Portland*, 59 Me. 383; *Hanson v. Dexter*, 36 Me. 516; *Plymouth v. Plymouth Co.*, 16 Gray (Mass.) 341; *George v. School District*, 6 Met. (Mass.) 497; *Jones v. Andover*, 6 Pick. (Mass.) 59; *Kingsbury v. Centre School District*, 12 Met. (Mass.) 99; *Scott v. Detroit, etc., Soc.*, 1 Dougl. (Mich.) 119; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *State v. Jersey City*, 27 N. J. L. 493; *Jewett v. Alton*, 7 N. H. 253; *Parrott v. Knickerbocker*, 38 How. Pr. (N. Y.) 508; *In re Palmer*, 31 How. Pr. (N. Y.) 43; *In re Beekman's Petition*, 31 How. Pr. (N. Y.) 17; *Harris v. Whitney*, 6 How. Pr. (N. Y.) 175; *People v. Board of Supervisors*, 10 Abb. Pr. (N. Y.) 233; 18 How. Pr. (N. Y.) 152; *Whitford v. Bissell*, 14 How. Pr. (N. Y.) 302; *Johnson v. Dodd*, 56 N. Y. 76; *Board of Excise v. Sackrider*, 35 N. Y. 154; *Pell v. Ulmar*, 18 N. Y. 139; *People v. Chenango Co.*, 11 N. Y. 563; *Olmstead v. Elder*, 5 N. Y. 144; *Oakley v. Aspinwall*, 3 N. Y. 565; *Powell v. Tuttle*, 3 N. Y. 396; *People v. Nichols*, 52 N. Y. 478; 11 Am. Rep. 735; *Downing v. Rugar*, 21 Wend. (N. Y.) 178; 34 Am. Dec. 223; *Crocker v. Crane*, 21 Wend. (N. Y.) 211; 34 Am. Dec. 228; *Whiteside v. People*, 26 Wend. (N. Y.) 635; *Woolsey v. Tompkins*, 23 Wend. (N. Y.) 324; *Field v. Field*, 9 Wend. (N. Y.) 394; *Babcock v. Lamb*, 1 Cow. (N. Y.) 238; *Ex parte Rogers*, 7 Cow. (N.

Y.) 526; *McCoy v. Curtice*, 9 Wend. (N. Y.) 17; *Horton v. Garrison*, 23 Barb. (N. Y.) 176; *People v. Walker*, 23 Barb. (N. Y.) 304; *Keeler v. Frost*, 22 Barb. (N. Y.) 400; *Miller v. Garlock*, 8 Barb. (N. Y.) 157; *Doolittle v. Doolittle*, 31 Barb. (N. Y.) 313; *Dougherty v. Hope*, 3 Den. (N. Y.) 253; *Lee v. Parry*, 4 Den. (N. Y.) 125; *L'Amoureux v. O'Rourke*, 2 Keyes (N. Y.) 499; *White v. Lester*, 1 Keyes (N. Y.) 316; *Gildersleeve v. Board of Education*, 17 Abb. Pr. (N. Y.) 201; *Austin v. Helms*, 65 N. Car. 560; *State v. King*, 4 Dev. & B. (N. Car.) 521; *McCready v. Guardians of the Poor*, 9 S. & R. (Pa.) 94; 11 Am. Dec. 667; *Jefferson Co. v. Slagel*, 66 Pa. St. 202; *Com. v. Lecky*, 6 S. & R. (Pa.) 166; *Com. v. Comrs.*, 9 Watts (Pa.) 466; *Cooper v. Lamporter Township*, 8 Watts (Pa.) 125; *Bathmore Turnpike*, 5 Binn. (Pa.) 481; *Walker v. Rogan*, 1 Wis. 597; *Cooley v. O'Conner*, 12 Wall. (U. S.) 391; *Curtis v. Butler Co.*, 24 How. (U. S.) 435.

A contract made by county commissioners must be made by the board at a regular session of their court in order to be binding on the county. *Potts v. Henderson*, 2 Ind. 327.

But where the majority of an elective body protest against the election of a proposed candidate to office, and do not propose another candidate, the minority may elect the candidate. *Hendrickson v. Decow*, 1 N. J. Eq. 577.

3. *Downing v. Rugar*, 21 Wend. (N. Y.) 178; 34 Am. Dec. 223; *Gorton v. Hurlburt*, 22 Conn. 178; *Martin v. Lemon*, 26 Conn. 192; *First Nat. Bank v. Mt. Tabor*, 52 Vt. 87; 36 Am. Rep. 734; *Louk v. Woods*, 15 Ill. 256; *People v. Walker*, 23 Barb. (N. Y.) 304; 2 Abb. Pr. (N. Y.) 421; *New York L. Ins. Co. v. Staats*, 21 Barb. (N. Y.) 570; *Parrot v. Knickerbocker*, 8 Abb. Pr., N. S. (N. Y.) 234; 38 How. Pr. (N. Y.) 508; *People v. Board of Supervisors*, 10 Abb. Pr. (N.

by law or by the rules and regulations of the body, or, in the absence of regulations, if reasonable notice be given, and no unfair means are used to prevent all from attending and participating in the proceedings, it is no objection that all the members do not attend if there be a quorum.¹ And where an act is done by a majority of those to whom the power is confided, the presence and concurrence, or notice to and refusal to act, of the rest will be presumed until the contrary appears.² Where the statute con-

Y.) 233; 18 How. Pr. (N. Y.) 152; Crocker v. Crane, 21 Wend. (N. Y.) 211; 34 Am. Dec. 228; Johnson v. Dodd, 56 N. Y. 76; Schuyler v. Marsh, 37 Barb. (N. Y.) 355. And see Curtis v. Portland, 59 Me. 483; Schenck v. Peay, 1 Woolw. (U. S.) 175; *Ex parte* Rogers, 7 Cow. (N. Y.) 526; Perry v. Tynen, 22 Barb. (N. Y.) 140; Moore v. Ewing, 1 N. J. L. 144; 1 Am. Dec. 195; Crocker v. Crane, 21 Wend. (N. Y.) 211; 34 Am. Dec. 228.

Statutes conferring powers upon officers relative to the divestiture of estates are construed strictly, and when such powers are conferred upon a number to act collectively it is an indication that the association, if not the concurrence, of all is necessary. Pell v. Ulmar, 21 Barb. (N. Y.) 500.

The county court of Harrison county, Kentucky, unless composed of a majority of the justices, cannot lay a charge upon the county for any one object, not even the erection of county buildings, exceeding fifty dollars. Harrison Co. Ct. v. Smith, 15 B. Mon. (Ky.) 155.

When a general power is conferred upon two or more bodies, they must all meet for consultation and deliberation; though when they have done so the vote of the majority controls, even though one of the bodies should leave before the vote is taken. Gildersleeve v. Board of Education, 17 Abb. Pr. (N. Y.) 210.

1. Williams v. School District No. 1, 21 Pick. (Mass.) 75; Horton v. Garrison, 23 Barb. (N. Y.) 176; First Nat. Bank v. Mt. Tabor, 52 Vt. 87; 36 Am. Rep. 734; Beekman's Petition, 1 Abb. Pr. (N. Y.) 449; 31 How. Pr. (N. Y.) 16; *In re* Palmer, 31 Abb. Pr. (N. Y.) 42; People v. Board of Supervisors, 10 Abb. Pr. (N. Y.) 233; 18 How. Pr. (N. Y.) 152.

The dispatch of public business is not to be prevented, and the interest of the public is not to suffer, because one or more members after being notified are

unable to or neglect to attend. If all have been duly notified, it is a meeting of all the persons, and if a majority of the whole number attend, it is competent for that majority to do any act, or exercise any power confided by law to the body collectively, as respects those who cannot, who neglect to, or who refuse to attend. It is the same as if they had attended and dissented from the act of those who were present. Gildersleeve v. Board of Education, 17 Abb. Pr. (N. Y.) 201; Horton v. Garrison, 23 Barb. (N. Y.) 176.

Taking part in the proceedings is a waiver of notice of the meeting. Mitchell Co. v. Horton, 75 Iowa 271.

The general rule is that to make a quorum of a select and definite body of men, a majority at least, must be present, and if the body be indefinite in number, then the majority of those who appear at a regular meeting constitute a body competent to transact business. People v. Walker, 23 Barb. (N. Y.) 304; Field v. Field, 9 Wend. (N. Y.) 394; see Crocker v. Crane, 21 Wend. (N. Y.) 211; 34 Am. Dec. 228.

2. McCoy v. Curtice, 9 Wend. (N. Y.) 17; 24 Am. Dec. 113, note; Yates v. Russell, 17 Johns. (N. Y.) 468; Cole v. Hall, 2 Hill (N. Y.) 625; Board of Excise v. Sacridier, 35 N. Y. 154; People v. Palmer, 52 N. Y. 87; Downing v. Rugar, 21 Wend. (N. Y.) 178; 34 Am. Dec. 223; Woolsey v. Tompkins, 23 Wend. (N. Y.) 324; People v. Whiteside, 23 Wend. (N. Y.) 15; Doughty v. Hope, 3 Den. (N. Y.) 253; Miller v. Garlock, 8 Barb. (N. Y.) 157; Doolittle v. Doolittle, 31 Barb. (N. Y.) 313; Tucker v. Rankin, 15 Barb. (N. Y.) 480; Perry v. Tynen, 22 Barb. (N. Y.) 137; Oakley v. Aspinwall, 3 N. Y. 565; Gildersleeve v. Board of Education, 17 Abb. Pr. (N. Y.) 210; Saratoga Co. v. Doherty, 16 How. Pr. (N. Y.) 49; First Nat. Bank v. Mt. Tabor, 52 Vt. 87; 36 Am. Rep. 734; First Nat. Bank v. Concord, 50 Vt. 257.

Where special provision is made by

ferring the power, in terms requires the presence and concurrence of all, all must be present.¹ Where there are only two, nothing can be done without the consent of both,² and where the law requires a designated number of members to constitute a board, if a less number qualify and enter upon the discharge of the duties of their offices, they are not a board and can do nothing.³

The members composing a board have no power to act as such except when together in session,⁴ and they will not be permitted to make any agreement among themselves, or with others, by

authorizing a majority to act, when all have notice of the meeting and its objects, the proceedings must show that all met and deliberated upon the subject-matter, or that those absent were duly notified of the meeting and failed to attend. And if such facts do not appear, other proceedings are void and cannot be cured by parol evidence, showing that the absent officers were duly notified and failed to attend. *Stewart v. Wallis*, 30 Barb. (N. Y.) 344; *People v. Hynds*, 30 N. Y. 470; *Marble v. Whitney*, 28 N. Y. 297; *People v. Williams*, 36 N. Y. 441.

1. *First Nat. Bank v. Mt. Tabor*, 52 Vt. 87; 36 Am. Rep. 734; *Pulaski Co. v. Lincoln*, 9 Ark. 320; *People v. Coghill*, 47 Cal. 361; *Petrie v. Doe*, 30 Miss. 698; *Powell v. Tuttle*, 3 N. Y. 396; *New York L. Ins. Co. v. Staats*, 21 Barb. (N. Y.) 570; *North Carolina R. Co. v. Sweepson*, 71 N. Car. 350, and see *People v. Walker*, 23 Barb. (N. Y.) 304.

Where the power of appointment of an officer is given by the statute to two distinct bodies, who are to assemble in separate chambers, and make separate nominations, and then to meet together, and, on disagreement, to proceed to an election by joint ballot, no election is valid unless both bodies assent to go into joint meeting for that purpose, and actually attend. *People v. Whiteside*, 23 Wend. (N. Y.) 9; 26 Wend. (N. Y.) 634.

2. *Downing v. Rugar*, 21 Wend. (N. Y.) 178; 34 Am. Dec. 223; *Gildersleeve v. Board of Education*, 17 Abb. Pr. (N. Y.) 201; *Pell v. Ulmar*, 21 Barb. (N. Y.) 500; *Cooper v. Lampeter Township*, 8 Watts (Pa.) 128.

Where, by the provisions of a statute, two are required to act, except in certain cases, the law does not presume that the case contemplated by the exception exists, where one alone can act, but the contrary. *Hancock Co. v. Eastern River Lock, etc., Co.*, 20 Me. 72.

Where, to prevent a failure of justice, it is indispensable that one should act alone, without conferring with the other, he may do so and the act will be valid. *Gildersleeve v. Board of Education*, 17 Abb. Pr. (N. Y.) 201; *Downing v. Rugar*, 21 Wend. (N. Y.) 178; 34 Am. Dec. 223.

The policy of the law is to guard against the failure of a public service, and a grant of power in the nature of a public office to several, does not become void upon the death or disability of one or more. *People v. Palmer*, 52 N. Y. 87.

3. *Schenck v. Peay*, 1 Woolw. (U. S.) 175; *Williamsburg v. Lord*, 51 Me. 599; *People v. Hynds*, 30 N. Y. 470; *Giter v. Comrs.*, 1 Bay (S. Car.) 354; 1 Am. Dec. 621.

In *Williamsburg v. Lord*, 51 Me. 600, the court by Clifford, J., said: "It appears that at the annual meeting, the town chose three selectmen and assessors. But it does not appear that one of them was ever sworn or acted as one of the assessors. The town for that year had only two assessors, one less than the law required. The two who professed to act were not the majority of the three, because there never were three chosen and qualified. Two assessors are not authorized to assess a tax when they only have been qualified."

In *Gildersleeve v. Board of Education*, 17 Abb. Pr. (N. Y.) 201, the court by Daly, F. J., said: "If the public duty is intrusted to three, and one dies or is disqualified, I doubt if the others can act alone, as in the event of division of opinion, there can be no decision. But if there is more than three remaining, the majority can decide; and if all qualified to act are notified, as was the case here, an act done by the majority of them is, in my judgment, valid."

4. *McCortle v. Bates*, 29 Ohio St. 419; 23 Am. Rep. 758; *Sioux City v. Weare*, 59 Iowa 95; *Strafford v. Welch*, 59 N. H. 46; *State v. King*, 4 Dev. &

which their public action is to be, or may be, restrained or embarrassed, or its freedom in any wise affected or impaired,¹ though action irregularly taken by a part may be confirmed at a full meeting of the board.²

d. IN WHOSE NAME EXERCISED.—(1) *By Officer*.—Public policy requires that an agent of the State should make his contracts and transact his business, not in his own name, but in the name of the State,³ and that all securities he may receive should be made payable to the State,⁴ and that all suits brought by him in his official capacity should be brought in the name of the State.⁵ All writs and process are usually required to run in the name of the State;⁶ process which does not so run, under statutory or constitutional provisions requiring it, being held to be void.⁷

B. (N. Car.) 521. And see *Haddam v. East Lyme*, 54 Conn. 34; *Stockton v. Creanor*, 45 Cal. 643.

An act performed by a board within the scope of their authority, is valid and binding, although not made at the office provided for their use. *Jefferson Co. v. Slagle*, 66 Pa. St. 202.

Where a by-law of a city prohibits the moving of buildings through the public streets, without a license granted by the mayor and aldermen, the board of aldermen cannot delegate to the mayor alone the power to grant such license. *Day v. Green*, 4 Cush. (Mass.) 433.

A city ordinance, providing that the pay of police officers shall be fixed by the mayor and aldermen, will not warrant the aldermen in denying to police officers, lawfully holding their offices, all pay whatever, without the concurrence of the mayor. *Murphy v. Webster*, 131 Mass. 482.

1. *McCortle v. Bates*, 29 Ohio St. 419; 23 Am. Dec. 758.

An agreement by one commissioner, acting without the authority of the board, to waive the objection arising from interest in the officer who summons a jury to assess damages, does not bind the county. *Merrill v. Berkshire*, 11 Pick. (Mass.) 269.

A statute requiring the appointment of a town collector *pro tempore* to be made by a writing under the hands of the selectmen, is not satisfied by a writing with the names of all written upon it by one selectman, in the absence of the others, they having agreed that the party should be appointed; and a collector thus appointed cannot recover compensation for his services in collecting the taxes. *Phelon v. Granville*, 140 Mass. 386.

2. *In re Pearsall*, 9 Abb. Pr. N. S. (N. Y.) 203.

3. *Irish v. Webster*, 5 Me. 171; *Hunter v. Field*, 20 Ohio 340.

4. *Irish v. Webster*, 5 Me. 171; *Hunter v. Field*, 20 Ohio 340.

5. *Hunter v. Field*, 20 Ohio 340; *Irish v. Webster*, 5 Me. 171; *Gilmore v. Pope*, 5 Mass. 491.

A suit by justices of the county court is, in legal effect, a suit by the county, which is a public corporation, and it is this corporation that is the party to the record. The justices have no private right in suit, and their names may be rejected as surplusage, and any one of the justices is, in such a case, a competent witness. *Ezell v. Giles Co.*, 3 Head (Tenn.) 583.

In *South Carolina*, where an action was brought for the benefit of another in the name of a public officer, who resigns pending the action, and a successor is appointed, his resignation need not be suggested on the record and his successor substituted. The practice is to prosecute the suit in the name of the incumbent, at the time the action is brought, and he is not liable for costs nor can he release the action. *Clowney v. Foot*, 1 Hill (S. Car.) 421.

6. *Ferris v. Crow*, 10 Ill. 96; *Fowler v. Watson*, 4 Mo. 27; *Little v. Little*, 5 Mo. 227; 32 Am. Dec. 317; *Gilbreath v. Kuykendall*, 1 Ark. 50; *Estill v. Baily*, 1 Ark. 131. And see *Hutchins v. Edson*, 1 N. H. 139.

In *Ferris v. Crow*, 10 Ill. 96, it was held that a fee bill answers to the meaning of writ or process in law, and has the effect of an execution, but to have such effect it must run in the name of the people of the State.

7. *Fowler v. Watson*, 4 Mo. 27; *Little v. Little*, 5 Mo. 227; 32 Am. Dec.

(2) *By Deputy*—(See also DEPUTY).¹—The act of a deputy is, in law, the act of his principal, and such act is a nullity unless done in the name of, and by the authority of, his principal;² but where the deputy is an officer known to the law whose office is recognized by statute, his acts may be certified in his own name with the addition of his proper official designation.³ And a deputy authorized by law to execute the duties of the office during the sickness or necessary absence of the principal officer may act in his own name when the circumstances exist which authorize him to act at all.⁴

317: *Estill v. Bailey*, 1 Ark. 131; *Gilbreath v. Kuykendall*, 1 Ark. 50, *Ferris v. Crow*, 10 Ill. 96.

In *Little v. Little*, 5 Mo. 227; 32 Am. Dec. 317, it was held that suit instituted by process that does not run in the name of the State, may be dismissed upon motion of the defendant, though prior to the motion he has appeared in the action for other purposes, and though the statute authorizes suits to be instituted, either by the voluntary appearance and agreement of the parties, or by process. But in *Pixley v. Winchell*, 7 Cow. (N. Y.) 366; 17 Am. Dec. 525, it was held that the appearance of the defendant will not be set aside, though the process by which the action was instituted is absolutely void, for by his appearance he is regularly in court, whether there was any process or not.

In *Michigan* the warrant of a supervisor to a township treasurer, authorizing him to collect taxes, is not void by reason of not being in the name of the people of the State of Michigan. The constitutional provision in respect to process applies only to process issued by courts or some judicial officer. *Tweed v. Metcalf*, 4 Mich. 579; *Wisner v. Davenport*, 5 Mich. 501.

1. Vol. 5, p. 623.

2. *Joyce v. Joyce*, 5 Cal. 449; *Lewes v. Thompson*, 3 Cal. 266; *Rowley v. Howard*, 23 Cal. 401; *Glencoe v. Owen*, 78 Ill. 382; *Ryan v. Eads*, 1 Ill. 217; *Ditch v. Edwards*, 2 Ill. 127; 26 Am. Dec. 414; *Evans v. Wilder*, 7 Mo. 359; *Simonds v. Catlin*, 2 Cal. (N. Y.) 61; *Ferguson v. Lee*, 9 Wend. (N. Y.) 258; *Anderson v. Brown*, 9 Ohio 151; *Jordan v. Terry*, 33 Tex. 680; *Arnold v. Scott*, 39 Tex. 378; *Graves v. Robertson*, 22 Tex. 130.

Whatever official act is done by a deputy should be done in the name of his principal and not in the name of the deputy. The authority given by

law to a ministerial officer is given to the incumbent of the office. Authority is not given to the deputy, but to the principal, and is exercised by the principal, either by himself or his deputy. *Talbot v. Hooser*, 12 Bush (Ky.) 408.

Where a summons is served by a special deputy, however, by appointment indorsed thereon, the return which is to be made on their oath, need not be made in the name of the sheriff. *Glencoe v. Owen*, 78 Ill. 382.

3. *Miller v. Alexander*, 13 Tex. 497; 45 Am. Dec. 73; *Towns v. Harris*, 13 Tex. 507; *Westbrook v. Miller*, 56 Mich. 148; *People v. Johr*, 22 Mich. 461; *Wheeler v. Wilkins*, 19 Mich. 78; *Fells v. Barbour*, 58 Mich. 49; *De Villers v. Prioleau*, 2 McCord (S. Car.) 144; *City Council v. Price*, 1 Nott & M. (S. Car.) 300; *Eastman v. Curtis*, 4 Vt. 616.

Under the *Michigan* statute requiring bail bonds for appearance to be executed to the officer making the arrest, a bond running to the undersheriff when that officer made the orders, is not thereby rendered invalid. *Wilcox v. Ismon*, 34 Mich. 268.

In *Westbrook v. Miller*, 56 Mich. 148, the court, by Cooley, J., said: "If the question were entirely new and were presented as a question as to the most proper and correct method of executing the duty by the deputy, we should say unhesitatingly that the proper method would be for the deputy to perform the act in the name of his principal. But this is matter of form rather than that of substance, and the rights neither of the State nor of any individual are greater or less because of one form being adopted rather than the other."

4. *Westbrook v. Miller*, 56 Mich. 148; *Calendar v. Olcott*, 1 Mich. 344; *Drennan v. Herzog*, 56 Mich. 467;

3. Disqualification to Act—*a.* OF MINISTERIAL OFFICERS.—Ministerial officers are incapable of acting officially, where by certain relations to either party an undue partiality or interest may be apprehended.¹ No officer who is interested in a suit can serve any process appertaining to it from the commencement to the conclusion.² But to disqualify an officer to execute a writ, he must have been a party to the action of which the writ was a

Allen v. Hazen, 26 Mich. 142; *People v. Sutherland*, 41 Mich. 177.

Under the statute of *Illinois*, upon the death of a sheriff, the authority of a deputy continues until a successor is qualified. If the sheriff is dead, then the deputy has direct authority to serve a summons from the statute, and not a derivative authority from the sheriff; and having no principal in whose name he could return the process, he must necessarily sign the return in his own name, and in the character which the statute has given him. *Timmerman v. Phelps*, 27 Ill. 496.

Under the *New York* statute, on the death of a sheriff, the powers of the under-sheriff to act in the name of the sheriff survive, for the benefit of the parties interested in the execution of the process, delivered to the sheriff before his decease; and he may proceed to act as under-sheriff in the name of the deceased sheriff, by virtue of the provisions of the statute. *Ward v. Storey*, 18 Johns. (N. Y.) 120.

1. *Gage v. Graffam*, 11 Mass. 181; *Edwards v. Estell*, 48 Cal. 194; *Stevenson v. Bay City*, 26 Mich. 44; *Clute v. Barron*, 2 Mich. 192; *Dwight v. Blackmar*, 2 Mich. 330; 57 Am. Dec. 130.

The law wisely foreseeing that the minister of justice should be freed as far as practicable from all the improper bias which may result from self-interest, has declared that no man shall be his own officer, and that no one shall in his own person, and by his own hand, do himself right by legal process. *Singletary v. Carter*, 1 Bailey (S. Car.) 467; 21 Am. Dec. 480.

Public policy requires that officers chosen to locate and survey public lands should not be permitted to speculate in them, or to acquire interest in them which would present to such officers the temptation to take advantage of the information which their official positions enabled them to acquire, to the detriment of holders of certificates generally. A contract made by a deputy surveyor, with the owner of the land certificate therefor, to locate the

same and pay all expenses and obtain a patent, is void, and the fact that there was something to be done after the expiration of his term of office does not entitle him to have the contract enforced. *Wills v. Abbé*, 27 Tex. 202; and see *Flanikin v. Fokes*, 15 Tex. 180; *De Leon v. White*, 9 Tex. 598.

Objection when Taken.—It is too late to object to a commissioner, appointed by special statute to award damages for property taken in laying out a highway, upon the ground of personal interest, upon a motion to confirm a report of such commissioners. Such objection is maintainable only on the hearing of the application for their appointment, and from an omission to make it at that time a consent or a waiver of the objection will be inferred. *In re Southern Boulevard*, 3 Abb. Pr. N. S. (N. Y.) 447.

2. *Singletary v. Carter*, 1 Bailey (S. Car.) 467; 21 Am. Dec. 480; *Boykin v. Edwards*, 21 Ala. 261; *Woods v. Gilson*, 17 Ill. 218; *Filkins v. O'Sullivan*, 79 Ill. 524; *Chambers v. Thomas*, 3 A. K. Marsh. (Ky.) 536; *Morton v. Crane*, 39 Mich. 526.

Officers are not to serve writs upon themselves. The sheriff and his deputies constitute, in legal analogy, one office and one officer, but the deputy keeper of a jail is not in the same relation to the office of sheriff. *Gage v. Graffam*, 11 Mass. 181.

A person deputized by the sheriff to serve a writ, bearing the same name as that of one of the plaintiff's in an action, and, nothing appearing to the contrary, will be presumed to be the party plaintiff himself from identity of names. *Filkins v. O'Sullivan*, 79 Ill. 524; *Brown v. Metz*, 33 Ill. 339; 85 Am. Dec. 277.

In *New York* it was formerly held that an officer who is plaintiff in an action might serve his own writ. *Bennet v. Fuller*, 4 Johns. (N. Y.) 486; *Tuttle v. Hunt*, 2 Cow. (N. Y.) 436; *Putnam v. Man*, 3 Wend. (N. Y.) 202; 20 Am. Dec. 686; *Mills v. Young*, 23 Wend. (N. Y.) 314. But that he could not

consequence, or he must have had a direct interest in, or right to, the moneys to be made by its execution.¹ And where no provision has been made for the discharge of the duty in which he is interested, by any other officer, the interested officer may discharge it.²

b. OF JUDICIAL OFFICERS.—See JUDGE.³

c. OF GOVERNMENTAL OR POLITICAL OFFICERS.—Members of a legislative body or municipal board are disqualified to vote on propositions in which they have a direct pecuniary interest adverse to the State or municipality which they represent.⁴

4. Ratification of Authority.—(See also AGENCY⁵).—The doctrine of estoppel to deny the authority of an agent arising from taking and holding the benefits derived from its exercise applies as well to the public and to public corporations as to private corporations and individuals,⁶ the subsequent ratification of an

execute final process in his own favor. *Mills v. Young*, 23 Wend. (N. Y.) 314. By the *New York Code of Civ. Proc.*, § 425, however, it is provided that a "summons may be served by any person other than the party to the action, except where it is otherwise specially prescribed by law."

In *Parmalee v. Loomis*, 24 Mich. 242, it was held that service by an officer of a summons in his own favor was an irregularity only.

In *Gage v. Graffam*, 11 Mass. 181, it was held that process served by a deputy sheriff, where another deputy of the same sheriff is a party, is not for that cause void, but that on motion or plea, the proceedings will be set aside, though if the defendant appears and answers, the irregularity is waived.

1. *Woods v. Gilson*, 17 Ill. 218; *Chambers v. Thomas*, 3 A. K. Marsh. (Ky.) 536; *People v. Wheeler*, 21 N. Y. 82; *People v. Kingston*, 101 N. Y. 82; *Foot v. Stiles*, 57 N. Y. 399.

The sheriff can execute a writ against his deputy, but the deputy cannot execute one against the sheriff. The sheriff acts in his own name and by virtue of his official authority, while the deputy acts in the name of the sheriff and by virtue of the authority from him derived. *Ford v. Dyer*, 26 Miss. 243.

A sale of canal land by the treasurer of the board of canal commissioners, whose duty it was to sell the same for a price fixed by law made to himself, is not void and will pass title if not avoided by the State. The price provided by law being paid, the State is not injured. *People v. Force*, 100 Ill. 549.

A sheriff who is a member of a banking corporation may serve process thereon, because not being personally liable, he is not a party in the action. *Adams v. Wiscasset Bank*, 1 Me. 361; 10 Am. Dec. 88.

2. *Trimmier v. Winsmith*, 23 S. Car. 449.

In *Evans v. Etheridge*, 96 N. Car. 42, it was held that in the absence of statutory regulations, a party is only prohibited from acting in his own case, when he exercises some judicial as distinguished from a ministerial office, and that a clerk of the superior court was authorized by law to issue a warrant of attachment in an action in which he is plaintiff; and that it had always been the practice in *North Carolina* for clerks to issue process either for or against themselves.

Though after the commencement of an action against a city, plaintiff's attorney becomes mayor, he may still appear for plaintiff on the trial. *McKeigue v. Janesville*, 68 Wis. 50.

3. Vol. 12, p. 2.

4. *Oconto Co. v. Hall*, 47 Wis. 208.

This rule is founded upon principles of national justice and sound public policy, and perhaps the only recognized exception to it is where the body or board is permitted to fix the compensation of its members. This exception goes upon the necessity of the case and the fact that all of the members are equally interested. *Oconto Co. v. Hall*, 47 Wis. 208.

5. Vol. 1, p. 331.

6. *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Ross v. Madison*, 1 Ind. 281; *Peterson v. Mayor*, etc., of

unauthorized act by a superior officer or governing body within his or its powers and according to the method pointed out by law binding the political division or public corporation for which the act was done as effectually as an employment in advance would have done.¹ This may be effected when the act is not

N. Y., 17 N. Y. 449; *Hodges v. Buffalo*, 2 Den. (N. Y.) 110; *State v. Buffalo*, 2 Hill (N. Y.) 434; *Kiley v. Forsee*, 57 Mo. 390; *Mills v. Gleason*, 11 Wis. 470; 78 Am. Dec. 721; *Marshall Co. v. Schenck*, 5 Wall. (U. S.) 772; *Clark v. Washington*, 12 Wheat. (U. S.) 40; and see *Backman v. Charlestown*, 42 N. H. 125; *Delafield v. Illinois*, 26 Wend. (N. Y.) 193.

A ratification like the ratification of the act of a private agent, is equivalent to previous authority. *McCracken v. San Francisco*, 16 Cal. 591; *Marshall Co. v. Schenck*, 5 Wall. (U. S.) 772; *Clarke v. Lyon Co.*, 8 Nev. 181; *McMillen v. Boyles*, 6 Iowa 304; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; and is retroactive, relating back to the time of the performance of the act in question. *Day Land, etc., Co. v. State*, 68 Tex. 521. And to be effective, a ratification must be made with full knowledge of all the facts relating to the act ratified. *McCracken v. San Francisco*, 16 Cal. 591; *Clark v. Lyon Co.*, 8 Nev. 181; *Dickinson v. Conway*, 12 Allen (Mass.) 487; *Combs v. Scott*, 12 Gray (Mass.) 493; and see *Hasbrouck v. Milwaukee*, 21 Wis. 219; *Wilhelm v. Cedar Co.*, 50 Iowa 254; *Wadleigh v. Sutton*, 6 N. H. 15; *Mayor, etc., of Baltimore v. Reynolds*, 20 Md. 1; 83 Am. Dec. 535.

Ratification of an act of an agent, which was unauthorized, cannot be held valid and binding, where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by the use of diligence on his part to ascertain them. *Combs v. Scott*, 12 Allen (Mass.) 493.

A ratification by a party of an act done in his behalf by another without authority, if made under a misapprehension of the full scope of the act, is voidable to the extent of the mistake, and the party can be relieved *pro tanto*. *Miller v. Board of Education*, 44 Cal. 166.

1. *People v. Swift*, 31 Cal. 26; *Mc-*

Cracken v. San Francisco, 16 Cal. 592; *Zottman v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Abbott v. Third School Dist.*, 7 Me. 118; *Fisher v. School Dist. No. 17*, 4 Cush. (Mass.) 494; *Arlington v. Peirce*, 122 Mass. 270; *Sault Ste. Marie v. Van Dusan*, 40 Mich. 429; *Green v. Cape May*, 41 N. J. L. 45; *Brown v. Mayor, etc., of N. Y.*, 63 N. Y. 239; *In re Van Antwerp*, 56 N. Y. 261; *Clarke v. Lyon Co.*, 8 Nev. 181; *Alleghany City v. McClurkan*, 14 Pa. St. 81; *State v. Torinus*, 26 Minn. 1; 37 Am. Rep. 395; *Dubuque Female College v. Dubuque*, 13 Iowa 555; *Hasbrouck v. Milwaukee*, 13 Wis. 37; 80 Am. Dec. 718; *Day Land, etc., Co. v. State*, 68 Tex. 526.

A ratification by a competent body or officer necessarily involves an approval of everything essential to give validity to the act ratified, including as a primary element of regularity the right of the public agent to assume the agency. *People v. Lothrop*, 24 Mich. 235.

A ratification must be proved. *School Dist. No. 6 v. Aetna Ins. Co.*, 62 Me. 330; *Combs v. Scott*, 12 Allen (Mass.) 493; *Wilhelm v. Cedar Co.*, 50 Iowa 254. Though it will be presumed for the purpose of justice that the authority exercised by public officers was properly delegated to them, and that contracts made by them without authority have been ratified. *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; and see *Marshall Co. v. Schenck*, 5 Wall. (U. S.) 772.

In *State v. Tappan*, 29 Wis. 664; 9 Am. Rep. 622, it was held that where a moral obligation exists to perform a contract not binding because it was irregularly entered into, slight evidence of ratification is sufficient. See also *Hampshire Co. v. Franklin Co.*, 16 Mass. 76; *Hasbrouck v. Milwaukee*, 13 Wis. 37; 80 Am. Dec. 718.

Where there has been a *bona fide* performance of a contract of which the city has had the benefit, there is a strong equity in favor of the contractor seeking his pay, entitling him to the benefit of a ratification, even of a void

ultra vires by acts of recognition and acquiescence, or by acts inconsistent with repudiation or disapproval as well as by express consent,¹ a receipt of the avails of an act being implicit evidence of authority to perform it or assent to its performance.² But a public corporation cannot, by a subsequent ratification, make good an act of its agent which it could not have directly empowered him to do,³ and an officer performing an unauthorized act cannot himself ratify it, either expressly or by any act signifying

contract upon slight evidence, if the ratifying body has general power over the subject of the contract. *Moore v. Mayor, etc.*, of N. Y., 73 N. Y. 238; 29 Am. Rep. 134.

1. *Taymouth v. Koehler*, 35 Mich. 22; *Connett v. Chicago*, 114 Ill. 233; *Keithsburg v. Frick*, 34 Ill. 405; *San Francisco Ins. Co. v. San Francisco*, 9 Cal. 453; *Mayor, etc.*, of Detroit *v. Jackson*, 1 Dougl. (Mich.) 106; *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 225; 41 Am. Dec. 549; *Abbott v. Third School Dist.*, 7 Me. 118; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Arlington v. Peirce*, 122 Mass. 270; *Stimpson v. Malden*, 109 Mass. 313; *Parks v. Wal-
tham*, 120 Mass. 160; *Hayden v. Madison*, 7 Me. 76; *Knowlton v. Plantation No. 4*, 14 Me. 25; *Hasbrouck v. Milwaukee*, 21 Wis. 219; *Marshall Co. v. Schenck*, 5 Wall. (U. S.) 772; *Bill v. Denver*, 29 Fed. Rep. 344.

Acts of acquiescence do not, as is sometimes carelessly said, ratify the unauthorized contract, but in the more guarded and philosophical language of the better authorities, they authorize judges and juries to presume consent or ratification. Certain conduct according to the usual experience of human nature, or of business, ordinarily accompanies or indicates consent or approval. *Delafield v. Illinois*, 26 Wend. (N. Y.) 192; *Mayor, etc.*, of Baltimore *v. Reynolds*, 20 Md. 1.

Where the commissioners' court is authorized to fix the allowance of the county treasurer within certain prescribed limits, and such court has for a long time allowed the same percentage, a failure to make an order regulating the allowance in a particular case raises an agreement by implication on the part of the county to continue to pay the same amount until it shall notify the treasurer to the contrary. *Bastrop Co. v. Hearn*, 70 Tex. 563.

The recovery of money obtained

through a transgression of power, does not affirm but denies the existence of the power. *Sault Ste. Marie v. Van Dusen*, 40 Mich. 429.

Where plaintiff acted as assistant janitor in a county courthouse without receiving any appointment, but thereafter the county supervisors passed a resolution recognizing the performance of such services and appointing him assistant janitor, the appointment to date back to the time when he began to perform the duties of such position, he can recover the reasonable value of his services rendered before his appointment. *Conway v. Mayor, etc.*, of N. Y., 8 Daly (N. Y.) 306.

2. *Alleghany City v. McClurkan*, 14 Pa. St. 81; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Worden v. New Bedford*, 131 Mass. 23; 41 Am. Rep. 185; *Lancaster v. Armstrong*, 56 Mo. 298; *Ruggles v. Washington Co.*, 3 Mo. 496; *Backman v. Charlestown*, 42 N. H. 125; *Moore v. Mayor, etc.*, of N. Y., 73 N. Y. 238; 29 Am. Rep. 134; *Mills v. Gleason*, 11 Wis. 470; 78 Am. Dec. 721.

Where a city brings action upon notes received by one of its officers without authority, its action is a ratification of the receipt of the notes. *Buffalo v. Bettinger*, 76 N. Y. 393.

Where a builder was employed to prepare plans and specifications, by a committee of a common council which had no power to employ him, it was held that the appropriation and use of the plans and specifications by the common council amounted to a ratification of the employment by the committee. *Peterson v. Mayor, etc.*, of N. Y., 17 N. Y. 449.

3. *Hodges v. Buffalo*, 2 Den. (N. Y.) 110; *Smith v. Newburgh*, 77 N. Y. 130; *Peterson v. Mayor, etc.*, of N. Y., 17 N. Y. 449; *Sault Ste. Marie v. Van Dusen*, 40 Mich. 429; *Reilly v. Philadelphia*, 60 Pa. St. 467; *Clark v. Janesville*, 13 Wis. 418.

his assent or acquiescence.¹ When officers fail to pursue the strict requirements of a statutory enactment under which they are acting, no subsequent action on their part can give validity to their acts.² Nothing short of an express act of the legislature can validate an act done in contravention of statutory law.³ And an act which is totally void, not for want of any formality or regularity, or for mistake as to time or otherwise, but for want of power under the law, cannot be ratified even by the legislature.⁴ A statute is not unconstitutional, however,

1. *State v. Hays*, 52 Mo. 578; *State v. Bank of Missouri*, 45 Mo. 528; *McCracken v. San Francisco*, 10 Cal. 624; *School Dist. No. 6 v. Aetna Ins. Co.*, 62 Me. 330; *Pratt v. Swanton*, 15 Vt. 147; *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676.

2. *Smith v. Newburgh*, 77 N. Y. 130; *Brady v. Mayor, etc., of N. Y.*, 20 N. Y. 312; *Cowen v. West Troy*, 43 Barb. (N. Y.) 48; *Peterson v. Mayor, etc., of N. Y.*, 17 N. Y. 449; *Brown v. Mayor, etc., of N. Y.*, 63 N. Y. 239; *Grogan v. San Francisco*, 18 Cal. 590; *Pimental v. San Francisco*, 21 Cal. 351; *Jefferson Co. v. Arrighi*, 54 Miss. 668; *Sault Ste. Marie v. Van Dusen*, 40 Mich. 429; *Reilly v. Philadelphia*, 60 Pa. St. 467; *Day Land, etc., Co. v. State*, 68 Tex. 526; *Bryan v. Page*, 51 Tex. 532; 32 Am. Rep. 637; *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676.

Where a charter or statute has committed a class of acts to particular officers or agents other than the general governing body, or where it prescribes certain formalities as conditions to the performance of any particular act, the proper functionaries must act, and the designated forms must be observed, and generally no act of recognition can supply a defect in these respects. *Peterson v. Mayor, etc. of N. Y.*, 17 N. Y. 449.

3. *State v. Bank of Missouri*, 45 Mo. 528; *People v. Phoenix Bank*, 24 Wend. (N. Y.) 431; 35 Am. Dec. 634; *Brown v. Mayor, etc., of N. Y.*, 63 N. Y. 239. And see *In re Van Antwerp*, 56 N. Y. 261; *Day Land, etc., Co. v. State*, 68 Tex. 526.

Where a legislature authorizes things to be done, a subsequent full legislative recognition of the legality of the thing done, and taking further action in pursuance of it, cures all illegalities in the performance of the act. *Campbell v. Kenocha*, 5 Wall. (U. S.) 194.

Where a State, by a legislative act,

authorized a loan upon particular terms, no officer of the State has power to ratify a loan made upon any other than the terms allowed by the statute. *State v. Delafield*, 8 Paige (N. Y.) 527.

4. *Shawnee Co. v. Carter*, 2 Kan. 109; *Atchison, etc., R. Co. v. Maquiklin*, 12 Kan. 301; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Marshall v. Silliman*, 61 Ill. 218; *Barnes v. Lacon*, 84 Ill. 461; *Menges v. Deutler*, 33 Pa. St. 495; 75 Am. Dec. 616; *Richards v. Rote*, 68 Pa. St. 255; *Palmer v. Howard Co.*, 45 Iowa 61; *Seebert v. Linton*, 5 W. Va. 57; *Hasbrouck v. Milwaukee*, 13 Wis. 37; 80 Am. Dec. 718. And see *Grogan v. San Francisco*, 18 Cal. 590; *McCracken v. San Francisco*, 16 Cal. 616; *Pimental v. San Francisco*, 21 Cal. 351; *Day Land, etc., Co. v. State*, 68 Tex. 526; *The Floyd Acceptances*, 7 Wall. (U. S.) 666; *McMillen v. Boyles*, 6 Iowa 304; *McManning v. Farrar*, 46 Mo. 376; *Dale v. Medcalf*, 9 Pa. St. 108; *Silliman v. Cummins*, 13 Ohio 116; *Horton v. Thompson*, 71 N. Y. 513.

The legislature cannot make good retrospectively acts which it previously had no power to commit. *Kimball v. Rosendale*, 42 Wis. 407; 24 Am. Rep. 421.

The legislature cannot make a law for the particular case affecting and changing rights and imposing burdens contrary to previously established law, so that the act if valid, has all the force of a judgment, though in violation of the principles upon which judgments are rendered. *Shawnee Co. v. Carter*, 2 Kan. 115.

Ratification is inoperative, if the party attempted to be charged was not competent to make the contract in question when the same was made, nor when the supposed acts of ratification were performed. Or if the contract was illegal, immoral, or against public policy. *Marshall Co. v. Schenck*, 5 Wall. (U. S.) 772.

because it gives validity to an act irregularly done, if it could have authorized it to be done in the irregular way in the first instance.¹

The act of ratification must be the act of the sovereign power, or of its authorized agents,² acting in the manner prescribed by

Confirmation may make good a voidable or defeasible estate, but cannot operate upon or aid an estate which is void in law, but only confirms its infirmity. *Branham v. Mayor*, etc., of San José, 24 Cal. 585.

1. *Lockhart v. Troy*, 48 Ala. 579; *State v. Torinus*, 26 Minn. 1; 37 Am. Rep. 393; *San Francisco v. Certain Real Estate*, 42 Cal. 517; *Creighton v. San Francisco*, 42 Cal. 450; *Bass v. Columbus*, 30 Ga. 845; *Schenley v. Com.*, 36 Pa. St. 29; 78 Am. Dec. 359; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Emporia v. Norton*, 13 Kan. 569; *Bartholomew Co. v. Bright*, 18 Ind. 93; *Maxey v. Wise*, 25 Ind. 1; *Johnson v. Campbell*, 49 Ill. 316; *McMillen v. Boyles*, 6 Iowa 304; *People v. Mitchel*, 35 N. Y. 551; *Sharpless v. Mayor*, etc., of Philadelphia, 21 Pa. St. 147; 59 Am. Dec. 759; *Fisk v. Kenosha*, 26 Wis. 33; *Knapp v. Grant*, 27 Wis. 147; *Blount v. Janesville*, 31 Wis. 648; *Single v. Marathon Co.*, 38 Wis. 363; *Kimball v. Rosendale*, 42 Wis. 407; 24 Am. Rep. 421; *Kunkle v. Franklin*, 13 Minn. 127; 97 Am. Dec. 226; and see *First Municipality v. Orleans Theatre Co.*, 2 Rob. (La.) 209; *Bartholomew v. Harwinton*, 33 Conn. 408; *Stuart v. Warren*, 37 Conn. 225; *Beach v. Walker*, 6 Conn. 190; *Booth v. Woodbury*, 32 Conn. 129; *Weister v. Hade*, 52 Pa. St. 474; *Thomson v. Lee Co.*, 3 Wall. (U. S.) 327; *Mattingly v. District of Columbia*, 97 U. S. 687. But see *Mills v. Charleston*, 29 Wis. 400; 9 Am. Rep. 578; *Hasbrouck v. Milwaukee*, 13 Wis. 37; 80 Am. Dec. 718; *Denny v. Mattoon*, 2 Allen (Mass.) 361; 79 Am. Dec. 784; *Grover v. Pembroke*, 11 Allen (Mass.) 90; *Bridgewater v. Elymouth*, 97 Mass. 382; *Walter v. Bacon*, 8 Mass. 468; *Winchester v. Corinna*, 55 Me. 9.

A school district by a legal meeting may ratify and confirm proceedings of previous meetings which were not strictly legal. *Jordan v. School Dist. No. 2*, 38 Me. 164; *Fisher v. School Dist. No. 17*, 4 Cush. (Mass.) 494.

Laws to obviate mistakes and irregularities in proceedings of municipal corporations, when they do not impair any contract or injuriously affect the rights of third persons, are within the

competency of legislative authority. *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Truchelut v. Charleston*, 1 Nott & M. (S. Car.) 227; *Frederick v. Augusta*, 5 Ga. 561; *Winn v. Macon*, 21 Ga. 275; *Atchison v. Butcher*, 3 Kan. 104; *Allison v. Louisville*, etc., R. Co., 9 Bush (Ky.) 247; *New Orleans v. Poutz*, 14 La. Ann. 866.

The legislature may, in strict conformity with its constitutional powers and duties, recognize a moral obligation as the sole basis for the imposition of a tax, and it may authorize a municipal corporation to pay claims invalid in law, but equitable and just in themselves. *People v. Burr*, 13 Cal. 343; *Beals v. Amador Co.*, 35 Cal. 624; *Brewster v. Syracuse*, 19 N. Y. 116.

If an act of the legislature appears upon its face to be an encroachment on the rights of any person, but would nevertheless be valid if passed, with the consent of such person, the court is bound to presume that such consent was given. *In re Wellington*, 16 Pick. (Mass.) 95; *McMillen v. Boyles*, 6 Iowa 304.

In *Kimball v. Rosendale*, 42 Wis. 407; 24 Am. Rep. 421, the court by *Ryan, C. J.*, said: "Perhaps the true limit of the curative power of the legislature as gathered from all authorities and sanctioned by principle, is, or ought to be, that it can reach things voidable only not void. Defects of execution only, not of authority or jurisdiction, and is confined to defective proceedings under previous legislative authority."

2. *Wilson v. School Dist. No. 4*, 32 N. H. 118; *School Dist. No. 6 v. Aetna Ins. Co.*, 62 Me. 330; *State v. Torinus*, 26 Minn. 1; 37 Am. Rep. 393; *State v. Hays*, 52 Mo. 578; *McMillen v. Boyles*, 6 Iowa 304; *Branham v. Mayor*, etc., of San José, 24 Cal. 585.

The legislature has power to ratify a contract entered into by a municipal corporation for a public purpose which is *ultra vires*. Municipal corporations are agencies of the State, through which the sovereign power acts in matters of local concern. It may confer upon them power to enter into contracts, and may annex such limitations

law,¹ the unofficial conduct of individuals having no controlling effect,² the test of the right to ratify the unauthorized act of a public agent being whether or not the officer by whom the ratification is claimed could have conferred on the agent the power to do the act in question.³ An officer who could not have originally performed the act cannot ratify it.⁴

and conditions to its exercise as in its discretion it deems proper for the protection of the public interest, and the right to limit involves the power to dispense with limitations. *Brown v. Mayor, etc., of N. Y.*, 63 N. Y. 239.

1. *Wilson v. School Dist. No. 4*, 32 N. H. 118; *Argenti v. San Francisco*, 16 Cal. 255; *School Dist. No. 6 v. Aetna Ins. Co.*, 62 Me. 330; *Chamberlain v. Dover*, 13 Me. 466; 29 Am. Dec. 517; *Delafield v. Illinois*, 26 Wend. (N. Y.) 193.

Where the authority could originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. *McCracken v. San Francisco*, 16 Cal. 591.

After an authority to issue bonds has been ratified, and the authority has been executed, the stock subscribed and the bonds issued and in the hands of innocent holders, it is too late, even in a direct proceeding, to call the power in question, much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in a collateral way. *Marshall Co. v. Schenck*, 5 Wall. (U. S.) 772; and see *Knox Co. v. Aspinwall*, 21 How. (U. S.) 544; *Bissell v. Jeffersonville*, 24 How. (U. S.) 299.

2. *School Dist., No. 6 v. Aetna Ins. Co.*, 62 Me. 330; *Davis v. School Dist. No. 2*, 24 Me. 349; *Lane v. Fourth School Dist.*, 10 Met. (Mass.) 462; *Kingman v. School Dist. No. 13*, 2 Cush. (Mass.) 426; *Taft v. Montague*, 14 Mass. 281; 7 Am. Dec. 215; *Wilson v. School Dist. No. 4*, 32 N. H. 118; *Keyser v. District No. 8*, 35 N. H. 477; *Taymouth v. Koehler*, 35 Mich. 22; *Chaplin v. Hill*, 24 Vt. 528; *Pratt v. Swanton*, 15 Vt. 147.

The use of a school building newly erected, alone could give no evidence of acceptance; accompanied by silence and the absence of complaint, however, where to complain would be natural and suitable, or by any circumstances indicating acquiescence, it would be evidence. *Wilson v. School Dist. No. 4*, 32 N. H. 188; and see *Davis v. School Dist. No. 2*, 24 Me. 349.

Where selectmen have applied the money of the town to pay their expenses in defending against a criminal prosecution brought against them for alleged official misconduct, a subsequent vote of the town to ratify the application of the money will not be valid against a voter and taxpayer of the town who has not assented to it. *Gates v. Hancock*, 45 N. H. 528.

The acceptance and occupancy of a public building by a county will not enable the builder to recover of the county an amount in excess of that authorized by the vote, caused by the changes and extension of the original plan. *Reichard v. Warren Co.*, 31 Iowa 381.

3. *Richardson v. Crandall*, 47 Barb. (N. Y.) 335; *Delafield v. Illinois*, 2 Hill (N. Y.) 159; *Brown v. Mayor, etc., of N. Y.*, 63 N. Y. 239; *McCracken v. San Francisco*, 16 Cal. 591.

The action of a city in authorizing and employing its solicitor to appear and defend an action brought against a police officer, for an assault and battery committed by him, does not make the city liable to pay damages for assault and battery. *Buttrick v. Lowell*, 1 Allen (Mass.) 172.

4. *Delafield v. Illinois*, 2 Hill (N. Y.) 159; *Horton v. Thompson*, 71 N. Y. 513; *Brady v. Mayor, etc., of N. Y.*, 20 N. Y. 312; *Michigan v. Phoenix Bank*, 33 N. Y. 9; *People v. Flagg*, 17 N. Y. 589; *State v. Bank of Missouri*, 45 Mo. 528; *Jefferson Co. v. Arrighi*, 54 Miss. 668; *Nash v. St. Paul*, 8 Minn. 181; *State v. Torinus*, 26 Minn. 1; 37 Am. Rep. 393; *Hague v. Philadelphia*, 48 Pa. St. 528; *Zottman v. San Francisco*, 20 Cal. 105; 81 Am. Dec. 96; *McCracken v. San Francisco*, 16 Cal. 591; *Clarke v. Lyon Co.*, 8 Nev. 181; *Connett v. Chicago*, 114 Ill. 233; *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676.

A ratification by one having the power to do the act ratified at the time it was done, but who had parted with such power before attempting to ratify is invalid. *McCracken v. San Francisco*, 16 Cal. 591.

The presumption of ratification from non-action of a public corporation is less readily inferable than in case of individuals who can more readily act.¹ If the State acts at the next regular session of its general assembly or other duly authorized body it is sufficient.² And it has been held that the State ought not to be concluded by the mere non-action of one of its officers.³

XI. DUTIES OF PUBLIC OFFICERS.—Where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty,⁴ whether the phraseology of the statute be peremptory or merely permissive;⁵

A contract made by a school corporation before it has a legal existence may be ratified and adopted, however, after it is incorporated. *Dubuque Female College v. Dubuque*, 13 Iowa 555.

1. *School District No. 6 v. Aetna Ins. Co.*, 62 Me. 330; *Mayor, etc., of Baltimore v. Reynolds*, 20 Md. 1; 83 Am. Dec. 535; *State v. Bank of Missouri*, 45 Mo. 528; *Delafield v. Illinois*, 26 Wend. (N. Y.) 192. And see *Dickinson v. Conway*, 12 Allen (Mass.) 487.

Where a State engages in trade or makes contracts, it must, for most purposes, be regarded in the same light as an individual. *Delafield v. Illinois*, 2 Hill (N. Y.) 159.

Ratification of a contract for compensation with an agent for the collection of taxes not collectible by the county treasurer made by the county treasurer and county attorney, cannot be inferred from the fact that the treasurer reported it to the board who acquiesced therein. *Wilhelm v. Cedar Co.*, 50 Iowa 254.

Municipal corporations are not principals but are themselves agents, answerable to their constituents, and are not to be presumed to recognize and incidentally ratify and confirm the acts of other officers done beyond the scope of their authority. *Mayor, etc., of Baltimore v. Reynolds*, 20 Md. 1; 83 Am. Dec. 535.

2. *Delafield v. Illinois*, 2 Hill (N. Y.) 159; and see *State v. Torinus*, 26 Minn. 1; 37 Am. Rep. 393.

In *Delafield v. Illinois*, 26 Wend. (N. Y.) 92, it was held that if the State acted in the manner deemed most prudent, in order to rescind a contract, and prevent loss while it avoided any unqualified disclaimer of the debt in honest hands, this is all that could be expected, and all that could have been

done consistently with a just regard for the honor and faith of the State.

3. *Lake Shore, etc., R. Co. v. People*, 46 Mich. 193; *Attorney-Gen'l v. St. Clair Co.*, 30 Mich. 388; *Detroit v. Weber*, 26 Mich. 284; *People v. Columbia Co.*, 10 Wend. (N. Y.) 363.

Effect of Ratification.—Where a municipal corporation approves and ratifies the illegal and unauthorized action of its agents, and afterwards, when sued by a third person, pleads such action and its results as a ground of defense, it is thereby estopped from subsequently pursuing the agent on account of such action. *New Orleans v. Southern Bank*, 31 La. Ann. 560.

In *Richardson v. Crandall*, 47 Barb. (N. Y.) 335, it was held that a ratification of an unauthorized act of a public officer by the principal, will not relieve him from liability for the act to the injured party.

4. *Mayor, etc., of N. Y. v. Furze*, 3 Hill (N. Y.) 612; *Smith v. State*, 1 Kan. 365; *Newburgh Turnpike Road Co. v. Miller*, 5 Johns. Ch. (N. Y.) 101; 9 Am. Dec. 274; and see *Logansport v. Wright*, 25 Ind. 512; *Cutter v. Howard*, 9 Wis. 309.

Where any person has a right to demand the exercise of a public function, and there is an officer or set of officers authorized to exercise that function, there the right and the authority give rise to the duty. *Carr v. Northern Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342.

Where the law makes it the duty of a county auditor at a certain time to draw his warrant on the county treasurer, it is his duty to do it without waiting for a request from the person entitled to it. *Wilson v. Neal*, 23 Fed. Rep. 129.

6. Where the statute directs the doing of a thing for the sake of justice or the public good, the word "may" is

but where the authority is essentially discretionary, no legal duty is imposed.¹ So, public offices are held subject to any change or increase of duties that may be imposed by the sovereign power—an increase of duties conferring upon the incumbent no right to increased compensation, as for extra services.² Aside from the general principles above stated, the duties of public officers are so closely allied to their liabilities, that, beyond a short examination of the general character of their duties, and the duties arising from their occupation of a fiduciary position, they will be left for treatment in connection with their liabilities.

1. Their Character.—The duties of public officers are mainly either ministerial or judicial and deliberative in their character. A duty is ministerial when the law exacting its discharge prescribes and defines the time, mode and occasion of its performance with such certainty and precision as to leave nothing to the exercise of judgment or discretion,³ in contradistinction

mandatory and means the same as "shall." *Mayor, etc., of N. Y. v. Furze*, 3 Hill (N. Y.) 612; *Newburg Turnpike Road Co. v. Miller*, 5 Johns. Ch. (N. Y.) 101; 9 Am. Dec. 274; and see *MAY*, vol. 14, p. 979.

There can be no legal right in an individual to hold an office or trust, unless there is also a corresponding legal right in the public to compel performance of the duties with which the office or trust is charged. *Hinze v. People*, 92 Ill. 406.

A public officer, judicial or otherwise, has no right under color of his office to extort from an individual a bond as a condition on which he will render to him rights and privileges which he may justly claim. *Whitted v. Governor*, 6 Port. (Ala.) 335.

1. *Carr v. Northern Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342; and see *Baugh v. Lamb*, 40 Miss. 493.

A prothonotary is not bound to perform, but he may perform, an official act at an unseasonable hour. *Polhemus's Appeal*, 32 Pa. St. 328.

2. *Mandell v. New Orleans*, 21 La. Ann. 9; *Hire v. New Orleans*, 21 La. Ann. 428.

Every public officer is required to perform all duties which are strictly official, although they may be required by laws passed after he comes into office, and may be cumulative upon his original duties, and although his compensation therefor be wholly inadequate. In such case he must look to the bounty of Congress for any additional reward. *Andrews v. U. S.*, 2 Story (U. S.) 202.

Duties, How Performed.—If public agents concede privileges, they must restrict the concession to such as may be given without detriment to the public. This the party to whom the concession is made is bound to understand. *New Jersey, etc., Teleg. Co. v. Board of Fire Com'rs*, 34 N. J. Eq. 117.

Where the law requires a public officer to take security in real estate of treble the value of the sum loaned, the duty is properly performed if he has availed himself of the best means of forming a correct opinion of the value of the property, and believes it adequate. *Greene Co. v. Bledsoe*, 12 Ill. 267.

3. *Grider v. Tally*, 77 Ala. 422; 54 Am. Rep. 65; *Sullivan v. Shanklin*, 63 Cal. 247; *Com'rs v. Smith*, 5 Tex. 471; *Arberry v. Beavers*, 6 Tex. 467; 55 Am. Dec. 791; *Rains v. Simpson*, 50 Tex. 495; 32 Am. Rep. 609; *Mississippi v. Johnson*, 4 Wall. (U. S.) 475; and see *Hudmon v. Slaughter*, 70 Ala. 546.

A duty is ministerial when an individual has such a legal interest in its performance that neglect becomes a wrong to him. *Morton v. Comptroller-Gen'l*, 4 S. Car. 430.

A ministerial act may be defined to be one which a person performs on a given statement of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his own judgment upon the propriety of the act being done. Acts done out of court in bringing parties into court are as a general proposition ministerial acts. *Bouv. L. Dict.*, tit. Ministerial; *Pennington v. Streight*, 54 Ind. 376; *Flournoy v. Jeffersonville*, 17

to those in which the officer is permitted to examine whether a thing proposed ought or ought not to be done, or whether it ought to be done in one manner or another.¹ Ministerial duties, however, do not exclude all deliberation; the necessity may exist for the ascertainment from personal knowledge or by information derived from other sources of the facts which render the performance of the act a clear and specific duty.² Where the exercise of judgment required extends only to ascertaining whether the requirements of the statute are complied with, the duty is a ministerial one.³ So also, there being no adverse parties, where the examination and auditing of accounts, the comparison of vouchers and the adjustment and statement of balances only are required.⁴ But, on the other hand, where, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer as to the propriety, legality, or practicability of the performance of an act or function, and its manner of execution, the duty is a judicial one,⁵ and an officer who is required faithfully

Ind. 169; 79 Am. Dec. 468; Ray v. Jeffersonville, 90 Ind. 572; State v. Doyle, 40 Wis. 175; 22 Am. Rep. 692; South v. Maryland, 18 How. (U. S.) 396.

1. Bouv. L. Dict., tit., Deliberation.

2. Grider v. Tally, 77 Ala. 422; 54 Am. Dec. 65; Crane v. Camp, 12 Conn. 464; Betts v. Dimon, 3 Conn. 107; Ray v. Jeffersonville, 90 Ind. 572; Flourney v. Jeffersonville, 17 Ind. 169; 79 Am. Dec. 468.

The clerk of a district court is a mere ministerial officer, with no judicial power and must act under the control of the court. Robbins v. Durell, 1 Idaho Ter. 50.

Supervisors.—The functions exercised by a county supervisor are chiefly ministerial, and those by a circuit clerk wholly so, and the discharge of the duties of the two offices, by the same person, is not incompatible or repugnant. State v. Fiebleman, 28 Ark. 424.

In Grider v. Tally, 77 Ala. 422, the court by Clopton, J., said: "A sheriff must determine whether process, coming into his hands, is issued from a court of competent jurisdiction, and is regular on its face; and a treasurer of public moneys must ascertain whether the warrant is drawn by such officer, and in such manner that its payment is a duty; but the execution of the process, and the payment of the warrant, are ministerial acts. A judge must determine whether a judgment is entered according to the verdict of the jury, or the consideration of the court, and

whether a bill of exceptions correctly recites the proceedings; but the act of signing the judgment and bill of exceptions is ministerial."

3. Jackson v. Buchanan, 89 N. Car. 74. See State v. Sneed, 84 N. Car. 816; Washington Co. v. Boyd, 64 Mo. 179.

The county treasurer, in collecting assessments of benefits in favor of a gravel-road company, under the *Indiana* act of March 11, 1867, does not act as the agent of the company, but as a ministerial officer, and is not liable for money had and received, to the persons assessed, after he had paid it to the company, before any notice of injunction, although the assessments may have been paid by said persons under protest and to save their property from seizure. Rhodes v. Piper, 47 Ind. 457.

In *Pennsylvania*, the tenure of ministerial offices is generally at pleasure. Field v. Girard College, 54 Pa. St. 233.

4. Machias River Co. v. Pope, 35 Me. 19.

5. Downer v. Lent, 6 Cal. 94; 65 Am. Dec. 489. See Schoettgen v. Wilson, 48 Mo. 253; Elliot v. Chicago, 48 Ill. 293; Saffrons v. Ericson, 3 Coldw. (Tenn.) 1; Com'r v. Smith, 5 Tex. 471; Arberry v. Beavers, 6 Tex. 467; 55 Am. Rep. 791.

The auditor of the State of North Carolina is not a mere ministerial officer. When a claim against the State is presented to him, he is to decide whether there is a sufficient provision of law for its payment, and if, in

to act according as things shall appear to him, to the best of his ability, is a judicial officer.¹ The question as to whether or not a *mandamus* would be granted to enforce a duty has been adopted as a criterion as to whether or not the duty is a ministerial one.²

Both judicial and ministerial duties are often imposed upon the same officer, in which case each class of duties is governed and regulated by the rules of law respectively applicable to that class.³ When the law, in words or by implication, thus commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is usually termed a *quasi* judicial one.⁴

2. Accountability for Public Property.—It is the duty of a public officer to keep and preserve the public property, such as books, records, furniture, etc., placed in his possession for the purpose of facilitating the execution of his functions, with reasonable diligence and care,⁵ and at the expiration of his term to surrender

his opinion, there is not, he must examine the claim and report the fact, with his opinion, to the general assembly. *Boner v. Adams*, 65 N. Car. 639.

Assessors having jurisdiction of the person and subject-matter for the purpose of making an assessment of property for taxation, act judicially in making the assessment; although the property assessed is not by law the subject of taxation. *Bank of Com. v. Mayor, etc., of New York*, 43 N. Y. 184.

To administer an affidavit on which a warrant of arrest may issue, is a duty in its nature judicial. *Lloyd v. State*, 70 Ala. 32.

The duty imposed by the *Maryland* act of 1831, ch. 281, upon the county commissioners, to take a sufficient bond from the person appointed to collect the taxes imposed by said act, is judicial and not ministerial, and an action will not lie against the commissioners for not taking a bond with sufficient security, unless fraud or corruption is alleged. *State v. Dunnington*, 12 Md. 340.

1. *Seaman v. Patten*, 2 Cai. (N. Y.) 312.

2. See *Rains v. Simpson*, 50 Tex. 495; 32 Am. Rep. 609; *Grider v. Tally*, 77 Ala. 422; 54 Am. Rep. 65; as to when *mandamus* will be granted, see *MANDAMUS*, vol. 14, p. 88.

3. See *Grider v. Tally*, 77 Ala. 422; 54 Am. Rep. 65; *People v. Bush*, 40 Cal. 344; *People v. Provines*, 34 Cal. 520; *Washington Co. v. Boyd*, 64 Mo. 179.

In Iowa.—The county judge is partly a ministerial and partly a judicial officer; in auditing claims he acts judicially, and his judgment may be corrected on appeal; but in drawing a warrant, or buying or selling, he acts as the ministerial agent of the county; therefore, in an action upon a warrant drawn by the judge, as there has been no judicial determination that there was a good consideration, want of consideration may be set up by the county. *Campbell v. Polk Co.*, 3 Iowa 467.

The duty resting on every public officer, on the termination of his official relations, to surrender to his successor the official papers and paraphernalia of the office is ministerial merely, and the *Alabama* statutes to compel their delivery are designed to give a more certain and expeditious remedy than that existing at common law. *Thompson v. Holt*, 52 Ala. 491.

Boards of county commissioners are courts of limited and special jurisdiction; and the records must show that the requisitions of the statutes under which they acted were complied with, so far as necessary to give them jurisdiction to make them evidence of the validity of their acts. *Rhode v. Davis*, 2 Ind. 53.

4. *Bishop Non. Cont. Law*, §§ 785, 786.

5. *Mechem's Pub. Off.*, § 916.

A public officer is a bailee of the government with reference to public property coming into his hands, and by the common law he is bound to due

it to his successor, or other public authority entitled to receive it.¹

So, any detention for an unlawful or unreasonable time, or appropriation of public moneys by an officer intrusted with their care, renders him chargeable with interest upon the amount retained during the time of detention,² and summary modes of recovering such moneys are not unconstitutional, or contrary to common law.³ The measure of fiduciary responsibility at common law and in equity is the same, whether arising from public or private relations;⁴ but the obligation assumed by the officer is in most instances fixed by the terms of the statute providing for the office or by the terms of his official bond,⁵ under which he is not regarded as a bailee, and his obligation to keep safely is deemed absolute, and without condition to be discharged only by payment.⁶ Under some of the statutes the public

diligence only, and only liable for negligence and dishonesty. *U. S. v. Thomas*, 15 Wall. (U. S.) 337.

Where property comes into the possession of a public officer, by reason of his official position and in accordance with the usage of his office, although it is not made by law the duty of his office to receive it, he owes a duty of ordinary care in its preservation, and occupies the position of a bailee in reference to it. *Phelps v. People*, 72 N. Y. 334.

1. See *McGee v. State*, 103 Ind. 444; *State v. Meeker*, 19 Neb. 444.

Where the right to occupy a building is part of the officer's compensation, his right terminates with his term, and he may be ousted. *Frazier v. Virginia Military Institute*, 81 Va. 59.

One who duly receives a certificate of election to the office of sheriff and qualifies by filing his oath of office with the county clerk, the bond being approved by the board of county commissioners, is entitled to a *mandamus* to compel the former sheriff to deliver to him properly belonging to the sheriff's office. *Huffman v. Mills*, 39 Kan. 577.

2. See *State v. Van Winkle*, 43 N. J. L. 125; *Justices v. Fennimore*, 1 N. J. L. 242; *Chenango Co. v. Birdsall*, 4 Wend. (N. Y.) 453; *State v. Sooy*, 39 N. J. L. 539; *Clark v. Shelden*, 57 Hun (N. Y.) 586; *Pease v. Wyoming*, 1 Wyoming Ter. 392.

Where no time is fixed by the provision creating the office, it is the duty of the officer to account within a reasonable time. See *Leake v. Sutherland*, 25 Ark. 219.

An official treasurer cannot defend

an action to compel him to pay over to his successor the funds in his official custody, upon any questions of the regularity of the proceedings whereby the funds came into his possession. *Mason v. Fractional School District*, etc., 34 Mich. 228. And see *School Directors of Sigel v. Coe*, 40 Wis. 103; *Cairns v. O'Brien*, 40 Wis. 469.

3. *Murray v. Hoboken Land Co.*, 18 How. (U. S.) 274. See also *Ratterman v. State*, 44 Ohio St. 641.

Where, on the default of a county treasurer, there is a shortage of moneys collected both for the county and the territory, the shortage will be apportioned according to the amount each is entitled to receive from the taxes collected. *Territory v. Bashford* (Arizona, 1881), 12 Pac. Rep. 671.

4. *Peck v. James*, 3 Head (Tenn.) 75.

The responsibility of a county treasurer, in the absence of any statute enlarging it, is measured by the common-law rule applicable to bailees for hire other than common carriers and innkeepers. If, without fault or negligence on his part, he is violently robbed of money belonging to the county, it is a valid defense, *pro tanto*, to an action on his bond; but the burden of proving such a defense is upon him. *Cumberland Co. v. Pennell*, 69 Me. 357.

5. The bond ought properly to be regarded as the measure of official duty. *Perley v. Muskegon Co.*, 32 Mich. 132; 20 Am. Rep. 637.

6. *U. S. v. Prescott*, 3 How. (U. S.) 587; *State v. Houston*, 78 Ala. 576; 56 Am. Rep. 59; *Township of Union v. Smith*, 39 Iowa 9; 18 Am. Rep. 39; *Tay-*

moneys have been regarded as, in legal effect, the property of the officer, the government standing in the position of creditor.¹ Where, however, a place of deposit is provided for by law, the officer's obligation ordinarily extends only to a compliance with the requirement,² and it has been held that he is not to be made responsible

for *v. Morton*, 37 Iowa 550; *Lowry v. Polk Co.*, 51 Iowa 50; 33 Am. Rep. 114; *Doolittle v. Atchison, etc.*, R. Co., 20 Kan. 329; *State v. Peck*, 58 Me. 123; *McLeod Co. v. Gilbert*, 19 Minn. 214; *Jefferson Co. v. Lineberger*, 3 Mont. 231; 35 Am. Rep. 462; *State v. Powell*, 67 Mo. 395; 29 Am. Rep. 512; *State v. Nevins*, 19 Nev. 162; 3 Am. St. Rep. 873; *U. S. v. Watts*, 1 N. Mex. 553; *State v. Clarke*, 73 N. Car. 255; *Havens v. Lathene*, 75 N. Car. 505; *State v. Blair*, 76 N. Car. 78; *State v. Harper*, 6 Ohio St. 610; 67 Am. Dec. 363; *Bailey v. Com.* (Pa. 1887), 10 Atl. Rep. 764; *Com. v. Comly*, 3 Pa. St. 372; *Nason v. Directors of Poor*, 126 Pa. St. 445; *Hart v. Guardians of the Poor*, 81½ Pa. St. 466; *Wilson v. Wichita Co.*, 67 Tex. 647; *U. S. v. Morgan*, 11 How. (U. S.) 154; *U. S. v. Dashiell*, 4 Wall. (U. S.) 183; *Boyden v. U. S.*, 13 Wall. (U. S.) 17; *Bevans v. U. S.*, 13 Wall. (U. S.) 56.

In *U. S. v. Prescott*, 3 How. (U. S.) 578, the court by McLean, J., said: "Public policy requires that every depository of public money should be held to strict accountability not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to frauds which might be practiced with impunity; a depository would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of customs, receivers of public moneys and others who receive more or less of the public funds, and what loss might not be anticipated by the public. No such principle has been recognized or admitted as a legal defense."

A treasurer is liable for loss of the funds deposited by him generally in a bank, although the bank was reputed solvent, and such deposit was necessary for the safety of the funds. *State v. Moore*, 74 Mo. 413; 41 Am. Rep. 322; *Inglis v. State*, 61 Ind. 212; *State v. Powell*, 67 Mo. 395; 29 Am. Rep. 512;

Ward v. School District, 10 Neb. 293; 35 Am. Rep. 477; *Wilson v. Wichita Co.*, 67 Tex. 647.

The fact that the county does not provide a safe or suitable place where its money may be kept will not release the treasurer from liability if he deposits it in a bank where, by reason of the failure of the bank, it is lost. *Lowry v. Polk Co.*, 51 Iowa 50; 33 Am. Rep. 114.

The felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, does not discharge him and his sureties. *U. S. v. Prescott*, 3 How. (U. S.) 578; *Halbert v. State*, 22 Ind. 125; *Morbeck v. State*, 28 Ind. 86; *State v. Nevin*, 19 Nev. 162; 3 Am. St. Rep. 873; *State v. Harper*, 6 Ohio St. 607; 67 Am. Dec. 363; *Jefferson Co. v. Lineberger*, 3 Mont. 231. 35 Am. Rep. 462. Nor is he discharged by its destruction. *Township of Union v. Smith*, 39 Iowa 9; 18 Am. Rep. 39.

1. *Perley v. Muskegon Co.*, 32 Mich. 132; 20 Am. Rep. 637; *Campbell v. Pence*, 118 Ind. 313; *Shelton v. State*, 53 Ind. 331.

Under such a theory, the officer would be liable absolutely, whatever may have been the cause of the loss. See *Muzzy v. Shattuck*, 1 Den. (N. Y.) 233; *Halbert v. State*, 22 Ind. 131; *Allen v. State*, 6 Blackf. (Ind.) 252; *Morebeck v. State*, 28 Ind. 86; *Rock v. Stinger*, 36 Ind. 346; *Steinbeck v. State*, 38 Ind. 483; *Egremont v. Benjamin*, 125 Mass. 19; *Agawam Nat. Bank v. South Hadley*, 128 Mass. 507; *Hancock v. Hazard*, 12 Cush. (Mass.) 112; 59 Am. Dec. 171; *Colerain v. Bell*, 9 Met. (Mass.) 99; *Albany v. Dorr*, 25 Wend. (N. Y.) 440; *Justice v. Fennimore*, 1 N. J. L. 242; *New Providence v. McEachron*, 33 N. J. L. 339.

Where, however, money of the United States is received by one public agent from another, whether received in an official or private capacity, it is received to the use of the United States, and they may recover it against the receiver. *U. S. v. Buford*, 3 Pet. (U. S.) 28.

2. *Halbert v. State*, 22 Ind. 125;

for losses caused by the act of God or the public enemy,¹ or occurring without fault or negligence on his part.² It is within the constitutional power of a legislature to relieve public officers against this extreme liability, and replace moneys lost without their fault by taxation.³

A public officer intrusted with public funds cannot defeat the right of the government to recover them upon the ground of the illegality of the transaction by which they were realized or of the purpose to which they were to be devoted.⁴

XII. LIABILITIES OF PUBLIC OFFICERS.—A breach of public duty by an officer raises a liability on the part of the officer in favor of the public which can be enforced against him only by public prosecution;⁵ but in order to confer a right of action on a pri-

Cumberland v. Pennell, 69 Me. 357; 31 Am. Rep. 284; *Jefferson Co. v. Lineberger*, 3 Mont. 231; 35 Am. Rep. 462.

Compulsory Deposit.—Under the act of Congress of April 18, 1814, which directs that moneys received by officers of the United States courts shall be deposited in bank, etc., the court is authorized to require its officers to pay moneys received by them into court, to be deposited in bank by the clerks of the court. *The Laurens and \$20,000 in Specie*, 1 Abb. Adm. (U. S.) 508.

1. The act of a public enemy in forcibly seizing or destroying property of the government in the hands of a public officer, against his will, and without his fault, is a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty, and have the property forthcoming when required. *U. S. v. Thomas*, 15 Wall. (U. S.) 337. And see *U. S. v. Humason*, 6 Sawy. (U. S.) 199.

2. *Cumberland Co. v. Pennell*, 69 Me. 357; 31 Am. Rep. 284; *Munphy v. U. S.*, 3 Ct. of Cl. 212. And see *Prime v. U. S.*, 3 Ct. of Cl. 209; *Pattee v. U. S.*, 3 Ct. of Cl. 397.

A county treasurer is not liable for funds lost through failure of a bank in good standing at the time of deposit. *York Co. v. Watson*, 15 S. Car. 1; 40 Am. Rep. 675.

A public officer intrusted with the receipt and disbursement of funds is not responsible for money stolen from his office, where there is no default or negligence on his part. *Albany Co. v. Dorr*, 25 Wend. (N. Y.) 440.

3. *Board of Education v. McLandsborough*, 36 Ohio St. 227; 38 Am. Rep.

582; *Hancock Co. v. Bradley*, 53 Ind. 422; *Mount v. State*, 90 Ind. 29; 46 Am. Rep. 192.

The effective words in the act of Congress of May 9, 1866, which authorizes the court of claims to decree relief to a disbursing officer who has lost government funds are "without fault or neglect." And they should not be given a technical but rather a common signification. The degree of care and diligence which the act requires is that which a prudent man would exact of his agent in a like case. *Malone v. U. S.*, 5 Ct. of Cl. 486.

4. *Placer Co. v. Astin*, 8 Cal. 303; *First Nat. Bank v. Leppel*, 9 Colo. 594; *Snell v. Pells*, 113 Ill. 145; *Daniels v. Barney*, 22 Ind. 207; *Reed v. Dougan*, 54 Ind. 307; *Chinn v. Chinn*, 22 La. Ann. 599; *Clark v. Moody*, 17 Mass. 145; *Gelliam v. Brown*, 43 Miss. 641; *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Hammond v. Christie*, 5 Robt. (N. Y.) 160; *Galbraith v. Gaines*, 10 Lea (Tenn.) 568; *Kreivert v. Rindskopf*, 46 Wis. 481; *Baldwin v. Potter*, 46 Vt. 402; *Brooks v. Martin*, 2 Wall. (U. S.) 70. And see *Norton v. Blinn*, 39 Ohio St. 145; *DeLeon v. Trevino*, 49 Tex. 88; 30 Am. Rep. 101.

That the title of the State was defective, cannot be pleaded to defeat its right to recover moneys received by one of its officers for a designated official purpose. *People v. Swineford*, 77 Mich. 573.

5. *Bartlett v. Crozier*, 17 Johns. (N. Y.) 438; 8 Am. Dec. 428; *Conrad v. Ithaca*, 16 N. Y. 159; *Young v. Comrs.*, 2 Nott & M. (S. Car.) 537. See also *Moss v. Cummings*, 44 Mich. 359; *New York Code Civ. Proc.*, §§ 1969, 1976.

vate individual, the officer must fail in the performance of some duty which he owes to that individual specially.¹ The officer is not liable to an action for his conduct in a governmental or political capacity;² and, as a general thing, it is only against ministerial officers that an action will lie for neglect of official duty.³

1. Cooley on Torts 379; Harrington v. Ward, 9 Mass. 251; Learock v. Putnam, 111 Mass. 499; Griffin v. Rising, 11 Met. (Mass.) 330; Raynsford v. Phelps, 43 Mich. 342; 38 Am. Rep. 189; Moss v. Cummings, 44 Mich. 360; Garlinghouse v. Jacobs, 29 N. Y. 297; Conrad v. Ithaca, 16 N. Y. 159; Robinson v. Chamberlain, 34 N. Y. 389; 90 Am. Dec. 713; Bassett v. Fish, 12 Hun (N. Y.) 209; Strong v. Campbell, 11 Barb. (N. Y.) 135; Clark v. Miller, 47 Barb. (N. Y.) 38; Bank of Rome v. Mott, 17 Wend. (N. Y.) 554; Butler v. Kent, 19 Johns. (N. Y.) 223; 10 Am. Dec. 219; Young v. Comrs., 2 Nott & M. (S. Car.) 537.

A county treasurer in levying on property of a mortgagor for taxes failed to levy on personal property, thereby throwing a greater burden on the mortgaged real property of the mortgagor. *Held*, that the mortgagee could not maintain an action against the treasurer for this failure. *State v. Harris*, 89 Ind. 363; 46 Am. Rep. 169. Compare *Raynsford v. Phelps*, 43 Mich. 342; 38 Am. Rep. 189.

The board of trustees of the New York and Brooklyn Bridge, appointed under the act of 1875, ch. 300, were not to be considered as a corporation, but as merely agents for and representatives of the two cities, and as such, they were entitled to all the immunities of public agents. And, therefore, an action to recover damages resulting from the negligence of a laborer engaged in the construction of the bridge was not maintainable either against the trustees of the New York and Brooklyn Bridge as a corporation, or against the trustees individually. *Walsh v. Trustees, etc.*, 96 N. Y. 427.

The mere architect or builder of a public work is answerable only to his employers for any want of care or skill in the execution thereof, and he is not liable to third persons for accidents or injuries which may occur after the completion of such work. Mayor, etc., of Albany v. Cunliff, 2 N. Y. 165.

Contra.—Although the doctrine stated in the text is supported by such an

array of authorities and has received the further indorsement of Mr. Mechem in his work on public officers, it has been doubted upon several occasions. And the doctrine that a public officer is liable for injuries sustained by a private individual, occasioned by the officer's neglect of duty, whether the officer owed him such duty specially or not, is sustained by several eminent authorities. See *Hayes v. Porter*, 22 Me. 371; *Connors v. Adams*, 13 Hun (N. Y.) 427; *Adsit v. Brady*, 4 Hill (N. Y.) 630; 40 Am. Dec. 305; *Hover v. Barkhoof*, 44 N. Y. 113; *Johnson v. Belden*, 47 N. Y. 130; *French v. Donaldson*, 5 Lans. (N. Y.) 293.

Although the statute regulating the inspection of beef and pork, imposes a penalty upon the inspector for neglect of duty, one moiety thereof to the use of the town wherein the offense shall have been committed, and the other to the use of the person suing for the same, yet a person injured by the inspector's neglect of official duty may recover damages sustained thereby in an action on the case. *Hayes v. Porter*, 22 Me. 371. See also *Nickerson v. Thompson*, 33 Me. 433.

2. *Durand v. Hollins*, 4 Blatchf. (U. S.) 451; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *State v. Warmoth*, 22 La. Ann. 1; 2 Am. Rep. 712; *People v. Lewis*, 7 Johns. (N. Y.) 73; 1 Min. Insts. 237; *Morrison v. McFarland*, 51 Ind. 206.

See MANDAMUS, vol. 14, p. 143.

The authority to decide whether the exigencies contemplated in the Constitution of the United States, and the act of Congress of 1795, ch. 101, in which the President has authority to call forth the militia "to execute the laws of the Union, suppress insurrections, and repel invasions" have arisen, is exclusively vested in the President, and his decision is conclusive upon all other persons. *Marton v. Mott*, 12 Wheat. (U. S.) 19.

3. Cooley on Torts 376.

The reason generally assigned is, that in the case of other officers, it is inconsistent with the nature of their

1. Legislative Officers.—Public legislative officers are exempt from personal liability for legislative action by them;¹ but where specific ministerial duties are assigned to them by law they are liable to persons sustaining injury because of the non-performance of such duties.² The Constitution of the United States and the constitutions of most of the States provide that members of Congress and of the respective State legislatures shall not be questioned in any other place for any speech or debate in either house, and shall be privileged from arrest in all cases except treason, felony, and breach of the peace, during their attendance at the session of their respective houses, and in going to and returning from the same.³ But an officer is not liable in an action for arresting a privileged person when his writ is regular on its face. It is his duty to serve such writ even though the privilege is claimed.⁴ The privilege of legislators can exist only while the house is in session, but it is considered to be in session notwithstanding adjournments, for short intervals for the

functions that they should be made to respond in damages for failure in satisfactory performance. *Cooley on Torts*, p. 376.

1. *Cooley on Torts*, 376; *Jones v. Loving*, 55 Miss. 109; 30 Am. Rep. 508; *Baker v. State*, 27 Ind. 485; *Walker v. Hallock*, 32 Ind. 239.

The motives of members of council or the influences under which they acted, cannot be brought to nullify an ordinance within their corporate powers, duly passed in legal form at a meeting regularly convened. *Freeport v. Marks*, 59 Pa. St. 253. See also *Buell v. Ball*, 20 Iowa 282.

2. *Cooley on Torts*, 377. See *Amperse v. Winslow*, 75 Mich. 234.

3. U. S. Const., art. 1, § 6.

Provisions exempting members of the legislature from arrest and from the service of civil process while in attendance at the seat of government during sessions of the legislature, are found in nearly all the State constitutions, and in many of the States this privilege is extended to the members while traveling to and from the place where the legislature is held. *Alabama Const.*, art. 4, § 14; *Arkansas Const.*, art. 5, § 12; *Michigan Const.*, art. 4, § 7; *Missouri Const.*, art. 4, § 16; *Mississippi Const.*, art. 4, § 19; *Nebraska Const.*, art. 11, § 16; *California Const.*, art. 4, § 11; 16 Am. Dec. 784. See also *Cassidy v. Steuart*, 2 M. & G. 437.

Construed Liberally.—In *Coffin v. Coffin*, 4 Mass. 1; 3 Am. Dec. 189, the court, by Parsons, C. J., said: "These privileges are thus secured not with the

intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered." See also *Kilbourn v. Thompson*, 103 U. S. 168.

Courts do not notice *ex officio* the privilege granted legislators exempting them from arrest and service of civil process. Advantage must be taken of the same at the proper time and in the proper way, or it will be deemed waived. *Prentiss v. Com.*, 5 Rand. (Va.) 697; 16 Am. Dec. 782; *Chase v. Fish*, 16 Me. 132; *Gyer v. Irwin*, 4 Dall. (U. S.) 107.

Giving bail is not a waiver of the privilege from arrest. *Washburn v. Phelps*, 24 Vt. 506.

The *Massachusetts* house of representatives has power to expel a member, and on such expulsion his privilege from arrest on mesne process ceases; and a court, in determining whether he was so privileged, cannot inquire into the reasons for expulsion, nor the question whether the member was duly heard before being expelled. *Hiss v. Bartlett*, 3 Gray (Mass.) 468; 63 Am. Dec. 768.

4. *Cooley on Torts*, 460; *Carle v. Delesdernier*, 13 Me. 363; 29 Am. Dec. 508; *Chase v. Fish*, 16 Me. 132; *Sperry v. Willard*, 1 Wend. (N. Y.) 32; *Secor v. Bell*, 18 Johns. (N. Y.) 52.

convenience of its members.¹ Neither does the privilege extend to the publication of slanderous matter uttered on the floor of the house.² Each house of Congress may punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member; and less than a quorum may be authorized to compel the attendance of absent members.³ And it has been held that imprisonment is a proper punishment to inflict either for disorderly behavior or for absence contrary to rules.⁴ The State Legislatures in general have the same powers in this regard as Congress.⁵ Legislative bodies also have the power to compel witnesses to appear and testify, and to compel the production of documents when the evidence is needed in a matter into which those bodies have jurisdiction to inquire.⁶

2. Judicial Officers—(See JUDGE;⁷ JURISDICTION)⁸—*a. QUASI JUDICIAL OFFICERS*.—It may be laid down as a general rule that a judicial officer acting within his jurisdiction is not liable, in an action for damages, for any judgment he may deliver.⁹ And for the purpose of exemption under this rule, an officer who acts judicially for the time being is considered a judicial officer, although he may also perform ministerial duties.¹⁰

1. Coffin v. Coffin, 4 Mass. 1; 3 Am. Dec. 189.

2. Stockdale v. Hansard, 9 A. & E. 1; 36 E. C. L. 13.

3. U. S. Const., art. 1, § 5.

4. Kilbourn v. Thompson, 103 U. S. 165; Anderson v. Dunn, 6 Wheat. (U. S.) 204.

5. Burnham v. Morrissey, 14 Gray (Mass.) 226; 74 Am. Dec. 676; Wickelhausen v. Willett, 10 Abb. Pr. (N. Y.) 164.

The common council of a city has no power to commit and punish for contempt. Whitcomb's Case, 120 Mass. 118; 21 Am. Rep. 502.

6. See PRODUCTION OF DOCUMENTS, vol. 19, p. 249; Kilbourn v. Thompson, 103 U. S. 168; Burnham v. Morrissey, 14 Gray (Mass.) 226; 74 Am. Dec. 676; Wickelhausen v. Willett, 10 Abb. Pr. (N. Y.) 164.

But they cannot be compelled to produce evidence which will tend to criminate themselves. Emery's Case, 107 Mass. 172; 9 Am. Rep. 22. This case was decided with reference to the Massachusetts Bill of Rights. Compare *In re Falvey*, 7 Wis. 630.

7. Vol. 12, p. 2.

8. Vol. 12, p. 244.

9. See JUDGE, vol. 12, p. 32; Cooley on Torts, p. 408.

10. Wilkes v. Dinsman, 7 How. (U. S.) 89; Kendall v. Stokes, 3 How. (U. S.) 87; Gould v. Hammond, 1 McAll.

(U. S.) 235; Otis v. Watkins, 9 Cranch (U. S.) 339; Downer v. Lent, 6 Cal. 94; 65 Am. Dec. 489; Porter v. Haight, 45 Cal. 631; Green v. Swift, 47 Cal. 536; San José Gas Co. v. January, 57 Cal. 614; Gregory v. Brooks, 37 Conn. 365; Raymond v. Fish, 51 Conn. 80; 50 Am. Rep. 3; Billings v. Lafferty, 31 Ill. 318; McCormick v. Burt, 95 Ill. 263; 35 Am. Rep. 163; Carter v. Harrison, 5 Blackf. (Ind.) 138; State v. Robb, 17 Ind. 536; Walker v. Hallock, 32 Ind. 239; McOskey v. Burrell, 55 Ind. 425; Spitznogle v. Ward, 64 Ind. 30; Elmore v. Overton, 104 Ind. 548; 54 Am. Rep. 343; Wasson v. Mitchell, 18 Iowa 153; Muscatine, etc., R. Co. v. Horton, 38 Iowa 33; Jones v. Brown, 54 Iowa 74; 37 Am. Rep. 185; Chamberlain v. Clayton, 56 Iowa 331; 41 Am. Rep. 101; Tiedt v. Carstensen, 64 Iowa 131; Caulfield v. Bullock, 18 B. Mon. (Ky.) 494; Lillenthal v. Campbell, 22 La. Ann. 600; Donahoe v. Richards, 38 Me. 379; Anderson v. Baker, 23 Md. 531; Oakes v. Hill, 10 Pick. (Mass.) 333; Van Deusen v. Newcomer, 40 Mich. 90; Wall v. Trumbull, 16 Mich. 228; Sage v. Laurain, 19 Mich. 137; Reed v. Conway, 20 Mo. 22; Pike v. Megoun, 44 Mo. 491; Schoettgen v. Wilson, 48 Mo. 253; Dritt v. Snodgrass, 66 Mo. 286; 27 Am. Rep. 343; Edwards v. Ferguson, 73 Mo. 686; Burnham v. Stevens, 33 N. H. 247; Waldron v. Berry,

51 N. H. 136; *Edes v. Boardman*, 58 N. H. 580; *Odiorne v. Rand*, 59 N. H. 504; *McDaniel v. Tebbetts*, 60 N. H. 497; *Morris Tp. v. Carey*, 27 N. J. L. 377; *Seamen v. Patten*, 2 Cai. (N. Y.) 312; *Vail v. Owen*, 19 Barb. (N. Y.) 22; *Jenkins v. Waldron*, 11 Johns. (N. Y.) 114; 6 Am. Dec. 359; *Van Steenberg v. Bigelow*, 3 Wend. (N. Y.) 42; *Easton v. Calendar*, 11 Wend. (N. Y.) 90; *Hill v. Sellick*, 21 Barb. (N. Y.) 207; *Williams v. Weaver*, 75 N. Y. 30; *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557; 2 Am. & Eng. Corp. Cas. 322; *Thomas v. Wilton*, 40 Ohio St. 516; *Yealy v. Fink*, 43 Pa. St. 212; *Burton v. Fulton*, 49 Pa. St. 151; *Com. v. Haines*, 97 Pa. St. 228; 39 Am. Rep. 805; *Keenan v. Cook*, 12 R. I. 52; *Fenwick v. Gibbes*, 2 Desaus. (S. Car.) 629; *Rail v. Potts*, 8 Humph. (Tenn.) 225; *Wilson v. Marsh*, 34 Vt. 352; *Henderson v. Smith*, 26 W. Va. 829; 53 Am. Rep. 139; *Fausler v. Parsons*, 6 W. Va. 486; 20 Am. Rep. 431; *Steele v. Dunham*, 26 Wis. 393; *Garnett v. Ferrand*, 6 B. & C. 611; 13 E. C. L. 277.

The powers and duties of a fish inspector to inspect fish offered for sale in the city, and to destroy all such as are unwholesome and unsuitable to be eaten, are judicial in their nature and he cannot be held liable for the careless, improper, or erroneous performance of such duties. *Fath v. Keoppel*, 72 Wis. 289.

No action is maintainable against school directors by one who withdraws his children from school because such directors erroneously admitted colored children. *Stewart v. Southard*, 17 Ohio 402; 49 Am. Dec. 463.

This rule has been held to apply to arbitrators. *Jones v. Brown*, 54 Iowa 74; 37 Am. Rep. 185. And to grand jurors. *Turpen v. Booth*, 56 Cal. 65; 38 Am. Rep. 48; *Hunter v. Mathis*, 40 Ind. 356. And to tax assessors. *Weaver v. Devendorf*, 3 Den. (N. Y.) 117; *Barhyte v. Sheperd*, 35 N. Y. 238; *Edes v. Boardman*, 58 N. H. 580; *Dillingham v. Snow*, 5 Mass. 547; see *National Bank v. Elmira*, 53 N. Y. 49. *Compare Auditor v. Atchison*, etc., R. Co., 6 Kan. 500; 7 Am. Rep. 575. And to highway commissioners. *Sage v. Laurain*, 19 Mich. 137; *Waldron v. Berry*, 51 N. H. 136. But *compare Proprietors*, etc. *v. Champney*, 2 N. H. 199.

An assessor is not personally liable for error in judgment in assessing the value of property. *Ballerino v. Mason*,

83 Cal. 447; but he is personally liable for assessing property of non-residents which is not taxable in that jurisdiction. *Ford v. McGregor*, 20 Nev. 446.

Allowance by a board of county commissioners, on the advice of able and competent attorneys, of claims which are not strictly legal, will not render them liable to the charge of corruption or forfeiture of office, where the allowance is honestly made upon a mistake or error of law. *State v. Scates*, 43 Kan. 330.

It is the settled doctrine in *New Hampshire* that highway surveyors and other town officers are not responsible in a civil suit for damages for acts done by them requiring the exercise of discretion and judgment in the discharge of their official duties, so long as they act in good faith and within the scope of their authority. But they are held to be liable in civil suits for damages done to individuals by their wanton, malicious, or fraudulent acts and for acts beyond their jurisdiction. *Waldron v. Berry*, 51 N. H. 136; *Rowe v. Addison*, 34 N. H. 306. See also *Adams v. Richardson*, 43 N. H. 312.

When selectmen are called upon to determine the amount of assistance furnished to a pauper within ninety days of an election, that he may refund the same in order to have his name inserted in the check list, and they, acting in good faith, determine the amount to be greater than the sum actually expended, and receive the amount so determined and pay it into the town treasury, they are not liable to refund the excess in an action brought by the person relieved. *Brown v. Marden*, 61 N. H. 15.

It has also been held to apply to overseers of highways in adjudging a person in default for not working as required. *Freeman v. Cornwall*, 10 Johns. (N. Y.) 470; and to judges of elections in refusing to allow a person to vote. *Bevard v. Hoffman*, 18 Md. 479; 81 Am. Dec. 618; *Wheeler v. Patterson*, 1 N. H. 88; 8 Am. Dec. 41; *Dwight v. Rice*, 5 La. Ann. 580; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693; 68 Am. Dec. 735; *Gordon v. Farrar*, 2 Dougl. (Mich.) 411.

In *Chrisman v. Bruce*, 1 Duv. (Ky.) 63; 85 Am. Dec. 603, the court, by Duvall, C. J., said: "The courts of Massachusetts, and perhaps of some of

In order to be entitled to this protection, however, the officer must act within his jurisdiction,¹ and in good faith, with-

the other States, have adhered to the doctrine of the English case, which decided that an action is maintainable against officers who pre-ide at an election for refusing the vote of a qualified voter, even though they may have exercised an honest and fair judgment on the question before them. This court has, however, adopted a more equitable and consistent rule and which more adequately protects such officers in the faithful discharge of their duties. In passing upon the qualifications of a person offering to vote, the judge of the election acts judicially and is not infrequently called upon to determine legal questions of great difficulty and doubt. To hold him responsible in such cases for a mere error of judgment by which a citizen may have been illegally deprived of his right to vote, would be unjust in principle and unwise in policy, for the natural result would be to deter honest and capable men from accepting an office attended with such hazards."

But in *Massachusetts*, an action lies against selectmen for refusing to receive the vote of a qualified elector, although they act without malice. *Lincoln v. Hapgood*, 11 Mass. 350; *Bridge v. Lincoln*, 14 Mass. 367; *Capen v. Foster*, 12 Pick. (Mass.) 485; 23 Am. Dec. 632; *Larned v. Wheeler*, 140 Mass. 390; 54 Am. Rep. 483. Or for omitting to put his name on the list of voters. *Blanchard v. Stearns*, 5 Met. (Mass.) 298. Or for erasing his name from the list of voters. *Harris v. Whitcomb*, 4 Gray (Mass.) 433. And the same doctrine is maintained in *Ohio*. *Jeffries v. Ankeny*, 11 Ohio 372; *Monroe v. Collins*, 17 Ohio St. 666.

A surveyor-general is not liable to an action for revoking the commission of a deputy surveyor, annulling a surveying contract, and refusing to receive and examine the field notes, where, without malice and in good faith, he exercises his judgment. *Reed v. Conway*, 20 Mo. 22.

In deciding on an application for a permit to sell intoxicating liquors, county commissioners act judicially and not ministerially only; therefore, a mandate cannot issue to compel the commissioners to grant such permit. *State v. Tippecanoe Co.*, 45 Ind. 501.

See also *Holliday v. Henderson*, 67 Ind. 103; *State v. Miami Co.*, 63 Ind. 497.

Quasi Judicial Functions Defined.—Mr. Bishop in his work on non-contract law defines *quasi* judicial functions to be those functions which lie midway between the judicial and ministerial. He goes on to say that "the lines such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed *quasi* judicial." *Bishop on Non-Contract law*, §§ 785, 786. See also *Mechem on Pub. Off.*, § 637.

In *McCord v. High*, 24 Iowa 336, the court by Beck, J., said: "It must be borne in mind that the fact of an officer being clothed with discretion in the discharge of a duty as to the manner of its performance, or as to the control of circumstances and attending causes, necessarily arising in the discharge of such duty, will not give to it a judicial character. It is impossible to conceive of any ministerial duty to be performed by an officer that may not be, that is not accompanied by circumstances which require the exercise of judgment and discretion."

1. *Gould v. Hammond*, 1 McAll. (U. S.) 235; *Taylor v. Moffat*, 2 Blackf. (Ind.) 305; *Chamberlain v. Clayton*, 56 Iowa 331; 41 Am. Rep. 101; *Van Deusen v. Newcomer*, 40 Mich. 90; *Adams v. Richardson*, 43 N. H. 212; *Waldron v. Berry*, 51 N. H. 136; *People v. Chenango Co.*, 11 N. Y. 563; *Mygatt v. Washburn*, 15 N. Y. 316; *Goetcheus v. Matthewson*, 61 N. Y. 420; *Williams v. Weaver*, 75 N. Y. 30; *Suydam v. Keys*, 13 Johns. (N. Y.) 444; *Professor v. Secor*, 5 Barb. (N. Y.) 607; *Van Rensselaer v. Cottrell*, 7 Barb. (N. Y.) 127; *Wade v. Matheson*, 4 Lans. (N. Y.) 158; *Palmer v. Lawrence*, 6 Lans. (N. Y.) 282; *Fausler v. Parsons*, 6 W. Va. 486; 20 Am. Rep. 431; *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444; 9 Am. Rep. 591. See *Freeman v. Kenney*, 15 Pick. (Mass.) 44; *Gage v. Currier*, 4 Pick. (Mass.) 399; *Rowe v.*

out fraud or malice;¹ and the burden of proof is on the

Addison, 34 N. H. 306; Sawyer v. Keene, 47 N. H. 173; Barhyte v. Shepherd, 35 N. Y. 238.

Tax assessors who assess non-residents of the assessment district in which the assessor has authority act without jurisdiction and are liable to the party injured in a civil action. *Suydam v. Keys*, 13 Johns. (N. Y.) 444; *Mygatt v. Washburn*, 15 N. Y. 316; *Wade v. Matheson*, 4 Lans. (N. Y.) 158; *Palmer v. Lawrence*, 6 Lans. (N. Y.) 282.

Trespass and not case is the proper form of an action in such cases. *Agry v. Young*, 11 Mass. 220.

1. *Gould v. Hammond*, 1 McAll. (U. S.) 234; *Green v. Swift*, 47 Cal. 536; *Porter v. Haight*, 45 Cal. 631; *Gregory v. Brooks*, 37 Conn. 365; *McCormick v. Burt*, 95 Ill. 263; 35 Am. Rep. 163; *Carter v. Harrison*, 5 Blackf. (Ind.) 138; *State v. Robb*, 17 Ind. 536; *Walker v. Hallock*, 32 Ind. 239; *McOsker v. Burrell*, 55 Ind. 425; *Spitznogle v. Ward*, 64 Ind. 30; *Elmore v. Overton*, 104 Ind. 548; 54 Am. Rep. 343; *Wasson v. Mitchell*, 18 Iowa 153; *Muscatine, etc., R. Co. v. Horton*, 38 Iowa 33; *Caulfield v. Bullock*, 18 B. Mon. (Ky.) 494; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693; 68 Am. Dec. 735; *Chrisman v. Bruce*, 1 Duv. (Ky.) 63; 85 Am. Dec. 603; *Patterson v. D'Auterive*, 6 La. Ann. 467; 54 Am. Dec. 564; *Bridge v. Oakey*, 12 Rob. (La.) 638; *Danahoe v. Richards*, 38 Me. 379; 61 Am. Dec. 256; *Van Deusen v. Newcomer*, 40 Mich. 90; *Dritt v. Snodgrass*, 66 Mo. 256; 27 Am. Rep. 343; *Pike v. Megoun*, 44 Mo. 491; *Reed v. Conway*, 20 Mo. 22; *Edwards v. Ferguson*, 73 Mo. 686; *Wheeler v. Patterson*, 1 N. H. 88; 8 Am. Dec. 41; *Rowe v. Addison*, 34 N. H. 306; *Waldron v. Berry*, 51 N. H. 136; *Williams v. Weaver*, 75 N. Y. 30; *Seamen v. Patten*, 2 Cai. (N. Y.) 312; *Yealy v. Fink*, 43 Pa. St. 212; *Burton v. Fulton*, 49 Pa. St. 151; *Keenan v. Cook*, 12 R. I. 52; *Rail v. Potts*, 8 Humph. (Tenn.) 225; *Wilson v. Marsh*, 34 Vt. 352; *Bishop on Non-Contract Law*, § 789.

A judicial officer of one grade must be presumed to have acted from bad motives where he knowingly and willfully renders a decision contrary to law, and proof of the act will, of itself, authorize the jury to presume the motive. *Chrisman v. Bruce*, 1 Duv. (Ky.) 63; 85 Am. Dec. 603. And in *Eben v.*

Wilson, 33 Md. 135, it was held that the fact that the inspectors of election differed from the voters, whom they had excluded, in political sentiments, might be considered by the jury.

Arbitrators.—The acts of arbitrators, though irregularly done, in all matters to which their jurisdiction extends, are performed in a judicial capacity, and an arbitrator cannot be held liable in a civil action for damages for an award alleged to have been made by him fraudulently and corruptly. *Jones v. Brown*, 54 Iowa 74; 37 Am. Rep. 185.

Judge of Elections.—A judge of an election is not liable for refusing to allow a person to vote, under an error of judgment, but is liable only when he acts willfully, fraudulently, or corruptly. *Bevard v. Hoffman*, 18 Md. 479; 81 Am. Dec. 618; *Jenkins v. Waldron*, 11 Johns. (N. Y.) 114; 6 Am. Dec. 359.

Where the judges of election refused the vote of a male inhabitant maliciously and wantonly, the voter having all the necessary qualifications to vote, it was held that the judges were liable in an action against them, by the party whose vote they refused. *Bernier v. Russell*, 89 Ill. 60.

When a public officer is warranted and authorized by law in the performance of certain acts the fact that he acted maliciously will not make him liable. His motives cannot be inquired into. *Moran v. McClearns*, 41 How. Pr. (N. Y.) 289.

Contra.—Though the weight of authority is believed to support the statement in the text, still there are several responsible authorities which maintain that no civil action lies for the neglect of official duty, *quasi* judicial in its nature, however corrupt or malicious such neglect may be. See *Wilson v. Mayor, etc., of N. Y.*, 1 Den. (N. Y.) 595; 43 Am. Dec. 719; *Weaver v. Devendorf*, 3 Den. (N. Y.) 117; *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557; 2 Am. & Eng. R. Cas. 322; *Steele v. Dunham*, 26 Wis. 393; *Turpen v. Booth*, 56 Cal. 65; 38 Am. Rep. 48; *Mechem on Public Officers*, § 640.

Mr. Mechem in his exhaustive work on public officers referring to the cases cited in support of this doctrine, says: "These cases are believed to follow the better and the safer rule. If the action is really judicial, the immunity which adheres to judicial actions should be applied whether the officer sits upon the

plaintiff to show that the officer acted maliciously and in bad faith.¹

3. Ministerial Officers.—A ministerial officer, acting within his authority and with due care, is not liable to any person who may be injured by his acts.² He is not liable for executing process regular on its face, though it be issued illegally or without jurisdiction, where the want of jurisdiction is as to persons or place;³

bench of a regularly established court or not. As has been said, if the action can be maintained by the allegation of improper motives, no litigant will fail to allege that they existed, and the public officer may constantly be called upon to defend himself from actions at law brought with motives fully malicious as those which are asserted to have inspired him. Public policy, it is believed, requires that all judicial actions shall be exempt from question in private suits." But the learned author seems to have mistaken the ground of decision in at least one of the cases which he cites as sustaining this point. In the case of *Amperse v. Winslow*, 75 Mich. 234, cited by him as sustaining this doctrine, the declaration alleged that the defendant willfully, wrongfully, and maliciously, and well knowing his duty therein in that regard, refused to vote, etc. But the court, by Long, J., said: "There is no claim made in the declaration that the defendant acted willfully and maliciously in this regard of his duty, except in that he refused to vote for and influence the other aldermen to vote for the approval of this bond after the same had been reported favorably by the committee, and after the city attorney had instructed the council as to its duty in the premises. And the fact that at the June meeting of the council it again refused to approve the bond without assigning any reason therefor; admitting these facts, it would not constitute a cause of action. The defendant may have acted honestly in refusing to vote for its approval, and it was a matter to be by him judicially determined."

True Rule.—The correct rule, however, is believed to be that laid down by the court by Wagner, J., in *Pike v. Megoun*, 44 Mo. 491. He says: "An action, then, does not lie against judges or magistrates, or persons acting judicially in a matter within the scope of their jurisdiction however erroneous their judgment, or corrupt and malicious their motives. But there is a limit to this judicial immunity. The civil

remedy depends exclusively upon the nature of the duty which has been violated. When duties which are purely ministerial are cast upon officers whose chief functions are judicial and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. And the same rule obtains where judicial functions are cast upon a ministerial officer. But to render a judge acting in a ministerial capacity, or a ministerial officer acting in a capacity in its nature judicial, liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption, and malice. In other words, that his action was knowingly wrongful, and not according to his honest convictions in respect of his duty."

1. *McOsker v. Burrell*, 55 Ind. 425; *Keenan v. Cook*, 12 R. I. 52; *Gregory v. Brooks*, 37 Conn. 365.

2. *Sample v. Broadwell*, 87 Ill. 617; *Wilmarth v. Burt*, 7 Met. (Mass.) 257; *Sage v. Laurain*, 19 Mich. 137; *Eagle Tp. v. Ely*, 54 Mich. 173; *Orr v. Quimby*, 54 N. H. 590; *Mechem on Pub. Off.*, § 661.

See also *SHERIFFS—Powers, Duties and Liabilities*; *REPLEVIN*, vol. 20, pp. 1089-1096, as to whether replevin may be maintained for property in the hands of an officer taken by a valid process.

A writ of *retorno habendo* in the action of replevin will not authorize the officer to take the property from the possession of a third person, who was not a party to the suit; and if the officer does, under color of the writ, take the property from such third person, he will be guilty of a technical trespass, for which an action will lie, but the measure of damages to be recovered against the officer would be simply for the trespass, and not the value of the property taken. *Lear v. Montross*, 50 Ill. 507.

3. *Watson v. Watson*, 9 Conn. 140; *Cannon v. Sipples*, 39 Conn. 505; *Osgood v. Carver*, 43 Conn. 24; *Neth v.*

but when jurisdiction over the subject-matter is wanting, the officer is liable,¹ as he also is where the want of jurisdiction

Crofut, 30 Conn. 580; *Camp v. Moseley*, 2 Fla. 171; *Martin v. Walker*, 15 Ill. 377; *Davis v. Wilson*, 65 Ill. 525; *Henke v. McCord*, 55 Iowa 378; *Nowell v. Tripp*, 61 Me. 426; 14 Am. Rep. 572; *Clarke v. May*, 2 Gray (Mass.) 410; 61 Am. Dec. 470; *Penniman v. Freeman*, 3 Gray (Mass.) 245; *Pearce v. Atwood*, 13 Mass. 324; *Smith v. Shaw*, 12 Johns. (N. Y.) 257; *Gardner v. Bain*, 5 Lans. (N. Y.) 256; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170; 21 Am. Dec. 181; *Parker v. Walrod*, 16 Wend. (N. Y.) 514; 30 Am. Dec. 124; *Abbot v. Yost*, 2 Den. (N. Y.) 86; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Bradley v. Ward*, 58 N. Y. 409; *Taylor v. Alexander*, 6 Ohio 144; *Champaign Co. Bank v. Smith*, 7 Ohio St. 42; *Sprague v. Birchard*, 1 Wis. 458; 60 Am. Dec. 393; *Bogert v. Phelps*, 14 Wis. 88; *McLean v. Cook*, 23 Wis. 364; *Wilkinson v. Rewey*, 59 Wis. 554; *Mudrock v. Killips*, 65 Wis. 622.

If, however, the officer has knowledge that the process is void he may refuse to execute it. *Davis v. Wilson*, 65 Ill. 525.

An execution fair upon its face is a protection to the officer in making the levy and sale under it, when nothing appears to indicate a want of jurisdiction in the justice who issued it. *Young v. Wise*, 7 Wis. 128; *Twitchell v. Shaw*, 10 Cush. (Mass.) 46; 57 Am. Dec. 80.

An officer who delivers property held by him under attachment to an assignee in insolvency of the debtor upon demand made while the assignment is in force, is not liable therefor to the attaching creditor in case the proceedings in insolvency are subsequently annulled for a want of notice to the debtor of the petition by which they were instituted. *Penniman v. Freeman*, 3 Gray (Mass.) 245.

In an action against an officer who has seized chattels on an execution by one who claims by previous purchase from the execution defendant, the officer must show the execution to be based on a valid judgment before he can dispute the validity of the alleged purchase on the ground that it was fraudulent as against creditors. *Bean v. Loftus*, 48 Wis. 371.

Where the action is by a third person who claims title to the property attached under a transfer from the attachment defendant, and that transfer

is sought to be impeached as having been made in fraud of creditors, it then becomes necessary for the officer to show not only that he acted under a writ valid on its face, but also that the relation of debtor and creditor existed between the attachment defendant and the plaintiff in the attachment. *Bogert v. Phelps*, 14 Wis. 88.

An officer against whom an action is brought for forcibly entering the plaintiff's house, assaulting the plaintiff, and carrying away furniture, may show, in mitigation of damages but not to prove the entry lawful, that he entered for the purpose of making, and did, in fact, make, an attachment, although the attachment was unlawful by reason of the writ not having been returned into court. *Paine v. Farr*, 118 Mass. 74.

1. *Smith v. Shaw*, 12 Johns. (N. Y.) 257; *Suydam v. Keys*, 13 Johns. (N. Y.) 444; *Champaign Co. Bank v. Smith*, 7 Ohio St. 42; *Camp v. Moseley*, 2 Fla. 171; *Taylor v. Alexander*, 6 Ohio 144; *Driscoll v. Place*, 44 Vt. 252.

In *Wilmarth v. Burt*, 7 Met. (Mass.) 257, the court, by Shaw, C. J., said: "As a general rule, the officer is bound only to see that the process which he is called upon to execute is in due and regular form and issues from a court having jurisdiction of the subject. In such case, he is justified in obeying his precept, and it is highly necessary to the due, prompt, and energetic execution of the commands of the law that he should be so. See *Stephens v. Wilkins*, 6 Pa. St. 260. See also *Wise v. Withers*, 3 Cranch (U. S.) 331; *Jones v. Com.*, 1 Bush (Ky.) 34; 89 Am. Dec. 605.

A deputy provost marshal, directed by his superior officer to arrest and punish persons not connected with the army, for retailing spirituous liquors, at their usual places of doing business, to soldiers, is not protected by such order from liability to the arrested party, for damages on account of such arrest, because such order is illegal. *Griffin v. Wilcox*, 21 Ind. 370.

When bonds are in the hands of a city comptroller in a shape to be negotiated, it is his official duty to keep them safely until authorized to dispose of them, and an unauthorized disposal is a violation of duty for which his

appears upon the face of the warrant.¹ The question whether an officer who has notice *aliunde* of a defect in the process under which he acts, will be liable for acting thereunder seems to be a doubtful question; but with a preponderance of authority in favor of holding him exempt from liability.² He is also liable for the execution of process void because of the unconstitutionality of the law under which the process was issued.³ He is

bondsmen are liable. *Stevenson v. Bay City*, 26 Mich. 44.

1. *Hull v. Blaisdell*, 2 Ill. 332; *Tefft v. Ashbaugh*, 13 Ill. 602; *Parker v. Walrod*, 16 Wend. (N. Y.) 514; 30 Am. Dec. 124.

Trover will lie against an officer for taking chattels under a writ of replevin issued for the replevy of goods attached, when there has been no attachment in fact, and the person from whom the officer takes them holds them not under process but as owner. *Driscoll v. Place*, 44 Vt. 252.

2. *People v. Warren*, 5 Hill (N. Y.) 440; *Underwood v. Robinson*, 106 Mass. 296.

It is the duty of a sheriff to levy an execution regular upon its face, and it is no excuse for his omission that the sum specified in it varies from the amount for which the judgment is rendered. *Parmelee v. Hitchcock*, 12 Wend. (N. Y.) 96.

A constable executing an attachment returnable more than four days after its date, is protected, although he knew the facts limiting the return of the process to four days provided that in other respects the process be good on its face. *Webber v. Gay*, 24 Wend. (N. Y.) 485.

Under § 3732, Rev. Sts. *Wisconsin*, an action of replevin cannot be maintained in a justices court against an officer for property taken by him by virtue of a tax warrant, regular upon its face, even though he had notice of a defect in the tax proceedings rendering them void. But such action may be maintained against one who purchases the property at a sale made under the tax warrant. *Power v. Kindschi*, 58 Wis. 539; 46 Am. Rep. 652. See also *O'Shaughnessy v. Baxter*, 121 Mass. 515; *Dunn v. Gilman*, 34 Mich. 256; *Watson v. Watson*, 9 Conn. 140. These cases, however, do not seem to be exactly in point. The facts in these cases, do not disclose an irregularity in the process or want of jurisdiction in the court issuing the process over the subject-matter, but the knowledge which

the officer had was merely of facts which evinced the want of a cause of action. See also *Carter v. Clark*, 28 Conn. 512.

Contra—Illinois.—In *Illinois* the officer is not protected in the execution of process though regular on its face, if he has knowledge of facts which render it void. *McDonald v. Wilkie*, 13 Ill. 22; 54 Am. Dec. 423; *Guyer v. Andrews*, 11 Ill. 494; *Barnes v. Barber*, 6 Ill. 406; *Hill v. Figley*, 25 Ill. 143; *Leachman v. Dougherty*, 81 Ill. 324.

Wisconsin.—The same doctrine is upheld in *Wisconsin*. *Grace v. Mitchell*, 31 Wis. 533; 11 Am. Rep. 613; *Sprague v. Birchard*, 1 Wis. 457; 60 Am. Dec. 393. See also *Bogert v. Phelps*, 14 Wis. 88.

In *Parker v. Walrod*, 16 Wend. (N. Y.) 514; 30 Am. Dec. 124, the court by Nelson, Ch., said: "It is admitted to be the law that the process of a court of inferior jurisdiction will not protect the officer if the want of jurisdiction to issue the same appears upon the face of the process. And I apprehend, also, the same principle may be applied to a case where the want of jurisdiction arises from a fact of public notoriety which is legally presumed to be within the knowledge of the officer as well as others, and of which he is, therefore, bound to take notice." But this is merely *dictum*.

An officer is not protected by his process against an action for false imprisonment where the arrest is made after the defendant against whom the warrant is issued had, subsequent to the date of the warrant and prior to the arrest, entered into a recognizance to appear and failed to do so. *State v. Queen*, 66 N. Car. 615.

3. *Astrom v. Hammond*, 3 McLean (U. S.) 107; *Woolsey v. Dodge*, 6 McLean (U. S.) 142; *Norton v. Shelby Co.*, 118 U. S. 425; *Poindexter v. Greenhow*, 114 U. S. 270; 61 Am. Dec. 381; *Sumner v. Beeler*, 50 Ind. 341; 19 Am. Rep. 718; *Strong v. Daniel*, 5 Ind. 348; *Fisher v. McGirr*, 1 Gray (Mass.) 1; *Lynn v.*

liable for any injury sustained by reason of his failure to perform, negligence in performing, or illegal performance of any duty which is legally cast upon him,¹ to any person specially

Polk, 8 Lea (Tenn.) 121; Bagnall v. Ableman, 4 Wis. 163; Cooley's Const. Lim. (6th ed.) 222. Compare Henke v. McCord, 55 Iowa 378; Sessums v. Botts, 34 Tex. 335; State v. Shakespeare, 41 La. Ann. 156. See Board v. McComb, 92 U. S. 531.

A justice of the peace who issues a warrant under an unconstitutional statute is liable in damages to the person arrested thereon. Kelly v. Bemis, 4 Gray (Mass.) 83; 64 Am. Dec. 50.

An officer who refuses to act under a statute which he considers unconstitutional, does so at his peril, and if the statute is declared valid, he is liable for such refusal. Clark v. Miller, 54 N. Y. 528; People v. Salomon, 54 Ill. 39.

1. Grider v. Tally, 77 Ala. 422; 54 Am. Rep. 65; Eslava v. Jones, 83 Ala. 139; 3 Am. St. Rep. 699; Temple v. People, 6 Ill. App. 378; Snyder v. Brosse, 51 Ill. 357; 99 Am. Dec. 551; Governor v. Dodd, 81 Ill. 162; McCord v. High, 24 Iowa 336; McCarty v. Bauer, 3 Kan. 237; Forsythe v. Ellis, 4 J. J. Marsh. (Ky.) 298; 20 Am. Dec. 218; Maxwell v. Pike, 2 Me. 8; Sawyer v. Wilson, 61 Me. 529; Melville v. Brown, 15 Mass. 82; Nowell v. Wright, 3 Allen (Mass.) 166; 80 Am. Dec. 62; Wallis v. Truesdell, 6 Pick. (Mass.) 455; Holden v. Eaton, 8 Pick. (Mass.) 436; Smith v. Gates, 21 Pick. (Mass.) 55; Keith v. Howard, 24 Pick. (Mass.) 292; Russell v. Phelps, 42 Mich. 377; Raynsford v. Phelps, 43 Mich. 342; 38 Am. Rep. 189; Handy v. Clippert, 50 Mich. 355; McNutt v. Livingston, 7 S. & M. (Miss.) 641; St. Joseph F. & M. Ins. Co. v. Leland, 90 Mo. 177; 59 Am. Rep. 9; Taylor v. Jones, 42 N. H. 25; Connors v. Adams, 13 Hun (N. Y.) 427; Bassett v. Fish, 12 Hun (N. Y.) 209; Piercy v. Averill, 37 Hun (N. Y.) 360; Hutson v. Mayor, etc., of N. Y., 9 N. Y. 163; Hicks v. Dorn, 42 N. Y. 47; 9 Abb. N. S. (N. Y.) 47; McCarthy v. Syracuse, 46 N. Y. 194; Robinson v. Chamberlain, 34 N. Y. 389; 90 Am. Dec. 713; Clark v. Miller, 54 N. Y. 528; Kennedy v. Ryall, 67 N. Y. 379; Bennett v. Whitney, 94 N. Y. 302; Hover v. Barkhoof, 44 N. Y. 113; Jenner v. Joliffe, 9 Johns.

(N. Y.) 381; Adsit v. Brady, 4 Hill (N. Y.) 630; 40 Am. Dec. 305; Bailey v. Mayor, etc., of N. Y., 3 Hill (N. Y.) 531; 38 Am. Dec. 669; Wilson v. Mayor, etc., of N. Y., 1 Den. (N. Y.) 595; 43 Am. Dec. 719; People v. Tweed, 13 Abb. N. S. (N. Y.) 25; Van Schaick v. Sigel, 60 How. Pr. (N. Y.) 122; Mott v. Hudson River R. Co. 8 Bosw. (N. Y.) 345; Wooley v. Baldwin, 101 N. Y. 688; Work v. Hoofnagle, 1 Yeates (Pa.) 506; State v. Cole, 6 Lea (Tenn.) 492; Sawyer v. Corse, 17 Gratt. (Va.) 230; 94 Am. Dec. 415; Amy v. Barkholder, 11 Wall. (U. S.) 136.

A mistake as to his duty, but with honest intentions, will not excuse the offender. Amy v. Barkholder, 11 Wall. (U. S.) 136.

A contractor invested with the powers of a non-judicial officer, is liable to one who sustains special damage by such contractor's neglect of duty. Robinson v. Chamberlain, 34 N. Y. 389; 90 Am. Dec. 713.

Officers De Facto.—An officer *de facto* cannot be compelled to act, and, therefore, incurs no liability by his mere nonfeasance. Olmsted v. Dennis, 77 N. Y. 379; Bentley v. Phelps, 27 Barb. (N. Y.) 524; Shepherd v. Lincoln, 17 Wend. (N. Y.) 250.

A taxpayer had funds in the bank sufficient to pay his taxes and the collector received his check for the amount, but failed to present the check at the bank in due time and the institution afterwards failed. *Held*, that the collector must bear the loss. *Held*, also, that if after the receipt of the check, the collector returned the taxes delinquent, and the taxpayer was compelled to pay them with another appropriation of money, the collector became liable to him for the amount of the check. Choteau v. Rowse, 56 Mo. 65.

The defendant was in command of a steamship at quarantine, which the deputy health officer of the port of New York, ordered to be fumigated. By his order, the chief steward cleared the passengers from the steerage, and utensils containing some poisonous substance were placed therein for the purpose of fumigation. The health officer gave instructions as to the length of time the steerage should

injured thereby,¹ provided such conduct is the proximate cause of the injury.² But if the duty is of such a nature as to require money to enable the officer to perform it, he cannot be held

remain closed and as to the removal of the utensils. One of these, an ordinary drinking cup, was not removed with the others and plaintiff's intestate, a child about five years old, who, with its mother, had been ordered by the steward to return to the steerage cabin, drank some of the poison in the cup and died from the effects. In an action by the father to recover damages, it was held that the defendant was liable. *Kennedy v. Ryall*, 67 N. Y. 379.

A superintendent of repairs on the canals of the State, although an agent of the State, is personally liable in an action on the case for damages sustained by an individual, through the negligence of workmen employed in making repairs. It seems that in an action against the superintendent for nonfeasance, it would be necessary to show his office, and all of the facts necessary to fix upon him the duty of making repairs, as that he had funds, etc.; but for misfeasance, it is enough to prove negligence or mismanagement. *Shepherd v. Lincoln*, 17 Wend. (N. Y.) 250.

A collector of taxes is liable in trespass, if he sell upon his warrant a greater number of the chattels than sufficient to pay the tax, with the fees and charges. *Williamson v. Dow*, 32 Me. 559.

The refusal of an officer, charged with the disbursement of public funds, to apply the fund to the purposes to which it is devoted by law, constitutes no misappropriation of the fund. *Ryerson v. Utley*, 16 Mich. 269. But when the commissioner of immigration, upon being required to render immediately to the comptroller a detailed statement of receipts, and to pay the same into the State treasury, replies that he had received no moneys belonging to the State, such reply is evidence of a conversion of all the moneys of the State, which had theretofore come to his hands, as fast as received, and such conversion was a breach of his official bond, which was in force at the time of the receipt of the moneys. *People v. Van Ness*, 79 Cal. 84.

As to what constitutes nonfeasance, misfeasance and malfeasance, see MAL-

FEASANCE, vol 14, p. 5; MISFEASANCE, vol. 15, p. 621.

An officer who attaches property on mesne process, and sells it thereon, without the consent of the creditor and owner, or otherwise than by the mode prescribed by statute, becomes a trespasser *ab initio*. *Ross v. Philbrick*, 39 Me. 29.

If an officer, having lawfully seized goods by virtue of a warrant of distress, wantonly removes them to a great distance before the sale, whereby the owner is injured, an action on the case may be maintained against him, but he is not for that cause, a trespasser *ab initio*. *Purrrington v. Loring*, 7 Mass. 388.

An officer who, at the request of the judgment creditor, commits a debtor on execution to the jail farthest from his residence, although requested by the debtor to commit to a nearer jail in the same county, is not liable to an action by the debtor. *Woodward v. Hopkins*, 2 Gray (Mass.) 210.

1. *Piercy v. Averill*, 37 Hun (N. Y.) 360; *Bassett v. Fish*, 12 Hun (N. Y.) 209; *Bennett v. Whitney*, 94 N. Y. 302. See *supra*, this title, *Liabilities of Public Officers*.

2. *Eslava v. Jones*, 83 Ala. 179; 3 Am. St. Rep. 699; Mayor, etc., of Albany v. Cunliff, 2 N. Y. 165; *Lick v. Madden*, 36 Cal. 208; 95 Am. Dec. 175; *State v. Harris*, 89 Ind. 363; 46 Am. Rep. 169; *District Tp. v. Bowman*, 55 Iowa 129.

No action for damages will lie against a circuit clerk who wrongfully issues a writ of *venditioni exponas* commanding the sheriff to sell certain lands in possession of the plaintiff on which an execution against another person has been levied, the wrongful levy and sale not affecting his right, title, or possession; and the costs, expenses, and attorney's fees incurred in defending a suit brought against him by the purchaser, alleged as special damages, not being the natural and proximate consequences of the issuing of the writ. *Eslava v. Jones*, 83 Ala. 179; 3 Am. St. Rep. 699.

When the fault or neglect of the injured party materially contributed to injury, the officer is not liable. See

liable unless it can be shown that he possessed sufficient funds or was in fault for not possessing them.¹ The fact that a failure of performance of his duty is made a penal offense, does not alter his personal liability. He remains liable.² And he will be held liable when his improper conduct was the result of a mistake in good faith as to his duty.³

a. FOR DEFAULT OF OFFICIAL SUBORDINATES.—A public officer is not responsible for the acts or defaults of his subordinates when the subordinates are public officers, even though they are selected by him and subject to his orders.⁴ The

Boardman v. Hayne, 29 Iowa 339; Lick v. Madden, 36 Cal. 208; 95 Am. Dec. 175.

1. Studley v. Geyer, 72 Me. 286; Nowell v. Wright, 3 Allen (Mass.) 166; 80 Am. Dec. 62; Hines v. Lockport, 50 N. Y. 236; Warren v. Clement, 24 Hun (N. Y.) 472; Bartlett v. Crozier, 17 Johns. (N. Y.) 439; 8 Am. Dec. 428; Smith v. Wright, 24 Barb. (N. Y.) 170; 12 How. Pr. (N. Y.) 555; Garlinghouse v. Jacobs, 29 N. Y. 297; Smith v. Wright, 27 Barb. (N. Y.) 621; Hutson v. Mayor, etc., of N. Y., 5 Sandf. (N. Y.) 289; Hover v. Barkhoof, 44 N. Y. 113. See also People v. Ulster Co., 93 N. Y. 397; People v. Comrs. of Highways, 7 Wend. (N. Y.) 474; Barker v. Loomis, 6 Hill (N. Y.) 463; Hickok v. Plattsburgh, 15 Barb. (N. Y.) 427; Shepherd v. Lincoln, 17 Wend. (N. Y.) 250; Porter v. Thomson, 22 Iowa 391; Oswald v. Thedinga, 17 Iowa 13.

An indictment against commissioners of highways for not repairing a bridge is defective unless it aver that the defendants had funds or other means to defray the expense of the repairs. People v. Adsit, 2 Hill (N. Y.) 619.

Misfeasance.—While in some cases in order to charge an officer, upon whom is imposed the duty of keeping a street in repair, with damages resulting from a defect in the street, it is necessary to show that he had adequate means in his hands to make the repairs, such proof is not necessary in a case of misfeasance; that is, when the officer has acted, but negligently, to the special injury of the plaintiff. Bennett v. Whitney, 94 N. Y. 302; Rector v. Pierce, 3 Thomp. & C. (N. Y.) 416.

Burden of Proof.—The burden of showing want of means is upon the defendant. Weed v. Ballston Spa, 76 N. Y. 329; Hyatt v. Roundout, 44

Barb. (N. Y.) 385; Griffith v. Follett, 20 Barb. (N. Y.) 620; Eveleigh v. Hounsfield, 34 Hun (N. Y.) 140; Smith v. Wright, 27 Barb. (N. Y.) 621; People v. Adsit, 2 Hill (N. Y.) 619. In these cases it was held that the complaint should aver the possession, or means of obtaining possession, of the requisite funds by the defendants.

2. Raynsford v. Phelps, 43 Mich. 342; 38 Am. Rep. 189; Hayes v. Porter, 22 Me. 371.

3. Amy v. Barkholder, 11 Wall. (U. S.) 136.

In Beckham v. Nacke, 56 Mo. 546, it was held that an honest mistake by a magistrate performing a marriage ceremony would not protect him against the penalty provided by law to the performance of such ceremony when the persons married are minors, without the consent of their parents or guardians. See Wood v. Ruland, 10 Mo. 143.

4. 1 Minor's Inst. (3d ed.) 253; Story on Agency, § 319; Throop on Pub. Off., § 592; Hall v. Smith, 2 Bing. 156; 9 E. C. L. 357; Robertson v. Sichel, 127 U. S. 507; Brissac v. Lawrence, 2 Blatchf. (U. S.) 121; Scott Co. v. Fluke, 34 Iowa 317; Foster v. Metts, 55 Miss. 77; 30 Am. Rep. 504; Whyte v. Mills, 64 Miss. 158; Hutchins v. Brackett, 22 N. H. 252; 53 Am. Dec. 248; Murphy v. Comrs. of Emigration, 28 N. Y. 134; Martin v. Mayor, etc., of Brooklyn, 1 Hill (N. Y.) 545; Bailey v. Mayor, etc., of N. Y., 3 Hill (N. Y.) 531; 38 Am. Dec. 669; Wiggins v. Hathaway, 6 Barb. (N. Y.) 632; Conwell v. Voorhees, 13 Ohio 523; 42 Am. Dec. 206; Bolan v. Williamson, 1 Brev. (S. Car.) 181; Richmond v. Long, 17 Gratt. (Va.) 375; 94 Am. Dec. 461; Tracy v. Cloyd, 10 W. Va. 19. See also Dunlop v. Munroe, 7 Cranch (U. S.) 242; Bishop v. Williamson, 11 Me. 495; People v. Campbell, 82 N. Y. 247; Cunningham v. Moore, 55 Tex. 373; 40

responsibility of sheriffs for the acts of their deputies constitutes an exception to this rule. It is supposed that the reason for this exception is that at common law the deputy was the private servant of the sheriff.¹ But where the public officer is charged with the appointment of his official subordinate he is liable for negligence in making the appointment if he appoint some person notoriously unfit for the place,² and he is also liable when he is negligent in superintending his subordinates in the discharge of their duties,³ or when he co-operates in or authorizes the wrong.⁴

b. FOR DEFAULT OF PRIVATE SERVANTS.—A public officer is liable for the default or negligence of one in his employment as a private servant, though he may be engaged in assisting his master in his public duties.⁵ But in order to make

Am. Rep. 812. See AGENCY, vol. 1, p. 395.

Where the injured party procured the appointment of a deputy by assuring the officer that he should run no risk and incur no liability by appointing such deputy, it was held that the officer was not liable for the defaults of his deputy nor for his own which were the result of such assurance. *Skinner v. Wilson*, 61 Miss. 90.

Where a sheriff's officer had seized goods of a trader under a *fi. fa.*, more than sufficient to satisfy the levy, and the trader having become bankrupt, and assignees chosen before the goods were sold, the assignees authorized the officer to deliver the whole of the goods to A B, and to receive from him a certain sum as the full value of the goods, which he did accordingly, and out of that money satisfied the execution creditor, but never paid over the residue to the assignees. *Held*, that they could not sue the sheriff for this money the officer not having derived his authority to sell the whole of the goods from the sheriff but from the plaintiffs, the assignees. *Cook v. Palmer*, 6 B. & C. 739; 13 E. C. L. 305.

The misconduct of a deputy sheriff is not ground for removing the sheriff from office, he not having sanctioned the misconduct. *State v. Budd*, 39 La. Ann. 232.

An officer is entitled to relief under the disbursing officers' act of 1866, in a case where his chief clerk opened his safe and stole government funds in the officer's hands without fault on the part of the officer. *Howell v. U. S.*, 7 Ct. of Cl. 512.

Where, however, a paymaster seeking relief under the disbursing offi-

cer's act avers that he drew checks which his clerk fraudulently raised, it will be presumed that the checks were drawn on some bank or bankers, against whom the paymaster would have recourse for the wrongful payment. *Hall v. U. S.*, 9 Ct. of Cl. 270.

1. Bl. Com., vol. 1, pp. 344, 346; 1 Minor's Insts. (3d ed.) 254; Bacon's Abr. Sheriffs (H).

As to liability of sheriff for acts of his deputy see DEPUTY, vol. 5, p. 634.

Under sheriffs, bailiffs, etc., are looked upon as the high sheriff's officers, for whom he shall answer as their superior, and their acts are to many purposes considered as his own. *Bac. Abr. Sheriffs (H)*.

2. *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632; *Story on Agency*, § 321. See 2 Kent's Com. 610.

A postmaster is not responsible for the secret delinquencies of a sworn assistant, appointed and retained by him in good faith. *Schroyer v. Lynch*, 8 Watts (Pa.) 453.

3. *Throop on Pub. Off.*, § 592; *Dunlop v. Munroe*, 7 Cranch (U. S.) 242; *Bishop v. Williamson*, 11 Me. 495. See *Ford v. Parker*, 4 Ohio St. 576.

4. *Tracy v. Cloyd*, 10 W. Va. 19.

5. 1 Minor's Inst. (3d ed.) 253; *State v. Newton*, 33 Ark. 276; *Ely v. Parsons*, 55 Conn. 83; *Anne Arundel Co. v. Duvall*, 54 Md. 350; 39 Am. Rep. 393; *Prosser v. Coots*, 50 Mich. 262; *McNutt v. Livingston*, 7 Smed. & M. (Miss.) 641; *State v. Moore*, 19 Mo. 369; 61 Am. Dec. 563; *Hutchins v. Brackett*, 22 N. H. 252; 53 Am. Dec. 248; *Van Schaick v. Sigel*, 60 How. Pr. (N. Y.) 122; *Shepherd v. Lincoln*, 17 Wend. (N. Y.) 250; *Bolan v. Williamson*, 1 Brev. (S. Car.) 181; *Flana-*

the officer so liable the subordinate must act under color of his office.¹

c. **LIABILITY ON THEIR OFFICIAL CONTRACTS.**—Contracts made by a public officer on behalf of the government do not generally bind him, although the contract be expressed in language

gan v. Hoyt, 36 Vt. 565; 86 Am. Dec. 675; Sawyer v. Corse, 17 Gratt. (Va.) 230; 94 Am. Dec. 445.

A person in making his requisition for a certificate upon the register of the city of New York, designated a clerk employed by the register whom he desired should make the search. *Held*, that the register was liable for all errors, inaccuracies or mistakes made in the return. *Van Schaick v. Sigel*, 60 How. Pr. (N. Y.) 122.

County commissioners are not liable for an injury sustained by a traveler on one of the county highways by the negligence of a laborer engaged in the repairing of the road upon the employment of the road supervisor, an independent officer appointed in pursuance of law. *Anne Arundel Co. v. Duvall*, 54 Md. 350; 39 Am. Rep. 393.

Who Is Private Servant.—If the sub-agent hold an office not known to the law and his appointment is private and discretionary with his principal, he is a private servant. *Ely v. Parsons*, 55 Conn. 83; also *Dunlop v. Monroe*, 7 Cranch (U. S.) 242; *Bishop v. Williamson*, 11 Me. 495.

"This distinction is not only logical, seeing that the subordinate, when a public officer, is the agent, not of his chief, but of the government, but it is also rendered needful by sound policy as well as by justice." 1 Min. Inst. (2d ed.) 254. See also *Hall v. Smith*, 2 Bing. 156; 9 E. C. L. 357.

Applied to Postmasters.—A postmaster is not liable for the loss of a letter occasioned by the negligence of his clerk appointed according to law. *Keenan v. Southworth*, 110 Mass. 474; 14 Am. Rep. 613; *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632.

A postmaster is liable for the acts of one whom he permitted to have the care and custody of the mail, in his office, not having been sworn according to law. *Bishop v. Williamson*, 11 Me. 495.

By law the clerk of a circuit court may appoint deputies, but the deputy is responsible to the clerk alone, and the clerk is liable to parties who may be injured by the acts of the deputy, as

the acts of the deputy are the acts of the principal. *McNutt v. Livingston*, 7 Smed. & M. (Miss.) 641.

A constable or deputy sheriff, who gives his receipt for the collection of notes placed in his hands, thereby assumes an agency, for negligence or misconduct in the fulfillment of which he is personally responsible to the party injured. *Rose v. Lane*, 3 Humph. (Tenn.) 218.

Exemplary Damages.—Exemplary damages may properly be awarded against a sheriff for the misconduct of his deputy. *Hazard v. Israel*, 1 Binn. (Pa.) 240; 2 Am. Dec. 438.

Burden of Proof.—Proof that the defendant was collector and that the person who made the sale was his deputy, and that the defendant had received from another person who acted as principal assessor a list of taxes in his district, will not throw on the defendant the burden of proving that the tax was not legally assessed. *Holden v. Eaton*, 8 Pick. (Mass.) 436.

The commissioners of emigration are not liable for the loss of passengers' baggage by persons whom they have licensed to run steamboats. *Murphy v. Comrs. of Emigration*, 28 N. Y. 134.

In the absence of personal negligence, one acting gratuitously as a public officer, is not liable personally for the negligence of a person necessarily employed in the execution of an order properly given by him. The doctrine of *respondet superior* does not apply to such cases. *Donovan v. McAlpine*, 85 N. Y. 185; 39 Am. Rep. 649; *Dailey v. Mayor, etc.*, of N. Y., 3 Hill (N. Y.) 531; 38 Am. Dec. 669.

Although a sheriff is liable for a trespass committed by his deputy alone, he cannot be sued therefor jointly with the deputy, nor will an action lie against him after a judgment against the deputy, upon which execution has been issued. *Campbell v. Phelps*, 1 Pick. (Mass.) 62; 11 Am. Dec. 139.

1. *Harrington v. Fuller*, 18 Me. 277; 36 Am. Dec. 719; *Weldes v. Edsell*, 2 McLean (U. S.) 366; *Knowl-*

that would render an agent of a private person liable;¹ in the absence of evidence of an unqualified intention of the parties to

ton *v.* Bartlett, 1 Pick. (Mass.) 270; Acker *v.* Ledyard, 8 Barb. (N. Y.) 514.

When Subordinate Acts Under Instructions.—A sheriff is not liable for the acts of his deputy, where the deputy acts out of the ordinary line of his duty, by the directions of the plaintiff in the execution. Acker *v.* Ledyard, 8 Barb. (N. Y.) 514; Armstrong *v.* Garrow, 6 Cow. (N. Y.) 465; Gorham *v.* Gale, 6 Cow. (N. Y.) 469, *n. a.*

But where the plaintiff in an execution has given instructions to a deputy sheriff to depart from the line of duty imposed by law, but the deputy has done nothing in conformity with such instructions, the sheriff is not discharged from liability for his deputy's acts. Sheldon *v.* Payne, 7 N. Y. 453.

1. 1 Minor's Inst. (3d ed.) 237; 2 Kent's Com., p. 632; Story on Agency, § 302; Mechem on Pub. Off., § 805; Bac. Abr., Master and Servant (L); Macbeath *v.* Haldimand, 1 T. R. 172, 181; Hodgson *v.* Dexter, 1 Cranch (U. S.) 845; Parks *v.* Ross, 11 How. (U. S.) 362; Jones *v.* La Tombe, 3 Dall. (U. S.) 384; New York, etc., S. S. Co. *v.* Harbison, 16 Fed. Rep. 688; Comer *v.* Bankhead, 70 Ala. 493; Dwinelle *v.* Henriquez, 1 Cal. 387; Adams *v.* Whittlesey, 3 Conn. 560; Perry *v.* Hyde, 10 Conn. 329; Broadwell *v.* Chapin, 2 Ill. App. 511; McClure *v.* Secrist, 5 Ind. 31; Perrin *v.* Lyman, 32 Ind. 16; Sheffield School Tp. *v.* Andress, 56 Ind. 157; Monticello *v.* Kendall, 72 Ind. 91; 37 Am. Rep. 139; Mackensie *v.* Board, etc., 72 Ind. 189; Wallis *v.* Johnson School Tp., 75 Ind. 368; Pine Civil Tp. *v.* Huber Mfg. Co., 83 Ind. 121; Murray *v.* Carothers, 1 Metc. (Ky.) 71; Stinchfield *v.* Little, 1 Me. 231; 10 Am. Dec. 65; Brown *v.* Austin, 1 Mass. 208; 2 Am. Dec. 11; Bainbridge *v.* Downie, 6 Mass. 253; Dawes *v.* Jackson, 9 Mass. 490; Cutler *v.* Ashland, 121 Mass. 588; Sanborn *v.* Neal, 4 Minn. 126; 77 Am. Dec. 502; Copes *v.* Matthews, 10 Smed. & M. (Miss.) 398; Tutt *v.* Hobbs, 17 Mo. 486; Reed *v.* Conway, 26 Mo. 13; Hodges *v.* Runyan, 30 Mo. 491; Knight *v.* Clark, 48 N. J. L. 22; 57 Am. Rep. 534; Andover *v.* Grafton, 7 N. H. 298; Crowell *v.* Crispin, 4 Daly (N. Y.) 100; Nichols *v.* Moody, 22 Barb. (N. Y.) 611; Walker *v.* Swartwout, 12 Johns. (N. Y.) 444; 7 Am. Dec. 334; Rathbon *v.* Budlong, 15 Johns. (N. Y.) 1; Olney *v.*

Wickes, 18 Johns. (N. Y.) 122; Fox *v.* Drake, 8 Cow. (N. Y.) 191; Belknap *v.* Reinhart, 2 Wend. (N. Y.) 375; 20 Am. Dec. 621; Osborne *v.* Kerr, 12 Wend. (N. Y.) 179; Hall *v.* Lauderdale, 46 N. Y. 70; Fleming *v.* Suspension Bridge, 92 N. Y. 368; Cook *v.* Irvine, 5 S. & R. (Pa.) 492; 9 Am. Dec. 397; Heidelberg School Dist. *v.* Horst, 62 Pa. St. 301; Miller *v.* Ford, 4 Rich. (S. Car.) 376; 55 Am. Dec. 687; Hammaraskold *v.* Bull, 11 Rich. (S. Car.) 473; Enloe *v.* Hall, 1 Humph. (Tenn.) 303; Stone *v.* Huggins, 28 Vt. 617. See AGENCY, vol. 1, p. 404. See also Tip-pets *v.* Walker, 4 Mass. 595.

Generally the officer will be exempt from liability, although he sign the contract in his own name, provided it contains a description of himself as a public officer. Heidelberg School Dist. *v.* Horst, 62 Pa. St. 301; Miller *v.* Ford, 4 Rich. (S. Car.) 376; 55 Am. Dec. 687; Tutt *v.* Hobbs, 17 Mo. 486. Compare Cahokia *v.* Rantenberg, 88 Ill. 219; Mellen *v.* Moore, 68 Me. 390.

Where a contract was made by public officers in their own names, to which they subscribed themselves with the further description of commissioners for building the courthouse at Owego village, it was held that they were not personally liable. Fox *v.* Drake, 8 Cow. (N. Y.) 191.

This applies as well to sealed as to unsealed instruments. Hodgson *v.* Dexter, 1 Cranch (U. S.) 346; Knight *v.* Clark, 48 N. J. L. 22. See Providence *v.* Miller, 11 R. I. 272; 23 Am. Rep. 453.

A lease for a year by county commissioners under their own seals and not the county seal, is binding on the county as an express contract; and if the possession be not delivered up at the end of the term, but the occupancy continued, an implied contract arises against the county. A suit for use and occupation, however, might not lie against the county, as the occupation was not by the county, nor for its benefit. County *v.* Bridenhart, 16 Pa. St. 458.

When an agent is intrusted with the performance of a public duty, he cannot be held personally liable on any contract made by him in pursuance of such duty. Brown *v.* Austin, 1 Mass. 208; 2 Am. Dec. 11.

A person was pardoned on condition

bind the officer,¹ it is not to be presumed, either that a public

that he secured the payment of \$1,000 to the county, and the county commissioners took a mortgage to themselves instead of the county. *Held*, that the mortgage was good, the commissioners being trustees for the county by implication of law from the nature of the transaction. *Rood v. Winslow*, 2 Dougl. (Mich.) 68. See *State Bank v. Chapelle*, 40 Mich. 447.

The vessel of the plaintiff was employed by the defendant, a captain in the service of the United States, in transporting ordnance and military stores of the United States from Oswego to Sackett's Harbor during the late war, and by the direction of the defendant was sunk in the harbor of Oswego in order to prevent the ordnance, etc., from falling into the hands of the enemy who captured Oswego and raided and carried off the vessel. It was held that the defendant was not answerable to the plaintiff for the value of the vessel so sunk and lost. *Bronson v. Woolsey*, 17 Johns. (N. Y.) 46.

Where Officer Receives Funds.—As a general rule a public agent is not personally liable on a contract made by him in behalf of the government, but if, by his interference he prevents the remedy as against the government, he makes himself answerable; or if he receives the money from the government to enable him to fulfill his contract and refuses to pay it over, he is liable to the parties in an action for goods had and received to his use. *Freeman v. Otis*, 9 Mass. 272; 6 Am. Dec. 66; *Hammaraskold v. Bull*, 11 Rich. (S. Car.) 493; *Chapman v. Williams*, 7 Har. & J. (Md.) 124. See *Twycross v. Dreyfus*, L. R., 5 Ch. Div. 605.

An agreement for the purchase and sale of realty was made between E J and M, of the first part, and D, "in behalf of the city of Providence," of the second part. It was signed by all of the parties in their own names and sealed with their own seals. On demurrer to a bill of specific performance filed by the city of Providence, it was held that the contract was that of D personally, and not that of the city. *Held*, further, that the words "in behalf of the city of Providence," though indicating a beneficial interest on the part of the city, neither made it a party to the contract, nor entitled it

to sue as such. *Held*, further, that the fact admitted at the hearing, though not charged in the bill, that D was mayor of the city of Providence when the contract was made and signed was unimportant. *Providence v. Miller*, 11 R. I. 272; 23 Am. Rep. 453.

The public administrator of the county of San Francisco is not a public officer within the meaning of the rule, and is personally liable upon a contract made in relation to estates upon which he administers, unless the idea of such personal liability be excluded by the contract. *Dwinelle v. Henriquez*, 1 Cal. 387.

A due-bill "for work done on the Hazle Valley schoolhouse and hall," and signed by two individuals with the addition "committee," is the personal liability of the signers. *Anderson v. Pearce*, 36 Ark. 293; 33 Am. Rep. 39.

Where a committee was chosen by a town to rebuild a bridge which the town was bound to maintain, it was held that the members of such committee were not to be deemed public agents, but were subject to the same rules in regard to personal liability on their contracts made for that purpose as other agents. *Simonds v. Heard*, 23 Pick. (Mass.) 120; 34 Am. Dec. 41.

In 1854, the county court of Lewis county by an order entered of record, having determined to build a new courthouse and clerk's office, the cost of which was to be paid in four equal annual installments, contracted for the erection thereof on the terms aforesaid. In December, 1854, said court appointed J B its agent, to borrow the money necessary to meet the engagements of the county with its contractors, and pledged the county for the payment thereof. J B forwarded from the Exchange Bank of Virginia \$4,075.04 for that purpose, for which he made four negotiable notes to the bank, whereby he promised to pay the same to the bank 120 days after their respective dates, and signed the same J B, agent for Lewis county. In an action brought by the bank against Lewis county to recover the amount of this loan, it was held that the said notes were the notes of J B, and not the notes of Lewis county. *Exchange Bank v. Lewis Co.*, 28 W. Va. 273.

1. *Parks v. Ross*, 11 How. (U. S.) 362; *New York, etc., S. S. Co. v.*

agent intends to bind himself personally, or that a party contracting with him in his public character means to rely upon his individual responsibility,¹ because governments can only contract through their officers and agents,² and, besides, to hold the agent liable would render it difficult for the government to obtain the services of responsible men; so that considerations of public policy require the agent to be held exempt.³ But in order to escape liability the officer must designate the department of the government for which he acts,⁴ and his contracts must be those which are authorized by law.⁵ But if the person with whom the contract is made has equal means of knowledge as to the officer's

Harbison, 16 Fed. Rep. 688; Perry v. Hyde, 10 Conn. 329; Mann v. Richardson, 66 Ill. 481; Broadwell v. Chapin, 2 Ill. App. 511; Bayliss v. Pearson, 15 Iowa 279; Simonds v. Heard, 23 Pick. (Mass.) 120; 34 Am. Dec. 41; Copes v. Matthews, 10 Smed. & M. (Miss.) 398; Osborne v. Kerr, 12 Wend. (N. Y.) 179; Gill v. Brown, 12 Johns. (N. Y.) 385; Nichols v. Moody, 22 Barb. (N. Y.) 611; Crowell v. Crispin, 4 Daly (N. Y.) 100; Miller v. Ford, 4 Rich. (S. Car.) 376; 55 Am. Dec. 687; Providence v. Miller, 11 R. I. 272; 23 Am. Rep. 453. Compare Bingham v. Stewart, 13 Minn. 106.

When the agent fails to disclose the fact that he was the agent of the government, it will be presumed that credit was given to the agent personally. Nichols v. Moody, 22 Barb. (N. Y.) 611.

Where one of the selectmen of a town signed a note with his own name "for the selectmen," it was not the promissory note of the town. Andover v. Grafton, 7 N. H. 298.

Where a government agent, though known to be such, wrote to the plaintiff a letter on the subject in suit in these words:

"Sir: I pray you to make a draft of the ship, as soon as possible, for which you shall have the usual allowance. From your humble servant,
"J. W."

It was held that the writing evidenced an unqualified intention on the part of J W to be personally bound by the contract. Sheffield v. Watson, 3 Cai. (N. Y.) 69.

Extrinsic evidence may be resorted to if it be doubtful from the contract itself whether the public agents intend to assume an individual responsibility, and the debt which is evidenced by the contract, the object sought to be obtained by the arrangement, the dec-

larations made at the time in the presence of the parties, and the disposition made of the money raised by the contract, may be given in evidence. Sanborn v. Neal, 4 Minn. 126; 77 Am. Dec. 502; New York, etc., S. S. Co. v. Harbison, 16 Fed. Rep. 688. Compare Fowler v. Atkinson, 6 Minn. 578.

1. Nichols v. Moody, 22 Barb. (N. Y.) 611; Crowell v. Crispin, 4 Daly (N. Y.) 100; Murray v. Carothers, 1 Metc. (Ky.) 71; Adams v. Whittlesey, 3 Conn. 560; 2 Kent's Com. 632.

There is a strong presumption of law against any credit having been given to a public agent acting within the scope of his authority. And if, in a case where he acted beyond his authority, the defect of authority was known to the other party, it seems that the same presumption lies against the liability. McCurdy v. Rogers, 21 Wis. 197; 91 Am. Dec. 468. See also Ogden v. Raymond, 22 Conn. 379; 58 Am. Dec. 429.

2. Mechem on Pub. Off. § 803.

3. 1 Minor's Inst. (3d ed.) 237; Story on Agency, § 302; Macbeath v. Haldimand, 1 T. R. 172; Hodgson v. Dexter, 1 Cranch (U. S.) 345; Sanborn v. Neal, 4 Minn. 126; 77 Am. Dec. 502.

4. Wing v. Glick, 56 Iowa 473; 41 Am. Rep. 118; Calikia v. Rautenberg, 88 Ill. 219; Bayliss v. Pearson, 15 Iowa 279; American Ins. Co. v. Stratton, 59 Iowa 696.

The officer must disclose a responsible principal. Blakely v. Bennecke, 59 Mo. 193.

5. Lee v. Munroe, 7 Cranch (U. S.) 366; Bloomington School Tp. v. National School, etc., Co., 107 Ind. 43; State v. Hawes, 112 Ind. 323; Jefferson School Tp. v. Litton, 116 Ind. 467; Ross v. Brown, 74 Me. 352; Parsons v. Monmouth, 70 Me. 262; Mayor, etc., of Baltimore v. Reynolds, 20 Md. 1; 83 Am. Dec. 535; McClellicks v. Bryant,

authority, as the officer himself, and the officer acts in good faith, he will not be liable for having exceeded his authority;¹ and where the officer's authority depends upon a public statute, all who contract with him are presumed to know the extent and limitations of his authority.² Conversely, no suit lies by a public agent upon any contract entered into by him on behalf of the government. It must be brought in the name of the government.³

A public officer is liable in tort for any false or fraudulent representations made by him in the course of his official transactions.⁴

1 Mo. 598; 14 Am. Dec. 310; McDonald v. Franklin Co., 2 Mo. 217; Ruggles v. Washington Co., 3 Mo. 496; Osborne v. Tunis, 25 N. J. L. 633; Delafield v. Illinois, 2 Hill (N. Y.) 159; Delafield v. Illinois, 26 Wend. (N. Y.) 192; Yulee v. Canova, 11 Fla. 9; Moulton v. Parks, 64 Cal. 166; Comrs. v. Lycoming Co., 46 Pa. St. 496; McCurdy v. Rogers, 21 Wis. 197; 91 Am. Dec. 468.

Though a private agent acting in violation of specific instructions, yet within the scope of a general authority, may bind his principal, the rule as to the effect of a like act of a public agent as the officer of a municipal corporation is otherwise. Mayor, etc., of Baltimore v. Eschbach, 18 Md. 276; Mayor, etc., of Baltimore v. Reynolds, 20 Md. 1; 83 Am. Dec. 535.

1. Murray v. Carothers, 1 Metc. (Ky.) 71; Newman v. Sylvester, 42 Ind. 106.

If township trustees, acting officially, exceed their authority unintentionally under a mistake of law, in which the other contracting party equally participates with equal means of knowledge, yet the parties contract, neither at the time looking to personal liability, the trustees will not become personally liable, nor will the township be liable. Houston v. Clay Co., 18 Ind. 396; Mann v. Richardson, 66 Ill. 481; Sanborne v. Neal, 4 Minn. 126; 77 Am. Dec. 502.

It has been held that it is not essential for the agent to give a right of action against some other party in order to escape liability himself. Ogden v. Raymond, 22 Conn. 379; 58 Am. Dec. 429; Hall v. Crandall, 29 Cal. 567; 89 Am. Dec. 64; McCurdy v. Rogers, 21 Wis. 197; 91 Am. Dec. 468. See also Newman v. Sylvester, 42 Ind. 106; Perry v. Hyde, 10 Conn. 329.

2. New York, etc., S. S. Co. v. Harbison, 16 Fed. Rep. 688; Newman v.

Sylvester, 42 Ind. 106; Hull v. Marshall Co., 12 Iowa 142; Clark v. Des Moines, 19 Iowa 199; 87 Am. Dec. 423; Mayor, etc., of Baltimore v. Eschbach, 18 Md. 276; State v. Hays, 52 Mo. 578; McCurdy v. Rogers, 21 Wis. 197; 91 Am. Dec. 468; The Floyd Acceptances, 7 Wall. (U. S.) 666. See *infra*, this title, *Liability of the Public for the Acts of Its Officers and Agents*.

In the case of a public agent where his authority or that of his principal to contract is derived from a public statute, the party contracted with is presumed to know the limitations of such authority, and the doctrine that an agent by contracting for his principal affirms his authority, does not apply. McCurdy v. Rogers, 21 Wis. 197; 91 Am. Dec. 468.

Individuals, as well as courts, must take notice of the extent of authority of public agents. Whiteside v. U. S., 93 U. S. 247.

3. Story on Agency, § 302; Irish v. Webster, 5 Me. 171; Bainbridge v. Downie, 6 Mass. 253.

4. Culver v. Avery, 7 Wend. (N. Y.) 380; 22 Am. Dec. 586; McHenry v. Duffield, 7 Blackf. (Ind.) 41; Newman v. Sylvester, 42 Ind. 106; New York, etc., S. S. Co. v. Harbison, 16 Fed. Rep. 688; McCurdy v. Rogers, 21 Wis. 197; 91 Am. Dec. 468; Duncan v. Niles, 32 Ill. 532; 83 Am. Dec. 293; Noyes v. Loring, 55 Me. 408.

A public officer making false or fraudulent representations in respect to property sold by him, is liable in an action on the case. Culver v. Avery, 7 Wend. (N. Y.) 380; 22 Am. Dec. 586.

When a public officer knowingly or carelessly assumes to act without being authorized, or conceals the true state of his authority, and falsely leads the party with whom he contracts to

(1) *Negotiable Instruments*.—The same rules apply to negotiable instruments executed by a public officer as to other contracts made by him.¹

d. CRIMINAL LIABILITY.—Any act or omission, in disobedience of official duty by one who has accepted public office is, when of public concern, in general, punishable as a crime.² A person serving in an official capacity in which he is called upon to exercise his own judgment and discretion, however, becomes crimi-

repose in his authority, he is liable. *Newman v. Sylvester*, 42 Ind. 106.

To authorize the setting aside of a contract made by an officer of a municipal corporation, on its behalf, on the ground of fraud, the fraud must be clearly proved. While it may be established by circumstantial evidence, it can only be so established by proof of such circumstances as are irreconcilable with any other theory than that of the guilt of the persons accused of the fraud. *Baird v. Mayor*, etc., of N. Y., 96 N. Y. 567.

1. *Randolph on Com. Paper*, § 132; *Jones v. Le Tombe*, 3 Dall. (U. S.) 384; *Wallis v. Johnson School Tp.*, 75 Ind. 368; *Monticello v. Kendall*, 72 Ind. 91; 37 Am. Rep. 139; *Lyon v. Adamson*, 7 Iowa 509; *Harvey v. Irvine*, 11 Iowa 82; *Armstrong v. Borland*, 35 Iowa 537; *Independent Dist. v. Reichard*, 50 Iowa 98; *Baker v. Chables*, 4 Greene (Iowa) 428; *Sandborn v. Neal*, 4 Minn. 126; 77 Am. Dec. 502.

Mr. Randolph, in his work on commercial paper, § 132, says: "An exception is made to the rule of an agent's individual liability, in favor of public officers acting in their public capacity with the knowledge of the other contracting party. In such a case the officer is not individually liable in whatever manner he may make the contract or sign the bill of exchange, draft, or note in question."

Contra, see *Exchange Bank v. Lewis Co.*, 28 W. Va. 273; *Forcey v. Caldwell* (Pa. 1887), 9 Atl. Rep. 466; *Ross v. Brown*, 74 Me. 352; *Bayliss v. Pearson*, 15 Iowa 279; *American Ins. Co. v. Stratton*, 59 Iowa 696.

The makers of a promissory note which showed upon its face that they executed it "as committeemen for the erection of a schoolhouse in district No. 3, of Camp Township, Polk Co.," held individually liable thereon. *Bayliss v. Pearson*, 15 Iowa 279.

2. *Bish. Cr. Law* (7th ed.), § 459;

citing State v. McEntyre, 3 Ired. (N. Car.) 171; *Reg. v. Neale*, 9 C. & P. 431; 38 E. C. L. 176; *Republica v. Montgomery*, 1 Yeates (Pa.) 419; *Reg. v. James*, 1 Eng. L. & Eq. 552; *Rex v. Howard*, 7 Mod. 307; *Rex v. Angell*, Cas. temp. Hardw. 124; *Anonymous*, 6 Mod. 96; *Crouther's Case*, Cro. Eliz. 654; *Smith v. Langham*, Skin. 60; *W's Case*, Loftt. 44; *Adams v. Tertenants*, Holt 179; *State v. Leigh*, 3 Dev. & B. (N. Car.) 127; *Rex v. Commings*, 5 Mod. 179; *Rex v. Hemmings*, 3 Salk. 187; *Smith's Case*, Syme 185; *Wilkes v. Dinsman*, 7 How. (U. S.) 89; *Rex v. Harrison*, 1 East P. C. 382; *Reg. v. Buck*, 6 Mod. 306; *Mann v. Owen*, 9 B. & C. 595; 17 E. C. L. 456; *Rex v. Bootle*, 2 Bur. 864; *Rex v. Fell*, 1 Salk. 272; *Reg. v. Tracy*, 6 Mod. 30; *State v. Buxton*, 2 Swan (Tenn.) 57.

In *State v. Glasgow*, Cam. & N. (N. Car.) 38; 2 Am. Dec. 629, it is said: "If a public officer, intrusted with definite powers, to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, although no injurious effect results to an individual from his misconduct. The crime consists in the public example, in perverting those powers to the purposes of fraud and wrong, which were committed to him as instruments of benefit to the citizens and of safety to their rights."

Ministerial Duties.—This is particularly the case where the duties of the officer are ministerial in their nature and mandatory, permitting the exercise of no discretion on the part of the officer. *Bish. Cr. Law* (7th ed.), § 459; *citing Rex v. Osborn*, 1 Comyns 240; *Com. v. Genther*, 17 S. & R. (Pa.) 135; *People v. Norton*, 7 Barb. (N. Y.) 477; *Anonymous*, Loftt. 185; *Rex v. Seymour*, 7 Mod. 382; *State v. Maberry*, 3 Strobh. (S. Car.) 144; *Taylor v. Doremus*, 16 N. J. L. 473; *Stone v. Graves*, 8 Mo. 148; 40 Am. Dec. 131; *State v. Stalcup*, 1 Ired. (N. Car.) 30; 35 Am. Dec. 732. And see *State v. Kern*, 51

nally liable for his acts, only, where they are willful, malicious or corrupt;¹ but where a public law imposes a public duty, the omission to perform it or its improper performance is a criminal act,² unless it can be made to appear that its proper performance was impossible or inconsistent with other official duties.³

Unless such remedy is given by constitutional or statutory provision, public officers acting judicially and those intrusted with responsible discretionary duties, are not liable to ordinary criminal prosecution for their official defaults,⁴ legislators being

N. J. L. 249; *Hill v. State*, 4 Sneed (Tenn.) 443; *State v. Raleigh*, 3 Jones (N. Car.) 399.

1. *State v. Williams*, 12 Ired. (N. Car.) 172; *State v. Powers*, 75 N. Car. 281; *State v. Wedge*, 24 Minn. 150; *People v. Stocking*, 50 Barb. (N. Y.) 573; 32 How. Pr. (N. Y.) 48; 6 Park. Cr. (N. Y.) 263; *In re East Syracuse*, 20 Abb. N. Cas. (N. Y.) 131; *State v. Porter*, 2 Tread. (S. Car.) 694; *People v. Coon*, 15 Wend. (N. Y.) 277; *State v. Odell*, 8 Blackf. (Ind.) 396; *Rex v. Badger*, 6 Jur. 994; *Com. v. Rodes*, 6 B. Mon. (Ky.) 171; *Lining v. Bentham*, 2 Bay (S. Car.) 1; *State v. Johnson*, 2 Bay (S. Car.) 385; *State v. Gardner*, 2 Mo. 23; *State v. Glasgow, Cam. & N.* (N. Car.) 38; 2 Am. Dec. 629; *Cooper v. Adams*, 2 Blackf. (Ind.) 294; *People v. Norton*, 7 Barb. (N. Y.) 477; *Rex v. Phelps*, 2 Keny. 570; *Rex v. Okey*, 8 Mod. 45; *Rex v. Allington*, 2 Stra. 678; *Garrett v. Ferrand*, 6 B. & C. 611; 13 E. C. L. 277; *Rex v. Webb*, 1 W. Bl. 19; *Rex v. Halford*, 7 Mod. 193; *Rex v. Seaford*, 1 W. Bl. 432; *Rex v. Lediard*, Say. 242; *Cope v. Ramsey*, 2 Heisk. (Tenn.) 197; *Downing v. Herrick*, 47 Me. 462.

Gross incompetency in a magistrate is not of itself evidence of official corruption or personal depravity, and an erroneous judicial decision, unaccompanied by any fact or circumstance indicating a corrupt or dishonest motive is wholly insufficient upon which to predicate a charge of criminality or corrupt misconduct in office. *Quinn v. Scott*, 22 Minn. 456.

A county court cannot be indicted for unlawfully approving an account against the county. *State v. Kingsbury*, 37 Tex. 159.

The fact that the bond required from an officer does not cover a default in duty, does not show that he is not liable, in an action for damages or a criminal prosecution. *Holt v. McLean*, 75 N. Car. 347.

2. *State v. Williams*, 12 Ired. (N. Car.) 172.

An omission on the part of a public officer to comply with the provisions of the statute regulating the discharge of his duties, may amount to a misdemeanor, for which he is liable to punishment, notwithstanding such provisions are, as respects the public, merely directory. *Case v. Dean*, 16 Mich. 12.

In *Mississippi* a probate clerk who issues a license for marriage, without the consent of the parent or guardian under which a female under eighteen years of age is married, renders himself liable to the penalty prescribed by art. 6332, of *Mississippi Rev. Code*, notwithstanding he may have been honestly mistaken as to her age. *Detterly v. Yeamans*, 39 Miss. 475. But not so if the girl and her guardian were non-residents of the State. *Bates v. Stokes*, 40 Miss. 56.

Privilege of Witness.—Where a charge of misconduct is made against an officer, whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment, he is not bound to be a witness against himself. *U. S. v. Collins*, 1 Wood (U. S.) 499.

3. *Underwood v. Russell*, 4 Tex. 175.

4. As to members of legislative bodies, see *Story Const.*, § 795; 1 *Kent Com.* 235, note; *Fergusson v. Kinnoull*, 9 C. & F. 251; *Howard v. Gosset*, May Parl. Law. (2d ed.) 151.

As to courts and juries, and other officers intrusted with responsible discretionary duties, see 1 *Hawk. P. C.* (Curw. ed.) p. 447, § 6; *Yates v. Lansing*, 5 Johns. (N. Y.) 282; 6 Am. Dec. 290; *Cunningham v. Bucklin*, 8 Cow. (N. Y.) 178; *Hammond v. Howell*, 2 Mod. 218; *Floyd v. Barker*, 12 Coke 23; 4 Bl. Com. 121; 2 *Woodb. Lect.* 355. But see *Rex v. Bynon*, 2 Show. 302; *Wylde v. Cookman*, Cro. Eliz. 492.

Justices of the peace have been held

held responsible to the bodies of which they are members,¹ while judges and other officers intrusted with discretionary, or governmental or political duties are liable to impeachment,² it being contrary to the spirit of our institutions to place in the hands of one department of government any control or power of restriction whatever over another.³

(1) *Particular Offenses.*—The neglect or failure of a public officer to perform any duty, which, by law, he is required to perform, is an indictable offense,⁴ even though no damage was

to come within the same rule. *State v. Campbell*, 2 Tyler (Vt.) 177; *Yates v. Lansing*, 5 Johns. (N. Y.) 282; *Floyd v. Barker*, 12 Coke 23; but the prevailing doctrine seems to be that while they are exempt from civil prosecution for their official acts, they are liable to the ordinary criminal processes. See *Wallace v. Com.*, 2 Va. Cas. 130; *Com. v. Alexander*, 4 Hen. & M. (Va.) 522; *Rex v. Borron*, 3 B. & Ald. 432; *Rex v. Harrison*, 1 East P. C. 382; *Rex v. Seaford*, 1 W. Bl. 432; *Rex v. Smith*, 7 T. R. 80; *Rex v. Fielding*, 2 Bur. 719; *Rex v. Allington*, 1 Stra. 678; *Ferguson v. Kinnoull*, 9 C. & F. 251; *Rex v. Okey*, 8 Mod. 45; *Rex v. Phelps*, 2 Keny. 570; *Rex v. Davis*, Lofft. 62; *In re Fentiman*, 4 N. & M. 126; *Rex v. Brooke*, 2 T. R. 190; *Rex v. Jones*, 1 Wils. 7; *Rex v. Cozens*, 2 Doug. 426; *Jacobs v. Com.*, 2 Leigh (Va.) 709; *State v. Gardner*, 2 Mo. 23; *Lining v. Bentham*, 2 Bay (S. Car.) 1; *People v. Coon*, 15 Wend. (N. Y.) 277; *State v. Porter*, 2 Tread. (S. Car.) 694; *Rex v. Justices*, Say. 25; *Rex v. Baylis*, 3 Bur. 1318; *Rex v. Jackson*, Lofft. 147; *Rex v. Wykes*, Andr. 238; *Rex v. Harries*, 13 East 270; *Rex v. Bishop*, 5 B. & Ald. 612; 7 E. C. L. 208; *Reg. v. Jones*, 9 C. & P. 401; 38 E. C. L. 171; *State v. Porter*, 3 Brev. (S. Car.) 175.

1. *Anderson v. Dun*, 6 Wheat. (U. S.) 204; 1 Kent Com. 235, 236; and see *Story Const.*, § 795; *Howard v. Lassett*, May Parl. Law. (2d ed.), 151; *Ferguson v. Kennoull*, 9 C. & F. 251.

The house of representatives of *Massachusetts* has the power to expel a member, and the reasons for expulsion and the question of whether a member was duly heard before being expelled cannot be inquired into by the court in determining whether he was privileged as a member from arrest on mesne process. *Hiss v. Bartlett*, 3 Gray (Mass.) 468; 63 Am. Dec. 768.

"If any Lord of Parliament, spiritual or temporal, have committed any op-

pression, bribery, extortion, or the like, he may be impeached." 4 Co. Inst. 24.

Legislators, however, are not "civil officers" subject to impeachment under the Constitution of the *United States*. *Story Const.*, § 793, 794; and it has been maintained by able jurists that on general principles they are not impeachable. *Story Const.*, § 795; 1 Kent Com. 235, note.

2. *Bish. Cr. Law* (7th ed.), 462; and see also IMPEACHMENT, vol. 9, p. 951.

3. "One of the most noticeable features in American constitutional law is the care which has been taken to separate legislative, executive, and judicial functions; it has evidently been the intention of the people in every State that the exercise of each should rest with a separate department. The different classes of powers have been apportioned to the different departments, and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others." *Cooley's Const. Lim.* (6th ed.) 104.

4. *Shaw v. Mayor*, etc., of Macon, 21 Ga. 280; *Robinson v. State*, 2 Coldw. (Tenn.) 181; *Robinson v. State*, 60 Ind. 26; *People v. Bedel*, 2 Hill (N. Y.) 196; and see *People v. Colborne*, 20 How. Pr. (N. Y.) 378; 1 Russ. Cr. 135; *State v. Kern*, 51 N. J. L. 259; *Ex parte Harrold*, 47 Cal. 129.

The neglect of officers charged with levying taxes, to raise money which they are required to raise for the benefit of public creditors, may amount, under peculiar circumstances, to a refusal to do so. *People v. Supervisors of New York*, 3 Abb. App. Dec. (N. Y.) 566.

An indictment lies against a constable for acting without giving bond. *U. S. v. Evans*, 1 Cranch (C. C.) 149.

Under the *Mississippi Code* 1871, § 262, providing that the county treasurer, at the expiration of his office,

caused by the default,¹ and a mistake as to his powers, or with relation to the facts of the case is no protection.²

Any sale, whether direct or indirect, of an office, or of an appointment to office, or any agreement to sell, appoint to or resign from an office, is an indictable offense,³ as also is any fraud or breach of trust committed with a corrupt motive affecting the public.⁴ Corruption may consist of passion and party prejudice.⁵

In averring an offense against a public officer it is usually sufficient to use the language of the statute designating the offense.⁶

"shall deliver to his successor all money, securities, property, books, and papers belonging to the county, or appertaining to his said office," and under § 2890, making it a misdemeanor for one to fail in performing such duty, it is a complete offense, if, at the expiration of his term, he fails to turn over the books. *Howze v. State*, 59 Miss. 230.

But on the trial of a criminal prosecution against a clerk of the circuit court of Alabama, for collecting, under judgment in favor of the State, and refusing to pay over to the county treasurer, money to which he is entitled, within three days after demand, proof that the collection was made in county claims will not support the indictment. *Tucker v. State*, 16 Ala. 670.

An indictment will not lie against commissioners for refusing to pay money allowed for a bridge by the sessions and grand jury, under a statute, if the bridge was built before that statute was passed. *Respublica v. Meylin*, 3 Yeates (Pa.) 1.

1. See *McBride v. Com.*, 4 Bush (Ky.) 531; *Respublica v. Montgomery*, 1 Yeates (Pa.) 419.

In *Com. v. Mitchell*, 3 Bush (Ky.) 39; 96 Am. Dec. 192, however, the court held that a jailer was not indictable for failure to keep the jail clean and comfortable.

An officer who permits himself to be voluntarily intoxicated while in the performance of his duties, is guilty of an indictable offense. *Pennsylvania v. Keffner*, Add. (Pa.) 290.

2. *Rex v. Pinney*, 3 B. & A. 745; *Respublica v. Montgomery*, 1 Yeates (Pa.) 419; *Reg. v. Neale*, 9 C. & P. 431. See *Hill's Case*, 6 Leigh (Va.) 636.

An indictment under *Tennessee* act of 1875, for a county court clerk's failure to make return of revenue, need not charge that the omission was corruptly

made. *State v. Jones*, 2 Lea (Tenn.) 716.

3. *Carleton v. Whetcher*, 5 N. H. 196; *Com. v. Callahan*, 2 Va. Cas. 460; *Reg. v. Woodie*, 20 Up. Can., Q. B. 389; *Reg. v. Mercer*, 17 Up. Can., Q. B. 389; *Rex v. Vaughn*, 4 Burr. 2494; *Reg. v. Pollman*, 2 Camp. 229; 2 Bish. Cr. Law (6th ed.) 471; 4 Black. Com. 139.

Offering a sum of money for the purpose of procuring an appointment, although unsuccessful, is a misdemeanor. *Rex v. Vaughn*, 4 Burr. 2494.

Improper or corrupt motives, or malice are necessary ingredients of the crime. *People v. Powell*, 63 N. Y. 88; *State v. Small*, 10 Me. 109; *State v. Gardner*, 2 Mo. 22; *People v. Coon*, 15 Wend. (N. Y.) 277; *State v. Johnson*, 2 Bay (S. Car.) 385; *Jacobs v. Com.*, 2 Leigh (Va.) 709; *Rex v. Halford*, 7 Mod. 193.

4. See *Com. v. Rodes*, 6 B. Mon. (Ky.) 171; *People v. Coon*, 15 Wend. (N. Y.) 277; *State v. Wedge*, 24 Minn. 150; *State v. Walton*, 62 Me. 106; *Zodrocco v. People*, 62 Ill. 127; *Comstock v. Gage*, 91 Ill. 330; *San Francisco v. Randall*, 54 Cal. 408; *Edwards v. State*, 2 Tex. App. 525; *Rex v. Brooke*, 2 T. R. 190; *Rex v. Cozens*, 2 Doug. 426; 2 Whart. Cr. Law, § 1572 a.

In *California*, the making and publication of a false statement by the officers of a corporation, is made an indictable offense by statute. *People v. Cooper*, 53 Cal. 647.

In *New Jersey*, the overdrawing of an account by a bank director is an indictable offense. *State v. Stimson*, 24 N. J. L. 478.

5. *Rex v. Brooke*, 2 T. R. 190.

As to other official acts criminal in their nature, see BRIBERY, vol. 2, p. 530; EMBEZZLEMENT, vol. 6, p. 450; EXTORTION, vol. 7, p. 585.

6. See *Moore v. State*, 49 Ark. 499; *Johnson v. People*, 123 Ill. 624;

His due election or appointment and qualification and entry upon the duties of his office, however, must be stated,¹ as well as that the act complained of was done in his official capacity,² and a mere statement of the illegality of the act is insufficient, the particular facts constituting the illegality being required to be stated.³ An officer who has assumed the duties of an office cannot dispute the validity of his own appointment or election as a justification or defense in a criminal prosecution against him.⁴ Removal from office is a common penalty for neglect or omission in the performance of its duties.⁵

XIII. LIABILITY OF THE PUBLIC FOR THE ACTS OF ITS OFFICERS AND AGENTS.—The government, or other public authority, is not

and see generally *State v. Clarkson*, 59 Mo. 149; *State v. Conlee*, 25 Iowa 237; *State v. Johnson*, 115 Ind. 467; *Casper v. State*, 47 Wis. 535.

The *Illinois* statutes make it a criminal offense for a town officer to withhold the town records from the county clerk's office on the discontinuance of the township system in the county. *Held*, that the indictment need not state the manner in which the town office was abolished, and that it is not necessary to a conviction that a demand should have been made on the officer for the records withheld. *Bay-singer v. People*, 115 Ill. 419.

An indictment against a county assessor for not calling on a person, resident in the county, for a list of his taxable property, need not allege that such person had such property. *State v. Hunter*, 8 Blackf. (Ind.) 212.

1. *Edge v. Com.*, 7 Pa. St. 275; *Com. v. Rupp*, 9 Watts (Pa.) 114; *Shanks v. State*, 51 Miss. 464; *State v. Hail*, 21 Tex. 587; and see *State v. Shield*, 8 Blackf. (Ind.) 151.

Where, pending a prosecution for drunkenness in office, under *Mississippi* acts 1873, p. 84, the term of the officer expires, no judgment can be pronounced, even for costs, and the case will be dismissed. *Stubbs v. State*, 53 Miss. 437.

2. *People v. Kallcock*, 60 Cal. 113; *State v. Lubin* (La. 1890), 7 So. Rep. 68; and see *Hollingsworth v. State*, 111 Ind. 289; *State v. Johnson*, 115 Ind. 467.

An indictment, charging the selectmen of a town with willful neglect "to raise and apply" money for the relief of the family of a soldier, under *New Hampshire* Pamph. Laws, ch. 3584, is insufficient, if it neither shows that a sufficient amount of money for the

purpose was not raised by the town, nor avers that there was no committee to apply it, legally constituted, in the town. *State v. Fitts*, 44 N. H. 621.

An indictment against the overseer of a road district must distinctly charge that the fork at which he neglected to place a finger-board is within his road district; and the roads forming the fork must not terminate at the same point. *State v. Tuley*, 20 Mo. 422.

3. *People v. Castleton*, 44 How. Pr. (N. Y.) 238; *Oliveira v. State*, 45 Ga. 555, and see *Com. v. Rodes*, 1 Dana (Ky.) 595; *State v. Hein*, 50 Mo. 362; *State v. Kern*, 51 N. J. L. 259; *People v. Otto*, 70 Cal. 523; *State v. Record*, 56 Ind. 107; *State v. Wedge*, 24 Minn. 150.

An indictment which charges the defendant with buying up an order on the county, he being county treasurer, for less than its par value, either by himself or his agents, directly or indirectly, sufficiently charges the offense. *Wilder v. State*, 47 Ga. 522.

4. *State v. Sellers*, 7 Rich. (S. Car.) 368.

A clerk, prosecuted for breach of good behavior, will be required to produce any books and papers belonging to his office, which may be necessary as evidence. *Com. v. Rodes*, 1 Dana (Ky.) 595.

A *de facto* officer is punishable for his criminal acts committed under color of office the same as an officer *de jure*. *State v. Goss*, 69 Me. 22.

5. See *Shattuck v. State*, 51 Miss. 575.

On the trial of a clerk for misbehavior, he must be acquitted unless a majority of the judges concur, as well as to the cause for which he is to be removed, as in the propriety of a sentence of removal. *Com. v. Rodes*, 1 Dana (Ky.) 595.

bound by the acts, declarations, or admissions of its officers or agents, unless it manifestly appears that such officers or agents are acting within the scope of their authority.¹ The authority of a public officer being fixed by law, is presumed to be known to all persons having dealings with him in his official capacity,

1. Story on Agency, § 307 a; *Davies v. Dickinson*, 117 U. S. 657; *Orleans v. Platt*, 99 U. S. 676; *Whiteside v. U. S.*, 93 U. S. 247; *Bank of U. S. v. Dunn*, 6 Pet. (U. S.) 51; *Barclay v. Howell*, 6 Pet. (U. S.) 498; *Lee v. Munroe*, 7 Cranch (U. S.) 366; *Curtis v. U. S.*, 2 Ct. of Cl. 144; *U. S. v. City Bank*, 6 McLean (U. S.) 130; *Woodruff v. Berry*, 40 Ark. 251; *Woodward v. Campbell*, 39 Ark. 580; *Parsell v. Barnes*, 25 Ark. 261; *Pulaski Co. v. State*, 42 Ark. 118; *Butler v. Bates*, 7 Cal. 136; *Rowe v. Yuba Co.*, 17 Cal. 61; *Wallace v. Mayor, etc., of San José*, 29 Cal. 180; *Sutro v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442; *La Salle Co. v. Simmons*, 10 Ill. 513; *Ristine v. State*, 20 Ind. 328; *Holten v. Lake Co.*, 55 Ind. 194; *Axt v. Jackson School Tp.*, 90 Ind. 101; *Platter v. Elkhart Co.*, 103 Ind. 360; *Reichard v. Warren Co.*, 31 Iowa 381; *Clark v. Des Moines*, 19 Iowa 199; 87 Am. Dec. 423; *Lisso v. Red River Parish*, 29 La. Ann. 590; *Morrell v. Dixfield*, 30 Me. 157; *Mitchell v. Rockland*, 41 Me. 363; 66 Am. Dec. 252; *Mayor, etc., of Baltimore v. Eschbach*, 18 Md. 276; *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen (Mass.) 109; *Mitchell v. St. Louis Co.*, 24 Minn. 459; *Bemis v. Rice Co.*, 23 Minn. 73; *State v. Bank of Missouri*, 45 Mo. 528; *State v. Bevers*, 86 N. Car. 588; *Sooy v. State*, 38 N. J. L. 324; *Cuyler v. Rochester*, 12 Wend. (N. Y.) 165; *Delafield v. Illinois*, 26 Wend. (N. Y.) 192; *Hodges v. Buffalo*, 2 Den. (N. Y.) 110; *Cornell v. Guilford*, 1 Den. (N. Y.) 510; *Lorillard v. Monroe*, 11 N. Y. 392; 62 Am. Dec. 120; *McDonald v. Mayor, etc., of N. Y.*, 68 N. Y. 23; 23 Am. Rep. 144; *Green v. North Buffalo Tp.*, 56 Pa. St. 110; *Erickson v. Smith*, 38 How. Pr. (N. Y.) 454; *State v. Hastings*, 12 Wis. 596. See *Iowa Railroad Land Co. v. Sac Co.*, 39 Iowa 124.

Laches.—A right which the government has acquired will not be destroyed by the laches of its agents. *Haehnlen v. Com.*, 13 Pa. St. 617; *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *U. S. v. Vanzandt*, 11 Wheat. (U. S.) 184; *Hart v. U. S.*, 95 U. S. 376.

Municipal officers are in no such sense municipal agents that their negligence is the neglect of the municipality, nor will their misconduct be chargeable against it, unless the act complained of be either authorized or ratified. *Detroit v. Blackeby*, 21 Mich. 84; 4 Am. Rep. 450. See also *Amperse v. Kalamazoo*, 75 Mich. 228; *Coots v. Detroit*, 75 Mich. 628; *Mayor, etc., of Baltimore v. Eschbach*, 18 Md. 276; *Mitchell v. Rockland*, 41 Me. 363; 66 Am. Dec. 252. See *Prince v. Lynn*, 149 Mass. 193; *Curran v. Boston*, 151 Mass. 505; *Western College v. Cleveland*, 12 Ohio St. 375.

The council of Portland authorized a contractor to lay a sewer in one of its streets, in pursuance of a power contained in its act of incorporation. In so laying the pipe the contractor infringed upon the patent of another for making sewer pipe. It was held that the city was liable for such infringement, the act of infringement having been a corporate one for the benefit of the city. *Asbestine Tiling, etc., Co. v. Hepp*, 39 Fed. Rep. 324.

Counties are instrumentalities of government, and are not liable for injuries caused by the negligence of the commissioners in the selection of an unskillful or incompetent physician for the care of the poor. *Summers v. Davies Co.*, 103 Ind. 262.

The State is concluded by the act of one of its officers acting within the authority of his office. Such act can only be judicially reviewed by a court of competent jurisdiction, and not by the legislature. *Boyers v. Crane*, 1 W. Va. 176.

If municipal bonds are issued without authority they cannot be held *bona fide*, neither can the municipality nor its officers be precluded by any estoppel or ratification from denying their validity. *Sutro v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442.

There is an essential difference between public and private corporations, for the officers of the former, exercising statutory powers, cannot bind the corporation by estoppel where the acts relied upon as creating the estoppel

and they deal with him at their peril so far as the liability of the government is concerned.¹

are beyond the scope of the authority vested in such officers. *Union School Tp. v. First Nat. Bank*, 102 Ind. 464.

When one assists the officers of a municipality in the performance of acts which he knows to be illegal, he cannot recover damages of the municipality for such illegal acts. *Owens v. Milwaukee*, 47 Wis. 461.

The declarations of an alderman are not evidence against a city or against its board of health, when he is not acting on behalf of either. *Mitchell v. Rockland*, 41 Me. 363; 66 Am. Dec. 252.

The declarations of a surveyor of highways, in relation to work done on the highways of the town under a contract made by him within the scope of his authority, uttered some months after the completion of the work, though before the expiration of his official year, are not admissible in evidence against the town. *Burgess v. Wareham*, 7 Gray (Mass.) 345.

Selectmen of the town have full power by virtue of their office to settle an account presented by another town against the town which they represent, for supplies furnished to a pauper belonging to their town; and the payment of such an account is of the nature of an implied admission that the pauper is a settled inhabitant of the town, and the fact is, therefore, evidence against the town in a suit afterwards brought for other supplies furnished the pauper. *Sharon v. Salisbury*, 29 Conn. 113.

A book kept in the clerk's office of the county commissioners under their direction respecting the affairs of the county, though not a public record, is yet *prima facie* evidence against the county of the facts stated therein. *La Salle Co. v. Simmons*, 10 Ill. 513.

The acts of town officers within the scope of their authority may furnish ground for presumptions and inferences as against the town, in the same manner as such presumptions and inferences may arise against natural persons from their acts. *Glidden v. Unity*, 33 N. H. 571; *O'Leary v. Board of Education*, 93 N. Y. 1; 45 Am. Rep. 156.

Where a county physician refuses to treat a person in urgent need of medical attendance, a township trustee has authority to employ another, and his declarations concerning payment are

competent. *Washburn v. Shelby Co.*, 104 Ind. 321; 54 Am. Rep. 332.

The trustees of a municipal corporation created under and controlled by the statute relating to towns and their incorporation, are not authorized to contract a debt for engraving scrip to be issued by said trustees, nor can they render the town liable for the payment of a warrant issued in satisfaction of the debt. And although the warrant, if signed by the proper officer, *prima facie* imports validity, its issuance may be shown to be *ultra vires*. *Cheaney v. Brookfield*, 60 Mo. 53.

In an action upon notes issued by the county treasurer to P, plaintiff's intestate, for moneys loaned, ostensibly to pay maturing obligations of the county, in pursuance of said resolutions of the board of supervisors and in renewal of notes so given, it appeared that there was a fraudulent over-issue of notes by the county treasurer to a large amount; that notes were outstanding at the time of the annual meeting of the board of supervisors in 1874 to the amount of \$138,631, while if the money raised by taxation had been honestly applied and he had borrowed only sufficient to extend the portion of the debt he was directed to have extended, the whole debt would have been but \$20,801. It did not appear that the treasurer misapplied any of the moneys for which the notes in suit were given, and at no time did the indebtedness the treasurer was authorized to extend fall short of the loans made by P, and the good faith of the lender was not questioned. *Held*, that the evidence failed to establish a defense to the notes; that as the authority given to the treasurer authorized transactions and dealings in form of the same precise character as those which took place between the treasurer and the payee of the notes, the presumption was that they were authorized; and if, in fact, they were not within the actual limits of the power, the burden was upon defendant to show it. *Parker v. Saratoga Co.*, 106 N. Y. 392. See also *Clark v. Saratoga Co.*, 107 N. Y. 553.

1. *Whiteside v. U. S.*, 93 U. S. 247; *Merchants' Exch., etc., Bank v. Bergen Co.*, 115 U. S. 384; *Curtis v. U. S.*, 2 Ct. of Cl. 144; *The Floyd Acco-*

If, however, his act is ratified, the public will become liable.¹

sey Co. v. Whitehead, 47 Ark. 205; Sutro v. Pettit, 74 Cal. 332; 5 Am. St. Rep. 442; Wallace v. Mayor, etc., of San José, 29 Cal. 180; Tamm v. Lavalle, 92 Ill. 263; Dement v. Rokker, 126 Ill. 174; Hull v. Marshall Co., 12 Iowa 142; Clark v. Des Moines, 19 Iowa 199; 87 Am. Dec. 423; Boardman v. Hayne, 29 Iowa 339; Reichard v. Warren Co., 31 Iowa 381; McPherson v. Foster, 43 Iowa 48; 22 Am. Rep. 215; Johnson v. Indianapolis, 16 Ind. 227; Pine Civil Tp. v. Huber Mfg. Co., 83 Ind. 121; Reeve School Tp. v. Dodson, 98 Ind. 497; Union School Tp. v. First Nat. Bank, 102 Ind. 464; Platter v. Elkhart Co., 103 Ind. 360; Bloomington School Tp. v. National School, etc., Co., 107 Ind. 43; Lisso v. Red River Parish, 29 La. Ann. 590; Mayor, etc., of Baltimore v. Reynolds, 20 Md. 1; 83 Am. Dec. 535; Mayor, etc., of Baltimore v. Eschbach, 18 Md. 276; Lowell Five Cents Sav. Bank v. Winchester, 8 Allen (Mass.) 109; State v. Bank of Missouri, 45 Mo. 528; State v. Hays, 52 Mo. 578; Mitchell v. St. Louis Co., 24 Minn. 459; Spitzer v. Blanchard, 82 Mich. 234; Delafield v. Illinois, 26 Wend. (N. Y.) 192; McDonald v. Mayor, etc., of N. Y., 68 N. Y. 23; 23 Am. Rep. 144. See Knox Co. v. Aspinwall, 21 How. (U. S.) 539.

Municipal corporations are not principals but themselves agents, answerable to their constituents; and are not to be presumed to recognize and incidentally ratify and confirm acts of their officers done beyond the scope of their authority. Mayor, etc., of Baltimore v. Reynolds, 20 Md. 1; 83 Am. Dec. 535.

The law imputes to every one dealing with public officers acting under a special statutory authority, full knowledge of the extent of such authority. Mitchell v. St. Louis Co., 24 Minn. 459.

Those who deal with the officers of a municipal corporation must ascertain, at their peril, that these agents are acting within the scope of their lawful powers. Cheeney v. Brookfield, 60 Mo. 53.

Purchasers of municipal securities must take the risk of the genuineness of official signatures. Merchants' Exch., etc., Bank v. Bergen Co., 115 U. S. 384.

Purchasers of municipal bonds are charged with notice of the laws of the

State, granting power to make the bonds they find in the market. If the power exists in the municipality, the *bona fide* holder is protected against mere irregularities in the manner of its execution, and the municipality may be estopped by recitals; but if there is a want of power, no legal liability can be created. Northern Nat. Bank v. Porter Tp., 110 U. S. 608.

Where the recitals in bonds set forth the judgment of the county judge, that it was duly rendered, that the bonds were issued pursuant to statute, for the proper object and by persons properly appointed and charged by law with the duty of subscribing for the stock and issuing the bonds, and the sufficiency of the statutory authority under which the proceedings were had is not denied, the recital is an estoppel. A *bona fide* holder of the bonds was not bound to look further, and the obligor cannot go behind it. Lyons v. Munson, 99 U. S. 684.

Recitals in municipal bonds given in aid of railroads, of a compliance with conditions precedent to their issue, where the bonds are executed by the officers whose duty it is to decide whether or not such conditions have been complied with, are conclusive of such facts and binding on the corporation; and a *bona fide* holder for value is not bound to look behind such a recital, except to the legislative authority given for the issue of such municipal bonds. Douglas Co. v. Bolles, 94 U. S. 104; Marion Co. v. Clark, 94 U. S. 278; Coloma v. Eaves, 92 U. S. 484.

1. Grenada Co. v. Brogden, 112 U. S. 261; Stevenson v. Summit Tp., 35 Iowa 462; Hawk v. Marion Co., 48 Iowa 472; Andrews v. School Dist. No. 4, 37 Minn. 96.

Where the school trustee borrows money and executes notes therefor in the name of the school corporation, the corporation will be liable if the money is actually used for the payment of legitimate claims against the corporation and the circumstances are such as to make it equitable that the lender should be subrogated to the rights of the persons whose claims the borrowed money paid. Union School Tp. v. First Nat. Bank, 102 Ind. 464; Bicknell v. Widner School Tp., 73 Ind. 501; Wallis v. Johnson School Tp., 75 Ind. 368.

Notice to a public officer is notice to the public only when given to him in his official capacity and with regard to the subject over which he has authority.¹

1. **Contracts Made by Officers.**—These general principles apply to contracts made by public officers. In order for the contract to be binding upon the public, the officer must keep within the limits of his authority.² And, of course, a public corporation cannot

Money loaned to commissioners for the benefit of a county may be recovered from the county, with legal interest thereon, if it is shown that it was appropriated to the execution of an act which is made the duty of the commissioners to perform, and the county has received the benefit of it; but nothing can be recovered which is not shown to have been expended for the use and benefit of the county, and for some purpose authorized by law. *Waitz v. Ormsby Co.*, 1 Nev. 370. Compare *Filor v. U. S.*, 9 Wall. (U. S.) 45. See also *Lyons v. Chamberlin*, 25 Hun (N. Y.) 49; *Salomon v. U. S.*, 19 Wall. (U. S.) 17.

A municipal corporation cannot be made liable for an act of its agent by a ratification thereof, where the act complained of was of such a nature that the corporation did not possess the power to authorize the doing of it by the agent. *Boom v. Utica*, 2 Barb. (N. Y.) 104. See also *Platter v. Elkhart Co.*, 103 Ind. 360; *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503.

Acts or acquiescence do not ratify unauthorized contracts, but rather, authorize judges and juries to presume consent or ratification. Municipal corporations cannot be presumed to ratify and confirm acts of their officers and agents, but acts of ratification by such bodies should be direct, explicit, unequivocal, and with full knowledge of the facts. *Mayor, etc., of Baltimore v. Reynolds*, 20 Md. 1; 83 Am. Dec. 535. See *supra*, this title, *Authority by Ratification*.

1. *Field v. New York*, 6 N. Y. 179; 57 Am. Dec. 435; *Cook v. Anamosa*, 66 Iowa 427; *Trapnell v. Red Oak Junction*, 76 Iowa 744.

The police force of a city constitutes a department of the city government, and a policeman of the city is an officer and agent thereof, and his knowledge of an obstruction or defect in the sidewalk is notice to the city and knowledge thereof on the part of the latter. *Carrington v. St. Louis*, 89 Mo. 208; 58 Am. Rep. 108; *Rehberg v. Mayor, etc.,*

of N. Y., 91 N. Y. 137; 43 Am. Rep. 657.

A notice of a nuisance on land belonging to a city and a request to remove it given to the city clerk only, will not affect the city; but it is sufficient notice and request if given to the mayor. *Nichols v. Boston*, 98 Mass. 39; 93 Am. Dec. 152.

Notice to a city councilman of a defect in a street of the city is notice to the city, although the councilman be not at the time sitting in the city council. *Logansport v. Justice*, 74 Ind. 378; 39 Am. Rep. 79.

A protest is ineffective unless made to the body having power to act upon the subject-matter. If a salaried officer protests that the amount of salary allowed him is less than he is entitled to, it is of no effect to make the protest to the functionary intrusted with the mere duty of paying him if the latter has no part in fixing the salary and is under no obligation to report the protest to the body which fixes it. *Thomas v. St. Clair Co.*, 45 Mich. 479.

2. *Tippecanoe Co. v. Cox*, 6 Ind. 403; *Dorsey Co. v. Whitehead*, 47 Ark. 205; *Boom v. Utica*, 2 Barb. (N. Y.) 104; *Brady v. Mayor, etc., of N. Y.*, 20 N. Y. 312; *Mayor, etc., of Baltimore v. Reynolds*, 20 Md. 1; 83 Am. Dec. 535; *Martin v. U. S.*, 4 T. B. Mon. (Ky.) 487; *Clark v. Des Moines*, 19 Iowa 199; 87 Am. Dec. 423; *Austin v. District Tp.*, 51 Iowa 102; *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503; *Newbery v. Fox*, 37 Minn. 141; 5 Am. St. Rep. 830; *Copp v. St. Louis Co.*, 34 Mo. 383; *State v. Bevers*, 86 N. Car. 588; *Hague v. Philadelphia*, 48 Pa. St. 527; *The Floyd Acceptances*, 7 Wall. (U. S.) 666; *Whiteside v. U. S.*, 93 U. S. 247; *Mayor, etc., of Nashville v. Ray*, 19 Wall. (U. S.) 468; *Levy v. Yuba Co.*, 13 Cal. 636; *Wallace v. Mayor, etc., of San José*, 29 Cal. 180; *Sutro v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442; *State v. Hastings*, 12 Wis. 506.

An officer of the State has no power or authority over any real estate owned by the State, except such as

be bound by a contract of its agent, which contract it is beyond the power of the corporation to make.¹ If the statute under which the agent contracts, prescribes any special formalities for

has been or may be conferred upon such officer by positive statute; and where the State sued for the recovery of such real estate, and the defendant relies upon an illegal agreement with the auditor of State in defense of such suit, unless it appears that the auditor of State was expressly authorized by statute to make the agreement, such agreement is absolutely void as against the State. *McCaslin v. State*, 99 Ind. 428.

The want of legislative authority in a municipal corporation to issue bonds, is a fatal objection to their validity, no matter under what circumstances the holder may have obtained them. *South Ottawa v. Perkins*, 94 U. S. 260; *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676; *East Oakland v. Skinner*, 94 U. S. 255; *McClure v. Oxford*, 94 U. S. 429; *Harshman v. Bates Co.*, 92 U. S. 569; *Lewis v. Shreveport*, 108 U. S. 282.

Corporate ratification, without authority from the legislature, cannot make a municipal bond valid which was void when issued for want of legislative power to make it. *Lewis v. Shreveport*, 108 U. S. 282; *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676.

Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements. *McClure v. Oxford*, 94 U. S. 429; *South Ottawa v. Perkins*, 94 U. S. 260.

Where a contract was made in pursuance of a vote of a town, but before the contract was performed the vote was rescinded, it was held that the person with whom the contract was made was not affected by the rescission, not having had notice thereof. The question of the effect of notice, however, was not decided. *Allen v. Taunton*, 19 Pick. (Mass.) 485.

County commissioners were authorized to allow accounts chargeable against the county not otherwise provided for, and to have the care of county property and management of county funds and business. Held, that they could make a contract to pay five per cent. for making a tax list of all delinquent taxes in a county. *Martin v. Whitman Co.*, 1 Wash. 533.

Implied Contracts.—As the county cannot be made liable on an express

contract by its agent in excess of his authority, neither can it be made liable on an implied one. *Reichard v. Warren Co.*, 31 Iowa 381.

1. Congressional Tp. No. 11 *v. Weir*, 9 Ind. 224; *Clark v. DeMoines*, 19 Iowa 199; 87 Am. Dec. 423; *McPherson v. Foster*, 43 Iowa 48; 22 Am. Rep. 215; *Parsons v. Goshen*, 11 Pick. (Mass.) 396; *Hood v. Mayor, etc., of Lynn*, 1 Allen (Mass.) 103; *Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145; *Vincent v. Nantucket*, 12 Cush. (Mass.) 103; *Attorney-General v. Marr*, 55 Mich. 445; *Halstead v. Mayor, etc., of N. Y.*, 3 N. Y. 430; *Appleby v. Mayor, etc., of N. Y.*, 15 How. Pr. (N. Y.) 428; *Boom v. Utica*, 2 Barb. (N. Y.) 104; *Cornell v. Guilford*, 1 Den. (N. Y.) 510; *Boylard v. Mayor, etc., of N. Y.*, 1 Sandf. (N. Y.) 27.

Where a town built a market house two stories high and appropriated the lower story for a market, which was *bona fide* their principal and leading object in erecting the building, it was held that the appropriation of the upper story to other subordinate purposes was not such an excess of authority as to render the erection of the building and the raising of money therefor illegal. *Spalding v. Lowell*, 23 Pick. (Mass.) 71.

The common council of the city of Buffalo have no authority to furnish an entertainment for the citizens and guests of the city at the public expense. It was, therefore, held that an action would not lie against the corporation at the suit of one who had provided such entertainment on Independence Day upon the employment of a committee authorized by the common council to contract for it. *Hodges v. Buffalo*, 2 Den. (N. Y.) 110.

Where the electors of a town in their town meeting directed the commissioners of highways to prosecute a turnpike company for entering upon and taking possession of a public highway and bridge in that town, and the commissioners accordingly brought a suit for that cause of action and had judgment against them, held that they could not sustain an action against the town to be reimbursed their costs and expenses, or the costs recovered against them in that suit. *Cornell v. Guilford*, 1 Den. (N. Y.) 510.

the making of the contract they must be complied with in order to bind the government.¹

But when all the formalities have been complied with which lie within the power of the person contracting with the public to obtain compliance with, the contract will be considered binding upon the public, and the omission of a mere clerical duty by the officer making the contract will not invalidate it.² If any conditions precedent exist, they must be fully complied with by the officer before his contract will bind the public.³ The government is not estopped as an individual or private corporation

Where city bonds recited on their face that the conditions had been complied with which authorized their issue, in an action upon them by an innocent holder, a demurrer to pleas which simply tendered an issue as to the authority of the city to issue the bonds, was sustained. *Nauvoo v. Ritter*, 97 U. S. 389.

It is impossible to ratify an *ultra vires* contract. *McPherson v. Foster*, 43 Iowa 48; 22 Am. Rep. 215.

1. *Camp v. U. S.*, 113 U. S. 648; *Clark v. U. S.*, 95 U. S. 539; *McDonald v. Mayor, etc.*, of N. Y., 68 N. Y. 23; 23 Am. Rep. 144.

The act of 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter accepting delivery of such supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid. *Salomon v. U. S.*, 19 Wall. (U. S.) 17.

The act of June 2, 1862, is mandatory, and requires all contracts made with the departments therein named to be in writing. But where a parol contract has been wholly or partially executed and performed on one side, the party performing will be entitled to recover the fair value of his property or services, as upon an implied contract for a *quantum meruit*. *Clark v. U. S.*, 95 U. S. 539.

Where county taxes have been levied to pay interest on county bonds, and interest has been paid on them for a number of years, this cures mere irregularities in the issuing of the bonds when they are sued on by a *bona fide* holder for value. *Clay Co. v. Society for Savings*, 104 U. S. 579.

Where the statute under which bonds of a county in Missouri were issued, required that they should be made payable to a railroad company, its successors and assigns, and they

were made payable to the company or bearer, held that the statutory requirement in this particular is only directory, the defect is one of form, and the county is estopped to take advantage of it by the recital in the bonds of conformity to the statutes. *Calhoun Co. v. Galbraith*, 99 U. S. 214.

If a municipal body has lawful power to issue bonds, dependent only upon the adoption of certain preliminary proceedings, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves, by the authorities whose primary duty it is to ascertain it. *Warren Co. v. Marcy*, 97 U. S. 96.

2. *State v. Ramsey Co.*, 32 Minn. 181; *Clark v. U. S.*, 96 U. S. 539.

3. *Merchants' Exch., etc., Bank v. Bergen Co.*, 115 U. S. 384; *Carroll Co. v. Smith*, 111 U. S. 556; *Dixon Co. v. Field*, 111 U. S. 83; *McClure v. Oxford*, 94 U. S. 429; *Fluty v. School Dist.*, 49 Ark. 94.

The plaintiff in an action against a county may recover on a *quantum meruit* such sum as the benefit of the work he has done in compliance with the terms of the contract is reasonably worth to the defendant, even though the contract stipulated that the work must be done "to the acceptance of the county commissioners," which stipulation was not complied with. *Atkins v. Barnstable Co.*, 97 Mass. 428.

When the law prescribes conditions upon the exercise of the power granted to a municipality, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will be estopped by recitals which import such performance. *Northern Nat. Bank v. Porter Tp.*, 110 U. S. 608.

A *bona fide* holder is not bound to look beyond the legislative act and the

would be to deny the authority of its officers, though they may be acting under an apparent authority;¹ but it may by its conduct ratify the acts of its agents and thus be estopped to deny their authority,² and when a corporation is acting in its private as contradistinguished from its governmental capacity, it may also be estopped by the action of its proper officers.³ When a contract is made by duly authorized agents, the public is as firmly bound as a private person would be;⁴ and when a State breaks a contract so made, it is liable for prospective profits.⁵ Public officers are agents within the policy of the rule against allowing an agent to act both for himself and his principal in the same transaction;⁶ but where

recitals in the bonds to see whether the conditions precedent to issuing the bonds have been complied with. *Walnut v. Wade*, 103 U. S. 683.

1. *Bishop on Contracts*, § 993; *Johnson v. U. S.*, 5 *Mason* (U. S.) 425; *U. S. v. Kirkpatrick*, 9 *Wheat.* (U. S.) 720; *State v. Brewer*, 64 *Ala.* 287; *Pulaski Co. v. State*, 42 *Ark.* 118; *Buena Vista Co. v. Iowa*, etc., *R. Co.*, 46 *Iowa* 226; *Howard Co. v. Bullis*, 49 *Iowa* 519; *Bixby v. Adams Co.*, 49 *Iowa* 507; see *Curnen v. Mayor*, etc., of *N. Y.*, 7 *Daly* (N. Y.) 544. Compare *Gifford v. White Plains*, 25 *Hun* (N. Y.) 606. But in this case one reason for the rule of non-liability of the public for the acts of its servants, viz., that every one is presumed to know the extent of their authority, did not exist.

2. *Waitz v. Ormsby Co.*, 1 *Nev.* 370; *Cook Co. v. Harms*, 108 *Ill.* 151; *Sexton v. Chicago*, 107 *Ill.* 323; *Beers v. Dalles City*, 16 *Oregon* 334; *Fister v. La Rue*, 15 *Barb.* (N. Y.) 323; *Davies v. Mayor*, etc., of *N. Y.*, 93 *N. Y.* 250; *Rock Creek v. Strong*, 96 *U. S.* 271; *Henry Co. v. Nicolay*, 95 *U. S.* 619.

3. *Chicago v. Sexton*, 115 *Ill.* 230; *Chicago v. Chicago*, etc., *R. Co.*, 105 *Ill.* 85; *Lyons v. Chamberlain*, 25 *Hun* (N. Y.) 49; *Cincinnati v. Cameron*, 33 *Ohio St.* 336. See *Chicago v. McGraw*, 75 *Ill.* 566; *Chicago v. Turner*, 80 *Ill.* 419; *Damon v. Granby*, 2 *Pick.* (Mass.) 345.

If a person contracts with a town to erect a meeting-house on a place to be designated by a committee, and the place is so designated, and the town afterwards disagrees as to the designation and gives notice to the contractor, but not until he has made some of the window-frames and has carried materials on the ground pointed out, although this is a beginning to execute the contract

it is not a beginning to erect a meeting-house, and the town may disagree to the first designation at any time before the ground shall be prepared for erecting the frame of the house, they indemnifying the contractor for any extra labor and expense occasioned by their fluctuating proceedings. *Damon v. Granby*, 2 *Pick.* (Mass.) 345.

4. *Richmond Co. v. Miller*, 16 *S. Car.* 244; *Dayton v. Rutland*, 84 *Ill.* 279.

5. *Danolds v. State*, 89 *N. Y.* 36; 42 *Am. Rep.* 277. See *Martin v. Whitman Co.*, 1 *Wash.* 533.

6. *People v. Overysse*, 11 *Mich.* 222; *Pickett v. School Dist.* No. 1, 25 *Wis.* 551; 3 *Am. Rep.* 105; *Clute v. Barron*, 2 *Mich.* 192; *Smith v. Albany*, 61 *N. Y.* 444; *Pierce v. Benjamin*, 14 *Pick.* (Mass.) 356. See also *Hannah v. Fife*, 27 *Mich.* 172; *Currie v. School Dist.* No. 26, 35 *Minn.* 163; *AGENCY*, vol. 1, p. 331.

A majority of a committee appointed by a school district to superintend the erection of a schoolhouse may employ one of their own number for such service, and, unless there is a fraudulent or corrupt dealing, such person may in his own name recover of the district the amount of his claims. *Junkins v. Union School Dist.*, 39 *Me.* 220.

A director or trustee is not permitted to be a party to a contract entered into between himself and other trustees of school district stipulating for his services or employment upon terms, or for a compensation fixed by such contract. Such contract is voidable at the election of the district. This rule is founded in public policy and is a salutary one to prevent the risk of abuse, and, therefore, does not permit an inquiry as to the alleged fairness or unfairness of such contract. *Currie v. School Dist.* No. 26, 35 *Minn.* 163.

a public officer does so act, the transaction is voidable only and not void.¹

2. Torts of Officers.—Neither the Federal nor the State governments are liable for the unauthorized torts of their officers,² and municipal corporations are entitled to the same exemption when

The Penal Code of *Texas*, art. 250, imposes a penalty on any county officer who shall become interested "in the purchase or sale of anything made for or on account of such county." *Held*, that such provision renders such officer liable for selling a mule to the county. *Rigby v. State*, 27 Tex. App. 55.

The employment by a city board of health of one of its members to vaccinate pupils in a public school, is void as against the city where the members of the board are by statute only authorized to receive an annual salary to be fixed by the common council. *Fort Wayne v. Rosenthal*, 75 Ind. 156; 39 Am. Rep. 127.

Sheriff.—Mr. Murfree, in his work on Sheriffs, § 1000, says: "A sheriff cannot purchase property sold under execution at his own sale either directly or through an agent. . . . It is not necessarily fraudulent; on the contrary, it may be beneficial to the *cestui que trust*. It is a rule of policy, however, applicable to sheriffs in common with other persons holding a trust relation, that one cannot occupy at the same time the inconsistent relation of seller and purchaser, and such sales are set aside upon a seasonable application to a court of equity, and a resale ordered." See also *Harrison v. McHenry*, 9 Ga. 164; 52 Am. Dec. 435; *Carr v. Houser*, 46 Ga. 479; *Flury v. Grimes*, 52 Ga. 343; *Mayor, etc., of Macon v. Huff*, 60 Ga. 221; *Worthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399. This rule applies to deputy sheriffs. *Perkins v. Thompson*, 3 N. H. 144. A purchase by a deputy sheriff at a sale by his co-deputy barely escapes being illegal, and will be held void if there are any indications of unfairness. *Worland v. Kimberlin*, 6 B. Mon. (Ky.) 608; 44 Am. Dec. 785.

A sheriff cannot sell where he has an interest in the judgment. *Collais v. McLeod*, 8 Ired. (N. Car.) 221; 49 Am. Dec. 376.

Executors.—This rule applies to executors. *Rosser v. De Priest*, 5 Gratt. (Va.) 6; 50 Am. Dec. 94; *Munro v. Allaire*, 2 Cai. Cas. (N. Y.) 183; 2 Am.

Dec. 330; *Ryden v. Jones*, 1 Hawks (N. Car.) 497; 9 Am. Dec. 660; *Bruch v. Lantz*, 2 Rawle (Pa.) 392; 21 Am. Dec. 458.

A partnership of which an executor is a member cannot purchase at a sale made by him in his official capacity. *Harrod v. Norris*, 11 Martin (La.) 297; 13 Am. Dec. 350.

Administrators.—And to administrators. *Brannan v. Oliver*, 2 Stew. (Ala.) 47; 19 Am. Dec. 37; *Pearson v. Moreland*, 7 Smed. & M. (Miss.) 609; 45 Am. Dec. 319; *Dwight v. Blackmar*, 2 Mich. 330; 57 Am. Dec. 130. See also *SHERIFF'S SALES—To Whom; EXECUTORS AND ADMINISTRATORS*, vol. 7, p. 294.

1. *Worthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399; *Grubbs v. McGlawn*, 39 Ga. 674; *Alexander v. Alexander*, 46 Ga. 283; *Bruch v. Lantz*, 2 Rawle (Pa.) 392; 21 Am. Dec. 458; *McClure v. Miller*, 1 Bailey Eq. (S. Car.) 107; 21 Am. Dec. 522; *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409; 45 Am. Dec. 310; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; *Ward v. Smith*, 3 Sandf. Ch. (N. Y.) 592. *Compare Harrison v. McHenry*, 9 Ga. 164; 52 Am. Dec. 435.

2. *Story on Agency*, § 319; *Mechem on Pub. Off.*, § 849; *Clodfelter v. State*, 86 N. Car. 51; 41 Am. Rep. 440; *Lewis v. State*, 96 N. Y. 71; 48 Am. Rep. 607; *Gibbons v. U. S.*, 8 Wall. (U. S.) 269.

Where a note was received by an officer of the government as collateral security for the payment of a debt due the State, the debtor cannot avail himself of the neglect or omission of the officer to perform the duties which the law in ordinary cases imposes upon a party thus receiving a note; and even should the officer expressly assume responsibility in relation to such note as to prosecute it to judgment, it seems that the State would not be responsible for any laches that might occur. *Seymour v. Van Slyck*, 8 Wend. (N. Y.) 403.

The claim of the United States upon an official bond and upon all parties thereto, is not released by the laches

they act in a governmental or political capacity.¹ But when the tort is committed in the performance of some municipal or corporate duty which is private in its nature, the corporation is liable.²

XIV. LIABILITY OF THE PARTY AT WHOSE INSTANCE THE OFFICER ACTS—1. **The General Rule.**—As a rule, a person who sets a public officer in motion is not liable for injuries thus caused; for it is the lawful right of every man who believes that he has a just demand against another, to institute a suit to obtain proper redress; and so, also, it is not only the right, but the duty, of every individual

of the officer to whom the assertion of this claim is intrusted by law. Such laches have no effect whatsoever on the rights of the United States as well against the sureties as the principal in the bond. *Dox v. Postmaster-General*, 1 Pet. (U. S.) 318. See also *Greer v. Mayor*, etc., of N. Y., 1 Abb. Pr. N. S. (N. Y.) 206.

A duly authorized agent of the State entered into a contract with an individual for the performance of labor for a public duty. The contractor was hindered and delayed and suffered loss in consequence of the failure on the part of other contractors to furnish necessary materials, and the acts and negligence of the agents and officers of the State. *Held*, that the State was liable to the contractor for the damage actually sustained by him. *State v. Farrish*, 23 Miss. 483.

1. *Maxmillian v. Mayor*, etc., of N. Y., 62 N. Y. 160; 20 Am. Rep. 468; *Lorillard v. Monroe*, 11 N. Y. 392; 62 Am. Dec. 120; *Bailey v. Mayor*, etc., of N. Y., 3 Hill (N. Y.) 531; 38 Am. Dec. 669; *Hafford v. New Bedford*, 16 Gray (Mass.) 297; *Walcott v. Swampscott*, 1 Allen (Mass.) 101; *Butterick v. Lowell*, 1 Allen (Mass.) 172; *Barney v. Lowell*, 98 Mass. 570; *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196; *Jewett v. New Haven*, 38 Conn. 368; 9 Am. Rep. 382; *Summers v. Daviess Co.*, 103 Ind. 262; *Vigo Tp. v. Knox Co.*, 111 Ind. 170; *Calwell v. Boone*, 51 Iowa 687; 33 Am. Rep. 154; *Stewart v. New Orleans*, 9 La. Ann. 461; *Murtaugh v. St. Louis*, 44 Mo. 479; *Rowland v. Gallatin*, 75 Mo. 134; 42 Am. Rep. 395; *Richmond v. Long*, 17 Gratt. (Va.) 375; 94 Am. Dec. 461; *Wallace v. Menasha*, 48 Wis. 79; 33 Am. Rep. 805; *Hayes v. Oshkosh*, 33 Wis. 314; 14 Am. Rep. 760; *Schultz v. Milwaukee*, 49 Wis. 254; 35 Am. Rep. 779; *Little v. Madison*, 49 Wis. 605; 35 Am. Rep. 793. See *Attorney-Gen'l v. St.*

Clair Co., 30 Mich. 388; *Oceana Co. v. Tp. of Hart*, 48 Mich. 319.

In the absence of any express statutory liability, the county authorities are not answerable in damages for any negligence or want of skill in the construction of bridges and highways. *Askew v. Hale Co.*, 54 Ala. 639; 25 Am. Rep. 730. See *Bennett v. New Orleans*, 14 La. Ann. 120.

2. *Cooley on Torts* 122; *Aldrich v. Tripp*, 11 R. I. 141; 23 Am. Rep. 434; *Sprague v. Tripp*, 13 R. I. 38; 43 Am. Rep. 11; *Durkee v. Kenosha*, 59 Wis. 123; 48 Am. Rep. 480; *Richmond v. Long*, 17 Gratt. (Va.) 375; 94 Am. Dec. 461; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Asbestine Tiling, etc., Co. v. Hipp*, 39 Fed. Rep. 324; *Murtaugh v. St. Louis*, 44 Mo. 479. See *Montgomery v. Des Moines*, 55 Iowa 101.

A municipal corporation in its private character as the owner, etc., of lands and houses, is to be regarded in the same light as an individual, and dealt with accordingly. *Bailey v. Mayor*, etc., of N. Y., 3 Hill (N. Y.) 531.

In *Richmond v. Long*, 17 Gratt. (Va.) 375; 94 Am. Dec. 461, the court by Rives, J., said: "Wherever it can be said that distinct duties are imposed upon a corporation, purely ministerial and involving no exercise of discretion, the same liability attaches as in the case of private persons owing the same service under the law. To this second class belong numerous cases of recovery against corporations for the torts or negligences of their servants. . . . These decisions proceed on the ground that where a municipal corporation acts in the exercise of powers or discharge of duties, in nowise discretionary or governmental but purely ministerial in their character, it incurs, like a private person, the common-law liability for the acts of its servants."

who in good faith and with probable cause believes that a public offense has been committed by another, to institute the proper proceedings for the punishment of the supposed offender.¹ But the above rule is subject to numerous qualifications in individual instances.

2. Various Classes of Proceedings—*a.* MALICIOUS PROSECUTION.²

b. FALSE IMPRISONMENT.—It is well settled that every person, whether natural or artificial,³ whether acting in person or by agent,⁴ and whether personally present or not,⁵ who directs, procures, authorizes, or participates in, the arrest and imprisonment of another, without any legal warrant or authority, and without reasonable or justifiable cause, is liable in damages to the party injured.⁶ So, also, a person who causes void or illegal process to be issued in an action, thereby causing loss or injury to the party

1. Cooley on Torts 180; Mechem's Public Officers, § 898; Drake on Attachment, § 114.

If a judicial officer, whether possessed of general or special jurisdiction, act erroneously, or even oppressively, in the exercise of his authority, an individual at whose instance he acts is not answerable as a trespasser for the error or misconduct of the officer; but if a judicial officer whose jurisdiction is special and limited transcend his authority and act in a case of which he has no cognizance, his proceedings are *coram non jndice*, and no person can justify under them. Taylor v. Moffatt, 2 Blackf. (Ind.) 305.

Where a party procures an inferior magistrate to exceed his jurisdiction, and to extend his powers to a case to which they cannot lawfully be extended, he becomes a trespasser, and is amenable to the party injured. Barkeloo v. Randall, 4 Blackf. (Ind.) 476; 32 Am. Dec. 46; Curry v. Pringle, 11 Johns. (N. Y.) 444.

2. See MALICIOUS PROSECUTION, vol. 14, p. 16; Cooley on Torts 180.

One who makes before a committing magistrate an affidavit of facts conceded to be true, which the magistrate erroneously believes to constitute a crime and upon which a warrant of arrest is accordingly issued, is not liable in damages to the person arrested. Leigh v. Webb, 3 Esp. 164; Cohen v. Morgan, 6 D. & R. 8; 16 E. C. L. 250; Carratt v. Morley, 1 G. & D. 275; McNeely v. Driskill, 2 Blackf. (Ind.) 259; Hahn v. Schmidt, 64 Cal. 284; Jones v. Jones, 71 Cal. 89; Diemer v. Herber, 75 Cal. 287; Von Latham v. Libby, 38 Barb. (N. Y.) 339.

3. Owsley v. Montgomery, etc., R. Co., 37 Ala. 560; Wheeler, etc., Mfg. Co. v. Boyce, 36 Kan. 350; 59 Am. Rep. 571; Lynch v. Metropolitan El. R. Co., 90 N. Y. 77; 12 Am. & Eng. R. Cas. 119; 43 Am. Rep. 141.

4. Parsons v. Lloyd, 3 Wils. 341; Barker v. Braham, 3 Wils. 396; Jones v. Nicholls, 3 M. & P. 12; Harris v. Louisville, etc., R. Co., 35 Fed. Rep. 116; Wheeler, etc., Mfg. Co. v. Boyce, 36 Kan. 350; 59 Am. Rep. 571.

5. Clifton v. Grayson, 2 Stew. (Ala.) 412; Stoddard v. Bird, Kirby (Conn.) 65.

6. FALSE IMPRISONMENT, vol. 7, p. 661; Mechem on Public Officers, § 906; Cooley on Torts 169; Barker v. Braham, 2 W. Bl. 866; Collett v. Foster, 2 H. & N. 356; Goslin v. Wilcock, 2 Wils. 302; Smith v. Cattel, 2 Wils. 376; Austin v. Debnam, 3 B. & C. 139; 10 E. C. L. 37; Wentworth v. Bullen, 9 B. & C. 840; 17 E. C. L. 503; Codrington v. Lloyd, 8 A. & E. 449; 35 E. C. L. 433; Walley v. McConnell, 13 Q. B. 903; 66 E. C. L. 901; Smith v. Sydney, L. R., 5 Q. B. 203; 39 L. J. Q. B. 144; 22 L. T. N. S. 16; Johnson v. Tompkins, 1 Baldw. (U. S.) 601; Harris v. Louisville, etc., R. Co., 35 Fed. Rep. 116; Clarke v. American Dock, etc., Co., 35 Fed. Rep. 478; Fotheringham v. Adams Express Co., 36 Fed. Rep. 252; Clifton v. Grayson, 2 Stew. (Ala.) 412; Crumpton v. Newman, 12 Ala. 199; 46 Am. Dec. 251; Floyd v. State, 12 Ark. 43; 54 Am. Dec. 250; Burlingham v. Wylee, 2 Root (Conn.) 152; Stoyel v. Lawrence, 3 Day (Conn.) 1; Develing v. Sheldon, 83 Ill. 390; Barkeloo v. Randall, 4 Blackf. (Ind.) 476; 32 Am.

against whom it is enforced, is answerable for the damages so occasioned. In such a case the process is considered the act of the party, and not that of the court, and he is therefore made liable for the consequences of his act.¹ So, if the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act in the premises, and if it nevertheless proceeds and entertains jurisdiction of the proceedings, all of its acts are void, and afford no justification to the parties instituting them as against parties injuriously affected thereby.² But if the facts presented

Dec. 46; *Letzler v. Huntington*, 24 La. Ann. 330; *Plummer v. Dennett*, 6 Me. 421; 20 Am. Dec. 316; *Winslow v. Hathaway*, 1 Pick. (Mass.) 211; *Emery v. Hapgood*, 7 Gray (Mass.) 55; 66 Am. Dec. 459; *Cody v. Adams*, 7 Gray (Mass.) 59; *Painter v. Ives*, 4 Neb. 122; *Curry v. Pringle*, 11 Johns. (N. Y.) 444; *Gold v. Bissell*, 1 Wend. (N. Y.) 210; 19 Am. Dec. 480; *Comfort v. Fulton*, 13 Abb. Pr. (N. Y.) 276; *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242; *Vredenburg v. Hendricks*, 17 Barb. (N. Y.) 179; *Hallock v. Dominy*, 7 Hun (N. Y.) 52; *Miller v. Adams*, 52 N. Y. 409; *affirming 7 Lans.* (N. Y.) 131; *In re Bradner*, 87 N. Y. 171; *Allison v. Rheam*, 3 S. & R. (Pa.) 139; 8 Am. Dec. 644; *McGarrahan v. Lavers*, 15 R. I. 302; *Pierson v. Gale*, 8 Vt. 509; 30 Am. Dec. 487; *Ogg v. Murdock*, 25 W. Va. 139.

The case of *McGarrahan v. Lavers*, 15 R. I. 302, was as follows: The plaintiff having ordered a rare steak at a restaurant, the waiter brought him one which was well done. This he refused, and repeated his order. The waiter then brought him another steak which was rare, and which he accepted and offered to pay for, refusing, however, to pay for the previous one. The defendant, a clerk in charge of the restaurant, directed an officer to take the plaintiff into custody. The officer obeyed, and took the plaintiff to the police station, from which he was removed to the jail. The defendant, when sued, claimed that he simply gave the direction for the arrest, and did not otherwise participate in it; but it was held that he was responsible for the wrongful imprisonment directed by him.

For acts done by an officer beyond the authority of his process, the party at whose instance the process was issued, is not responsible, unless those acts were done by his direction.

Adams v. Freeman, 9 Johns. (N. Y.) 117. But where the process, which is itself regular, is abused by the advice of a party, he is liable for such abuse. *Snydacker v. Brosse*, 51 Ill. 357; 99 Am. Dec. 551.

1. *Fischer v. Langbein*, 103 N. Y. 84; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316; *Mudrock v. Killips*, 65 Wis. 622.

In the case of void process the liability attaches when the wrong is committed, and no preliminary proceeding is necessary to vacate or set it aside, as a condition to the maintenance of an action. Process, however, that a court has general jurisdiction to award, but which is irregular by reason of the non-performance by the party procuring it, of some preliminary requisite, or the existence of some fact not disclosed in his application therefor, must be regularly vacated or annulled by an order of the court, before an action can be maintained for damages occasioned by its enforcement. *Fischer v. Langbein*, 103 N. Y. 84, *citing Day v. Bach*, 87 N. Y. 56.

But one who, in making a criminal complaint, merely states the facts and circumstances to the prosecuting attorney, and swears to the complaint drawn by the latter embodying such facts, is not liable in an action for false imprisonment, though the facts sworn to fail to make out a criminal offense. *Barker v. Stetson*, 7 Gray (Mass.) 53; 66 Am. Dec. 457; *Langford v. Boston, etc., R. Co.*, 144 Mass. 431; 30 Am. & Eng. R. Cas. 653; *Murphy v. Walters*, 34 Mich. 180; *Von Latham v. Rowan*, 17 Abb. Pr. (N. Y.) 237. *Compare Carratt v. Morley*, 1 Q. B. 18; 41 E. C. L. 417; *Fenelon v. Butts*, 49 Wis. 342.

2. *Crumpton v. Newman*, 12 Ala. 199; 46 Am. Dec. 251; *Dusy v. Helm*, 59 Cal. 188; *Hall v. Rogers*, 2 Blackf. (Ind.) 429; *Bauer v. Clay*, 8 Kan. 580;

to the court call upon it for the exercise of judgment and reason, upon evidence which might in its consideration affect different minds differently, a judicial question is presented, which, however decided, does not render either party, or the court making it, liable for the consequences of its action.¹ And in all cases where a court has acquired jurisdiction in an action or proceeding, its order made or judgment rendered therein is valid and enforceable, and affords protection to all persons acting under it, although it may be afterwards set aside or reversed as erroneous.²

c. INJUNCTIONS.—The plaintiff in an injunction suit is liable upon his injunction bond for all damages and costs incurred by the defendant on account of the improper issue of the injunction.³ If no injunction bond be taken, or if the court of chancery granting the injunction fails to make an order that the party seeking the injunction shall pay the party enjoined such damages as may be sustained in consequence of the injunction, the injunction plaintiff will not be liable,⁴ save that, where the proceedings were maliciously and groundlessly instituted, an action for malicious prosecution will lie.⁵

d. ATTACHMENTS.—A void or irregular attachment affords no protection to a party at whose instance it was issued, for acts done under it; and when the attachment is set aside, he becomes liable for such acts, as a trespasser *ab initio*.⁶

Gillett v. Thiebold, 9 Kan. 427; Hauss v. Kohlar, 25 Kan. 640; Cody v. Adams, 7 Gray (Mass.) 59; Swart v. Kimball, 43 Mich. 443; Fischer v. Langbein, 103 N. Y. 84; Spice v. Steinruck, 14 Ohio St. 213. Compare Gorton v. Frizzell, 20 Ill. 292.

1. Landt v. Hiltz, 19 Barb. (N. Y.) 283; Fischer v. Langbein, 103 N. Y. 94. In this latter case the court by Ruger, C. J., said; "The rule to be deduced from these authorities seems to be that when a court is called upon to adjudicate upon doubtful questions of law, or determine as to inferences to be drawn from circumstances reasonably susceptible of different interpretations or meanings, and calling for the exercise of the judicial function in their determination, its decision thereon does not render an order or process based upon it, although afterward vacated or set aside as erroneous, void, or subject the party procuring it to an action for damages thereby inflicted."

2. Von Kettler v. Johnson, 57 Ill. 109; Johnson v. Von Kettler, 66 Ill. 63; Fischer v. Langbein, 103 N. Y. 90; Simpson v. Hornbeck, 3 Lans. (N. Y.) 53.

3. INJUNCTIONS, vol. 10, p. 987; High

on Injunctions (2d ed.), vol. 2, § 1619; Newell v. Partee, 10 Humph. (Tenn.) 325; Hubbard v. Fravell, 12 Lea (Tenn.) 304.

4. Lexington, etc., R. Co. v. Applegate, 8 Dana (Ky.) 289; Sturgis v. Knapp, 33 Vt. 486. Compare Cayuga Bridge Co. v. Magee, 2 Paige (N. Y.) 122.

5. Robinson v. Kellum, 6 Cal. 399; Lexington, etc., R. Co. v. Applegate, 8 Dana (Ky.) 289; Cox v. Taylor, 10 B. Mon. (Ky.) 17.

In Gorton v. Brown, 27 Ill. 489, 81 Am. Dec. 245, it was held that the action for malicious prosecution was not maintainable where an injunction bond had been given, the only remedy being on the bond.

6. Kirksey v. Jones, 7 Ala. 622; Connelly v. Woods, 31 Kan. 359; Offutt v. Edwards, 9 Rob. (La.) 90; Merritt v. St. Paul, 11 Minn. 223; Dominick v. Eacker, 3 Barb. (N. Y.) 17; Lyon v. Yates, 52 Barb. (N. Y.) 244; Patrick v. Solinger, 9 Daly (N. Y.) 149; Sprague v. Parsons, 14 Abb. N. Cas. (N. Y.) 320; Kerr v. Mount, 28 N. Y. 659; Miller v. Adams, 52 N. Y. 409; 7 Lans. (N. Y.) 133; Webb v. Bailey, 54 N. Y. 165; Wehle v. Butler, 61 N. Y. 245; affirming 34 N. Y. Super. Ct.

And a return of the property only mitigates the damages.¹

c. PROCEEDINGS UNDER AN UNCONSTITUTIONAL STATUTE.—

An unconstitutional law can afford to no one authority, justification, or protection.² Hence, where proceedings are instituted under an unconstitutional statute, the person at whose instance the process is issued,³ the magistrate who grants it,⁴ and the officer who executes it,⁵ are all liable in damages to the person injured. But when a person does no more than prefer a complaint to the magistrate, he is not liable for acts done under the warrant which the magistrate thereupon issues, even though the magistrate has no jurisdiction.⁶

f. EXECUTIONS.—A party is never a trespasser or wrongdoer for selling property by virtue of an execution in due form issued upon a judgment regularly obtained, though the same be after-

215; 35 N. Y. Super. Ct. 1; 12 Abb. Pr. N. S. (N. Y.) 139; 43 How. Pr. (N. Y.) 5; *Wehle v. Haviland*, 69 N. Y. 448; 42 How. Pr. (N. Y.) 399; 4 Daly (N. Y.) 550; and see *Campbell v. Chamberlain*, 10 Iowa 337; *Hayden v. Shed*, 11 Mass. 500.

The reason is, that where the process is irregular, unauthorized, and void, the officer serving the attachment is the agent of the party suing out the process; although, where the process is authorized and regular, the officer is in no sense the agent of the party. *Hall v. Waterbury*, 5 Abb. N. Cas. (N. Y.) 374; 57 How. Pr. (N. Y.) 131; *Raney v. Weed*, 3 Sandf. (N. Y.) 577.

1. *Gibbs v. Chase*, 10 Mass. 9; *Vosburgh v. Welch*, 11 Johns. (N. Y.) 175; *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91; *Kerr v. Mount*, 28 N. Y. 659.

2. *Astrom v. Hammond*, 3 McLean (U. S.) 107; *Woolsey v. Dodge*, 6 McLean (U. S.) 142; *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 868; *Meagher v. Storey Co.*, 5 Nev. 244, 250; *Campbell v. Sherman*, 35 Wis. 103.

In *Cooley's Const. Lim.* (6th ed.) 222, the author says: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any

time, been possessed of any legal force."

3. *Merritt v. St. Paul*, 11 Minn. 223.

Particularly is this the case, if the complaint is malicious and without probable cause. *Barker v. Stetson*, 7 Gray (Mass.) 53; 66 Am. Dec. 457.

4. *Kelly v. Bemis*, 4 Gray (Mass.) 83; 64 Am. Dec. 50; *Barker v. Stetson*, 7 Gray (Mass.) 53; 66 Am. Dec. 457. *Contra*, *Henke v. McCord*, 55 Iowa 378.

5. *Sumner v. Beeler*, 50 Ind. 341; 19 Am. Dec. 718; *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70; *Fisher v. McGirr*, 1 Gray (Mass.) 1; 61 Am. Dec. 381; *Barker v. Stetson*, 7 Gray (Mass.) 53; 66 Am. Dec. 457.

In *Sumner v. Beeler*, 50 Ind. 341, 19 Am. Rep. 718, the court by Pettit, C. J., said: "No question in law is better settled . . . than that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void. All persons are presumed to know the law, and if they act under an unconstitutional enactment of the legislature, they do so at their peril, and must take the consequences." But in *Texas* it has been held that an unconstitutional statute has, until adjudged unconstitutional, the force and effect of law, so far as to protect officers who obey its mandates. *Sessums v. Botts*, 34 Tex. 335. Compare *Henke v. McCord*, 55 Iowa 378. And see *State v. McNally*, 34 Me. 210; 56 Am. Dec. 650.

6. *Barker v. Stetson*, 7 Gray (Mass.) 53; 66 Am. Dec. 457. Compare *Chivers v. Savage*, 5 E. & B. 697, 701, per Lord Campbell, C. J.; 85 E. C. L. 699.

wards reversed for error.¹ If an execution is lawfully issued, persons who employ an officer of the law to execute the process are not liable where the officer, without their knowledge or assent, abuses his functions; as, for instance, in levying on property belonging to a stranger, or on property not subject to levy.² But if they command, direct, encourage, or advise such irregularity, or even give their sanction or assent to it, they will be answerable.³ So, if the plaintiff in an execution directs that it be exe-

1. *Kissock v. Grant*, 34 Barb. (N. Y.) 150.

But if a party issuing execution on a judgment for a debt which had been paid before its entry, knew that it had been paid, he is liable in an action for malicious abuse of legal process, whether he caused the judgment to be entered or not. *Barnett v. Reed*, 51 Pa. St. 190; 88 Am. Dec. 574.

2. *Snively v. Fahnestock*, 18 Md. 391; *Sutherland v. Ingalls*, 63 Mich. 620; 6 Am. St. Rep. 332; *Princeton Bank ads. Gibson*, 20 N. J. L. 138; *Chapman v. Douglas*, 15 Abb. Pr. N. S. (N. Y.) 421; *Averill v. Williams*, 1 Den. (N. Y.) 501; *Barnard v. Stevens*, 2 Aik. (Vt.) 429; 16 Am. Dec. 733.

Thus, in *Sutherland v. Ingalls*, 63 Mich. 620. 6 Am. St. Rep. 332, the court, by Campbell, C. J., said: "No one can be held liable as a trespasser at all for employing an officer to execute lawful process. It is the right of every one to have his regular and valid writ served and enforced. The officers of the law are bound to perform that duty, and cannot be blamed for doing it in a legal manner. Every one has a right to suppose the ministers of the law will not abuse their functions, and no one who lawfully employs them is liable if they do. . . . It is only where the party himself orders or encourages lawlessness that he can be treated as a joint wrongdoer, and then he is liable because he is actually a trespasser, and liable to the extent of his own misconduct." But see *Jarmain v. Hooper*, 6 M. & G. 827; 46 E. C. L. 826; 1 D. & L. 769; 7 Scott's N. R. 663; 8 Jur. 127; *Duperron v. Van Wickle*, 4 Rob. (La.) 39; 39 Am. Dec. 509; *Davis v. Newkirk*, 5 Den. (N. Y.) 92. Thus in *Duperron v. Van Wickle*, 4 Rob. (La.) 39, 39 Am. Dec. 509, it was held that execution creditors are liable for illegal seizure, though they did not authorize the sheriff to seize property in question. And in *Davis v. Newkirk*, 5 Den. (N. Y.) 92, it was

decided that the giving of a bond of indemnity by a surety to induce an officer to seize particular property on an execution, makes the party executing such bond a trespasser, if the seizure be illegal.

In the absence of any showing of fraud, a creditor who has caused a levy to be made under a valid judgment entered on default, and on the setting aside of the judgment has returned the property to the defendant, is not liable for the seizure and detention. *White v. Adams*, 52 Cal. 435.

3. *Snydacker v. Brosse*, 51 Ill. 357; 99 Am. Dec. 551; *Haskins v. Haskins*, 67 Ill. 446; *Shaw v. Rowland*, 32 Kan. 154; *Hale v. Ames*, 2 T. B. Mon. (Ky.) 143; 15 Am. Dec. 150; *Allen v. Crary*, 10 Wend. (N. Y.) 349; 25 Am. Dec. 566; *Weber v. Ferris*, 37 How. Pr. (N. Y.) 102; 2 Daly (N. Y.) 405; *Herring v. Hoppock*, 15 N. Y. 409; 3 Duer (N. Y.) 20; *Lentz v. Chambers*, 5 Ired. (N. Car.) 587; 44 Am. Dec. 63. Compare *Churchill v. Siggers*, 3 E. & B. 929; 77 E. C. L. 929.

Where a person directs a sheriff to levy an execution in his favor upon the chattels of another, it has been held that, although he may never have had the property in his possession, replevin will lie against him in favor of the owner. *Allen v. Crary*, 10 Wend. (N. Y.) 349; 25 Am. Dec. 566; *Stewart v. Wells*, 6 Barb. (N. Y.) 79; *Knapp v. Smith*, 27 N. Y. 277; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631; 30 Am. Dec. 77. Compare *Hadley v. Hadley*, 82 Ind. 75. But see, for the better doctrine, *REPLEVIN*, vol. 20, p. 1084.

And so he will be liable in trespass where, although he had no agency in the first taking, he directed the officer to detain the property, and indemnified him for such taking. *Root v. Chandler*, 10 Wend. (N. Y.) 110; 25 Am. Dec. 546.

Participation by an execution plaintiff in an unlawful sale of the property

cuted in a different manner from that commanded in the writ, he makes the officer so executing it his agent, and is bound by whatever is, under his direction, done or omitted by the officer.¹ If, on the other hand, the execution is illegal, as, for example, from being issued upon a judgment void for want of jurisdiction,² or upon a judgment rendered against a defendant who was not served with process,³ the person who causes the execution to be issued is liable for damages arising from the acts of the officer in obedience to the writ, though not for irregularities in executing it, unless committed by his order or advice.⁴ A writ of execution which is only voidable, and not void, is a justification to parties sued in trespass for causing it to be executed.⁵

g. LEVY IN BANKRUPTCY PROCEEDINGS.—In an action of trespass for a wrongful seizure of the plaintiff's goods, made by an officer under a warrant issued against the goods of another at the suit of the defendant, it has been held that the defendant is not liable for the wrongful acts of the officer, without proof that he authorized such acts; and that the fact that the defendant's attorney had directed such wrongful acts, will not render the defendant liable in the absence of proof of special authority in the attorney.⁶

h. OTHER CASES.⁷

levied upon, by being present at the sale and purchasing part of the property, will render him liable with the officer. *Deal v. Bogue*, 20 Pa. St. 228; 57 Am. Dec. 702.

If a sheriff levies an execution upon, and raises money out of a sale of, property not belonging to the judgment debtor, he is guilty of a conversion; and if the plaintiff in execution receives the money so raised with a knowledge of the facts, he also is guilty. *Lentz v. Chambers*, 5 Ired. (N. Car.) 587; 44 Am. Dec. 63.

1. *Shaw v. Rowland*, 32 Kan. 154.

2. *Gunz v. Heffner*, 33 Minn. 215.

3. *Bender v. Askew*, 3 Dev. (N. Car.) 149; 22 Am. Dec. 714.

4. *Snydacker v. Brosse*, 51 Ill. 357; 99 Am. Dec. 551; *Haskins v. Haskins*, 67 Ill. 446; *Foster v. Wiley*, 27 Mich. 244; 15 Am. Rep. 185; *Gunz v. Heffner*, 33 Minn. 215; *Newberry v. Lee*, 3 Hill (N. Y.) 523; *Woodcock v. Bennett*, 1 Cow. (N. Y.) 735; 13 Am. Dec. 568; *Kissock v. Grant*, 34 Barb. (N. Y.) 144; *Poucher v. Blanchard*, 86 N. Y. 256.

5. *Blanchenay v. Burt*, 4 Q. B. 707; 45 E. C. L. 707.

6. *Welsh v. Cochran*, 63 N. Y. 181; 20 Am. Rep. 519; *reversing 2 Hun (N. Y.) 675*; 5 *Thomp. & C. (N. Y.) 699*.

7. **Receivers.**—Where a receiver, duly

appointed in an action, in pursuance of the directions of a judgment regularly obtained therein, sells property in his possession, the protection of the judgment extends not only to the receiver, but to the plaintiff in the action wherein the receiver was appointed, and he does not become a trespasser or wrongdoer by advising the receiver to discharge his duty as such, or by aiding him to make the sale. *Walling v. Miller*, 108 N. Y. 179.

No Execut.—A writ of *ne exeat* which is void on account of having been issued without an affidavit, or upon one which shows clearly no grounds for granting it, although if regular on its face it may protect the officer executing it, will not protect the party who procures it to be issued and executed. *Bonesteel v. Bonesteel*, 28 Wis. 245.

Officer Refusing Bail at Plaintiff's Instance.—A plaintiff causing the defendant to be arrested on a writ and knowing the sufficiency of the bail offered by the defendant to the officer making the arrest, is liable for the damage done by his ordering and causing the officer to refuse the bail and hold the defendant in custody. *Gibbs v. Randlett*, 58 N. H. 407.

Replevin.—See *Ex parte Thompson*, 1 *Flip. (U. S.) 507*; *REPLEVIN*, vol. 20, p. 1154.

3. **Ratification.**—A party may become liable for the consequences of an unlawful act done by an officer in his behalf, or for the consequences of a lawful act performed in an unlawful manner, even where he did not originally direct it, if he subsequently ratifies such act.¹ Thus, ratification will be inferred from the party's seeking to avail himself of the benefits of the act,² or from his indemnifying the officer against its consequences,³ but not from a mere acceptance of what the party would have been entitled to receive irrespective of the wrongful act, nor from a failure to interpose to prevent it.⁴

XV. RIGHTS OF THE PUBLIC AGAINST THIRD PERSONS.—The rules governing the rights of the public against third persons, growing out of acts and transactions between such third persons and public officers and agents, are the same as those applied to the rights of private individuals against third persons with whom they have dealt through agents.⁵ An exception to this rule, however, exists in case of the prerogative right of the State,

1. *Cooley on Torts* 129; *Peterson v. Foli*, 67 Iowa 404; *Tucker v. Jerris*, 75 Me. 184; *Cook v. Hopper*, 23 Mich. 511; *Abbott v. Kimball*, 19 Vt. 551; 47 Am. Dec. 708. Compare *Adams v. Freeman*, 9 Johns. (N. Y.) 117.

To hold one responsible for a tort not committed by himself nor by his orders, his adoption of, and assent to, the same must be clear and explicit, and made with a full knowledge of all the facts. *Tucker v. Jerris*, 75 Me. 184; *Adams v. Freeman*, 9 Johns. (N. Y.) 118.

2. *Hyde v. Cooper*, 26 Vt. 552.

3. *Lovejoy v. Murray*, 3 Wall. (U. S.) 1; *Knight v. Nelson*, 117 Mass. 458; *Root v. Chandler*, 10 Wend. (N. Y.) 110; 25 Am. Dec. 546; *Herring v. Hoppock*, 15 N. Y. 409; *Ball v. Loomis*, 29 N. Y. 412. Compare *Crossman v. Owen*, 62 Me. 528.

A bond given to indemnify against an illegal act to be done, is void, but not so, if given to indemnify against an act already done, and not known at the time to be illegal. *Griffiths v. Hardenbergh*, 41 N. Y. 464; citing *Stone v. Hooker*, 9 Cow. (N. Y.) 154.

4. *Hyde v. Cooper*, 26 Vt. 552.

See further as to what amounts to a ratification and the effect thereof, *supra* this title, *Authority by Ratification*.

5. *Dugan v. U. S.*, 3 Wheat. (U. S.) 172; *Cook v. Tullis*, 18 Wall. (U. S.) 332; *Lee v. Lee*, 67 Ala. 406; *Milhous v. Dunham*, 78 Ala. 48; *Wolffe v. State*, 79 Ala. 201; 58 Am. Rep. 590; *Skinner v. Merchants' Bank*, 4 Allen (Mass.) 290; *Com. v. Haupt*, 10 Allen

(Mass.) 38; *Bainbridge v. Downie*, 6 Mass. 253; *Shaw v. Spencer*, 100 Mass. 382; 1 Am. Rep. 115; *People v. Auditor General*, 38 Mich. 746; *State v. Torinus*, 28 Minn. 175; *Demarest v. New Barbadoes*, 40 N. J. L. 604; *Michigan v. Phoenix Bank*, 33 N. Y. 9; *Younce v. McBride*, 68 N. Car. 532; *Bean v. Froneberger*, 75 N. Car. 540; *State v. Bevers*, 86 N. Car. 588; *Coble v. Nonemaker*, 78 Pa. St. 501; *Day Land, etc., Co. v. State*, 68 Tex. 526. See also *AGENCY*, vol. 1, p. 331.

The State or other public authority may maintain an action for the recovery of public money or property which has been paid out or disposed of without authority of law. *Com. v. Field*, 84 Va. 26; *Day Land, etc., Co. v. State*, 68 Tex. 526.

So when money has been paid out under mistake of fact. *Belden v. State*, 103 N. Y. 1; *aff'g* 31 Hun (N. Y.) 409. Or where it has been fraudulently obtained under color of a contract with the State. *People v. Denison*, 80 N. Y. 656.

Where public property has been sold by an agent, the State may sue for the price thereof in its own name. *State v. Torinus*, 28 Minn. 175; 26 Minn. 1; 37 Am. Rep. 393; 24 Minn. 332.

Where money was deposited in the bank by a tax-collector to the credit of I. H. Vincent, Treasurer, and checked out by him in the purchase of exchange on New York, the draft being made payable to himself as

where no liens have intervened, to priority of payment of its claims out of the estates of debtors and others.¹ And in those jurisdictions in which officers intrusted with the custody of the public moneys are considered as the debtors and not the bailees of the government, such moneys cannot be followed into the hands of third persons as in cases of ordinary agency; the public resort is against the officer only and against his sureties.²

XVI. RIGHTS OF THE OFFICER AS AGAINST THIRD PERSONS.—Public officers have implied authority to maintain all actions which the proper and faithful discharge of the duties of their offices require, their rights being commensurate with their public duties and trusts.³ Thus a public officer who, as such, has the property of another in his possession, may by virtue of that possession recover against a stranger for an injury to, or a conversion of, the goods.⁴ And where he has acquired a special property in the goods by virtue of his office, he may recover, to the extent of his interest, against any one who injures or converts them, though

treasurer and indorsed in the same way, the indorsee knowing that Vincent was State treasurer, it was held that the indorsee was chargeable with notice of the official character in which the treasurer held the funds; and in applying the money in payment of an individual indebtedness of the treasurer to him, he became liable to the State in an action for money had and received. *Wolffe v. State*, 79 Ala. 201; 58 Am. Rep. 590.

1. See DEBTS OF DECEDENTS, vol. 5, p. 236, *et seq.*; *Com. v. Logan*, 1 Bibb (Ky.) 529; *State v. Rogers*, 2 Har. & M. (Md.) 198; *Murray v. Ridley*, 3 Har. & M. (Md.) 171; *Contee v. Chew*, 1 Har. & J. (Md.) 417; *State v. Bank of Maryland*, 6 Gill & J. (Md.) 205; 26 Am. Dec. 561; *Smith v. State*, 5 Gill (Md.) 45; *Jones v. Jones*, 1 Bland (Md.) 443; 18 Am. Dec. 327; *Green's Estate*, 4 Md. Ch. 349; *State v. Mayor of Baltimore*, 10 Md. 515; *Orem v. Wrightson*, 51 Md. 34; 34 Am. Rep. 286; *Com. v. Lewis*, 6 Binn. (Pa.) 266.

In *New Jersey* this right to preference does not exist. *Middlesex Co. v. State Bank*, 29 N. J. Eq. 268; 30 N. J. Eq. 311.

2. See *Perley v. Muskegon Co.*, 32 Mich. 132; 20 Am. Rep. 637; *State v. Rubey*, 77 Mo. 610.

In *Iowa* a county may maintain an action for its money alleged to have been wrongfully obtained and converted by defendant, by collusion with the county treasurer, and is not con-

fined in its remedy to an action on the treasurer's bond. *Taylor Co. v. Standley*, 79 Iowa 666.

3. See *Haynes v. Butler*, 30 Ark. 69; *Berrien Co. v. Bunbury*, 45 Mich. 79; *Comrs. of Sinking Fund v. Walker*, 6 How. (Miss.) 143; 38 Am. Dec. 433; *Rouse v. Moore*, 18 Johns. (N. Y.) 407; *Todd v. Birdsall*, 1 Cow. (N. Y.) 260; 13 Am. Dec. 522; *Jansen v. Ostrander*, 1 Cow. (N. Y.) 679; *Galway v. Stimson*, 4 Hill (N. Y.) 136; *Gould v. Glass*, 19 Barb. (N. Y.) 184; *Victory v. Blood*, 25 Hun (N. Y.) 515; *Looney v. Hughes*, 26 N. Y. 515; *aff'g* 30 Barb. (N. Y.) 605; *People v. New York*, 32 N. Y. 473; *Hamilton Co. v. Noyes*, 35 Ohio St. 201; *Philadelphia v. Germantown Pass. R. Co.*, 10 Phila. (Pa.) 165; *School Dist. No. 8 v. Arnold*, 21 Wis. 657. Compare *Clarissy v. Metropolitan Fire Dept.*, 7 Abb. Pr. N. S. (N. Y.) 352.

The commissioners of a county may sue for and recover money due to the county. *State v. Piatt*, 15 Ohio 15.

4. *Cooley on Torts* 442; and see *Cargill v. Webb*, 10 N. H. 199; *Sibley v. Story*, 8 Vt. 15; *Baker v. Fuller*, 21 Pick. (Mass.) 318; *Barker v. Miller*, 6 Johns. (N. Y.) 195.

If the plaintiff shows that property in his possession has been taken and converted, he shows a *prima facie* right to maintain the suit. *Foster v. Chamberlain*, 41 Ala. 158.

Where the law makes it the duty of an officer to preserve all books and papers belonging to his office, he may

it be the general owner himself.¹ An action by a public officer, however, must be brought in the name of his office in all actions which are peculiar to the office or to the official character of the officer, and where the very statement of the cause of action shows that it is an action that can be brought only by some officer.² Where a public officer, acting solely in behalf of his government within the scope of his authority, enters into a contract or performs an official act, a suit thereon must be brought in the name of the government, when the redress is sought in its behalf.³ And official bonds given, for the faithful performance of duty or contract, to a designated officer, can, in the absence of statutory provision, be recovered upon only by the government

maintain replevin for them against any one who assumes to take them. *Phenix v. Clark*, 2 Mich. 327.

1. *Clark v. Withers*, 6 Mod. 292; *Sawle v. Paynter*, 1 D. & R. 307; 16 E. C. L. 37; *Gibbs v. Chase*, 10 Mass. 125; *Brownell v. Manchester*, 1 Pick. (Mass.) 232; *Badlam v. Tucker*, 1 Pick. (Mass.) 389; 11 Am. Dec. 202; *Baker v. Fuller*, 21 Pick. (Mass.) 318; *Brewster v. Vail*, 20 N. J. L. 56; 38 Am. Dec. 547; *Dezell v. Odell*, 3 Hill (N. Y.) 215; 38 Am. Dec. 628; *Lockwood v. Bull*, 1 Cow. (N. Y.) 322; 13 Am. Dec. 539; *Marsh v. White*, 3 Barb. (N. Y.) 518; *Weatherby v. Covington*, 3 Strobb. (S. Car.) 27; 49 Am. Dec. 623; *Lowry v. Walker*, 5 Vt. 181; *Fisher v. Cobb*, 6 Vt. 622; *Whitney v. Ladd*, 10 Vt. 165; *Sewell v. Harrington*, 11 Vt. 141; 33 Am. Dec. 675; *Fletcher v. Cole*, 26 Vt. 170. *Compare Mills v. Camp*, 14 Conn. 219; 36 Am. Dec. 488; *Huntley v. Bacon*, 15 Conn. 257.

An officer may bring replevin for the recovery of goods upon which he has actually levied, against any person interfering with his possession, including even the owner himself, or another officer who afterwards attempts to levy upon them. *Dayton v. Fry*, 29 Ill. 525; *Mulheisen v. Lane*, 82 Ill. 117; *Fitch v. Dunn*, 3 Blackf. (Ind.) 142; *Walpole v. Smith*, 4 Blackf. (Ind.) 304; *Dunkin v. McKee*, 23 Ind. 447; *Ladd v. North*, 2 Mass. 516; *Pomeroy v. Trimmer*, 8 Allen (Mass.) 399; 85 Am. Dec. 714; *Clark v. Norton*, 6 Minn. 412; *Rhoads v. Woods*, 41 Barb. (N. Y.) 471; *Lockwood v. Bull*, 1 Cow. (N. Y.) 333; 13 Am. Dec. 539; *Dezell v. Odell*, 3 Hill (N. Y.) 215; 38 Am. Dec. 628; *Morris v. Van Voast*, 19 Wend. (N. Y.) 283; *Pugh v. Calloway*, 10 Ohio St. 488; *Whitney v. Brunette*, 3 Wis. 625; *Martin v. Wat-*

son, 8 Wis. 315. And see *REPLEVIN*, vol. 20, p. 1074.

But a mere paper levy is not sufficient. *Johnson v. Prussing*, 4 Ill. App. 575.

It has been held that where a deputy sheriff has attached property or seized it in execution, his possession is merely that of his superior, whose servant he is, and does not authorize him to maintain trespass for the taking of such property. *Terwilliger v. Wheeler*, 35 Barb. (N. Y.) 620. *Contra*, *Stanton v. Hodges*, 6 Vt. 64, in which case it was decided that the deputy, by reason of his ultimate liability to the sheriff, might maintain trespass for such taking.

In *Merritt v. Miller*, 13 Vt. 416, it was held that the true owner, when sued by the officer, might set up his title in defense to the action. But in *Weidensaul v. Reynolds*, 49 Pa. St. 73, the contrary was held.

2. *Brewster v. Vail*, 20 N. J. L. 56; 38 Am. Dec. 547; *Board of Trustees v. Acker*, 26 How. Pr. (N. Y.) 263; *Comyns Dig.*, tit. Abatement, e, 21.

But where a plaintiff has a special or general property in himself as an individual, he may bring trover in his own name, whether he acquired that property as a purchaser, as a common carrier, as a special bailee, or in the special discharge of his duty as sheriff or other public officer. *Brewster v. Vail*, 20 N. J. L. 56; 38 Am. Dec. 547.

3. *Balcombe v. Northrup*, 9 Minn. 172. And see *Irish v. Webster*, 5 Me. 171; *State v. Boies*, 11 Me. 474; *Gilmore v. Pope*, 5 Mass. 491.

A payee cannot recover in his own name upon a note running to him as United States Indian agent, his successors in office, or order. *Balcombe v. Northrup*, 9 Minn. 172.

or body having the legal interest in them.¹ When an officer is authorized to sue in his own name, he should do so with the addition of his official title,² and no action can be maintained in his own name after his term of office has expired.³ An officer may sue in his own name when he and not the sovereign power is the party legally interested.⁴ Actions commenced by a public officer do not abate by his death, removal, or resignation, or by the expiration of his term, but continue in favor of his successor in office in the names of the original parties, until a substitution of such successor is made.⁵

XVII. COMPENSATION—1. From the Public.—The salary attached to a public office belongs to the incumbent as an incident of his office; he is entitled to it, not by force of any contract, but because the law attaches it to the office;⁶ and where the law makes no provision for the payment of an officer, a promise on the part

1. *Bagby v. Baker*, 18 Ala. 653; *Northampton v. Elwell*, 4 Gray (Mass.) 81. *Compare Bissell v. Spencer*, 9 Conn. 267; 23 Am. Dec. 336; *State v. New London*, 22 Conn. 170.

In *Northampton v. Elwell*, 4 Gray (Mass.) 81, it was held, in accordance with the general principle that the right of action on a sealed instrument belongs to the party having the legal interest, that on a bond made to the Commonwealth, for the use of the town of Northampton, no action lies by the town, although the forfeitures belong to the town by statute.

A bond running to the people must be sued upon by the proper officer in the name of the people. *Lawton v. Erwin*, 9 Wend. (N. Y.) 233.

2. *Bagby v. Baker*, 18 Ala. 653; *Comrs. of Highways v. Peck*, 5 Hill (N. Y.) 215; *Overseers of Hebron v. Ely*, Hill & D. (N. Y.) 379; *State Prison v. Rikeman*, 1 Den. (N. Y.) 279; *Board of Trustees v. Archer*, 26 How. Pr. (N. Y.) 263.

Actions brought by a public officer either in his own name alone or in the name of the office alone are amendable by the insertion of a proper designation of the plaintiff; and a failure to take advantage of such error by pleading it is a waiver. *Berrien Co. v. Bunbury*, 45 Mich. 79; *Johr v. St. Clair Co.*, 38 Mich. 532; *State Prison v. Rikeman*, 1 Den. (N. Y.) 279.

3. *Jansen v. Ostrander*, 1 Cow. (N. Y.) 670. And see *Bagby v. Baker*, 18 Ala. 653; *Armine v. Spencer*, 4 Wend. (N. Y.) 406.

4. *Hunnicut v. Kirkpatrick*, 39 Ark. 172; *Haynes v. Butler*, 30 Ark.

69; *Brewster v. Vail*, 20 N. J. L. 56; 38 Am. Dec. 547.

Where the State is not only the nominal plaintiff, but the real party in interest, it is immaterial whether the officer upon whose information the suit is brought is legally entitled to the office or not. *McAlister v. Com.*, 6 Bush (Ky.) 581.

5. See *Board of Excise v. Garlinghouse*, 45 N. Y. 249; *Manchester v. Herrington*, 10 N. Y. 164; *Colegrove v. Breed*, 2 Den. (N. Y.) 125.

6. *Fitzsimmons v. Brooklyn*, 102 N. Y. 536; 55 Am. Rep. 835; *Love v. Mayor, etc., of Jersey City*, 40 N. J. L. 456; *Kelm v. State*, 65 How. Pr. (N. Y.) 488; *Steubenville v. Culp*, 38 Ohio St. 18; 43 Am. Rep. 417; *State v. Smedes*, 26 Miss. 47; *Knappen v. Barry Co.*, 46 Mich. 22. And see *Mayor, etc., of Hoboken v. Gear*, 27 N. J. L. 265; *Marden v. Portsmouth*, 59 N. H. 18; *Locke v. Central City*, 4 Colo. 65; 34 Am. Rep. 66; *Iowa City v. Foster*, 10 Iowa 189; *Smith v. Philadelphia Co.*, 2 Pars. Eq. Cas. (Pa.) 293; *Tenney v. State*, 27 Wis. 387; *Farrell v. Bridgeport*, 45 Conn. 191; *People v. White*, 54 Barb. (N. Y.) 622; *People v. Burrows*, 27 Barb. (N. Y.) 89; *People v. Tremain*, 29 Barb. (N. Y.) 96; *Koontz v. Franklin Co.*, 76 Pa. St. 154. But see to the contrary in *North Carolina*, *Hoke v. Henderson*, 4 Dev. (N. Car.) 1; 25 Am. Rep. 677.

The only contract which arises from a statute establishing a salary is to pay the incumbent that salary while that law remains in force. *Fisher v. U. S.*, 15 Ct. of Cl. 323.

Where the statute, in case of a

of the public to pay for his services is not implied from the fact of his election or appointment and the rendition of service.¹

The right to the possession of an office carries with it the right to emoluments pertaining to the place, and an officer seeking to recover these emoluments must show his right to the possession of the office;² an officer *de jure* being as a general rule entitled to the full amount of his salary from the date of his election or appointment.³ The emoluments of an office are prescribed and allowed by law, and may be altered, increased, reduced, and regulated by law at all times except where the constitution has

vacancy in a public office, confers upon the deputy all the powers and imposes on him all the duties attached by law to the office of superintendent, on the happening thereof he becomes at once acting superintendent, and is entitled to the salary of that office while he so continues to act. *Church v. Hopkins*, 55 N. Y. 74.

1. *Talbot v. East Machias*, 76 Me. 416; *Bicknell v. Amador Co.*, 30 Cal. 237; *Barnes v. Bakersfield*, 57 Vt. 375; *Perry v. Cheboygan*, 55 Mich. 250; *White v. Levant*, 78 Me. 568; *Carlyle v. Sharp*, 51 Ill. 71; *State v. Roach*, 123 Ind. 167; *Tippecanoe Co. v. Barens*, 123 Ind. 403; *Walker v. Cook*, 129 Mass. 578; *Sikes v. Hatfield*, 13 Gray (Mass.) 347; *Posey v. Mobile Co.*, 50 Ala. 6; *Crittenden Co. v. Crump*, 25 Ark. 235; *Standford v. Wheeler*, 28 Ark. 144; *Wortham v. Grayson Co. Ct.*, 13 Bush (Ky.) 53; and see *Kinsey v. Kellogg*, 65 Cal. 111; *Reddy v. Tinkum*, 60 Cal. 458; *Beaman v. U. S.*, 19 Ct. of Cl. 5; *Wallace v. U. S.*, 20 Ct. of Cl. 273.

Rendition of the services of a public officer is gratuitous, unless, by express statutory provision, compensation is fixed, and an express liability for its payment imposed on the State. *State v. Brewer*, 59 Ala. 130; and see *Sampson v. Rochester*, 60 N. H. 477.

To charge a county with a claim for services rendered or expenses incurred, there must be some statutory authority authorizing the same to be rendered or incurred, or directing the payment thereof. Without this the board of supervisors cannot be compelled by mandamus to audit such claim. *People v. Albany Co.*, 28 How. Pr. (N. Y.) 22.

But where a statute requires a board of commissioners to have a secretary, but makes no provision for his compensation, he is entitled to reasonable compensation. *Territory v. Norris*, 1 Ore-

gon 107. See also *Bradley v. Jefferson Co.*, 4 Greene (Iowa) 300.

Where services are rendered for a municipal corporation by a person acting as its private agent and not as a public officer, he is entitled to recover the reasonable value of such services. *Detroit v. Redfield*, 19 Mich. 376; *In re Public Parks' Department*, 27 Hun (N. Y.) 305; *Webster Co. v. Taylor*, 19 Iowa 117. But see *Sidway v. South Park Comrs.*, 120 Ill. 496.

2. *McCue v. Wapello Co.*, 56 Iowa 608; 41 Am. Rep. 134; *Baxter v. Brooks*, 29 Ark. 173; *Coburn v. Dodd*, 14 Ind. 347; *Matthews v. Copiah*, 53 Miss. 715; 24 Am. Rep. 715; *Wiley v. Worth*, Phil. (N. Car.) 171; *State v. Storey Co.*, 16 Nev. 92; *Meeham v. Hudson Co.*, 46 N. J. L. 276; 50 Am. Rep. 421; *Darby v. Wilmington*, 76 N. Car. 133.

An officer *de jure* is entitled to his salary, notwithstanding the refusal of other officers in his department to have the communication with him necessary to a full discharge of his duties. *Williams v. Clayton* (Utah 1889), 21 Pac. Rep. 398.

Where the district court appoints a person public prosecutor in the absence of the district attorney, the county is liable to him for his services as such officer. *White v. Polk Co.*, 17 Iowa 413.

A county officer claiming compensation under the salary act on the ground that the population of the county equals a certain number, must show the population to have equaled that number when he entered on the performance of his duties. *Monroe v. Luzerne Co.*, 103 Pa. St. 278.

3. *Fitzsimmons v. Brooklyn*, 102 N. Y. 536; 55 Am. Rep. 835; *Ball v. Kenfield*, 55 Cal. 320; *Swann v. Turner*, 23 Miss. 565; *Shelly v. U. S.*, 19 Ct. of Cl. 653.

He is entitled to interest on the same

expressly forbidden it.¹ Constitutional provisions prohibiting an increase or decrease of the emoluments during the term of an office, however, are remedial in their nature and will be liberally construed and strictly enforced;² such a provision meaning dur-

from the time a demand is made upon the auditor of public accounts for a proper warrant on the treasurer, for the amount of his salary. *Swann v. Turner*, 23 Miss. 565.

Although the law requires that a government official—an internal revenue collector, for instance—shall take an oath and give a bond before entering on the duties of his office, he may, nevertheless, claim compensation for a period during which he was permitted to discharge, and did discharge, the duties of the office before taking the oath and giving the bond. *U. S. v. Flanders*, 112 U. S. 88.

The legislative branch of the government can, by antedating the appointment or commission of a public officer, create a liability on the part of the government; but the appointing power cannot. *Collins v. U. S.*, 15 Ct. of Cl. 22.

1. *Conner v. Mayor*, etc., of N. Y., 5 N. Y. 285; *Prince v. Skillen*, 71 Me. 361; 36 Am. Rep. 325; *Castle v. Uinta Co.*, 2 Wyoming Ter. 126; *Perkins v. Corbin*, 45 Ala. 103; 6 Am. Rep. 698; *Benford v. Gibson*, 15 Ala. 521; *Robinson v. White*, 26 Ark. 139; *Augusta v. Sweeney*, 44 Ga. 463; 9 Am. Rep. 172; *Coffin v. State*, 7 Ind. 157; *People v. Lippincott*, 67 Ill. 333; *Gilbert v. Board of Comrs.*, 8 Blackf. (Ind.) 81; *Iowa City v. Foster*, 10 Iowa 189; *Williams v. Newport*, 12 Bush (Ky.) 438; *Evans v. Populus*, 22 La. Ann. 121; *Farwell v. Rockland*, 62 Me. 296; *Vose v. Essex Co.*, 145 Mass. 500; *Knappen v. Barry Co.*, 46 Mich. 22; *People v. Manistee Co.*, 40 Mich. 585; *Wyandott v. Drennan*, 46 Mich. 478; *Hennepin Co. v. Jones*, 18 Minn. 199; *Hamilton v. St. Louis Co. Ct.*, 15 Mo. 3; *Kendall v. Canton*, 53 Miss. 526; *Marden v. Portsmouth*, 59 N. H. 18; *State v. Gales*, 77 N. Car. 283; *Conner v. Mayor*, etc., of N. Y., 2 Sandf. (N. Y.) 355; 5 N. Y. 285; *People v. Green*, 58 N. Y. 295; *People v. Tremain*, 29 Barb. (N. Y.) 96; *Warner v. People*, 2 Den. (N. Y.) 273; 43 Am. Dec. 740; *People v. Burrows*, 27 Barb. (N. Y.) 89; *Riley v. Mayor*, etc., of N. Y., 96 N. Y. 331; *Phillips v. Mayor*, etc., of N. Y., 1 Hill (N. Y.) 483; *Com. v.*

Mann, 5 W. & S. (Pa.) 403; *Crawford Co. v. Nash*, 99 Pa. St. 253; *Koontz v. Franklin Co.*, 76 Pa. St. 154; *French v. Com.*, 78 Pa. St. 339; *Alexander v. McKenzie*, 2 S. Car. 81; *Field v. Marye*, 83 Va. 882; *Rucker v. Supervisor*, 7 W. Va. 661; *State v. Douglas*, 26 Wis. 428; 7 Am. Rep. 87; *Hall v. State*, 39 Wis. 79; *State v. Kalb*, 50 Wis. 178; *State v. Van Baumark*, 12 Wis. 310; *Butler v. Pennsylvania*, 10 How. (U. S.) 402; *U. S. v. Mitchell*, 109 U. S. 146; *U. S. v. Hartwell*, 6 Wall. (U. S.) 385. And see *People v. Kings Co.*, 105 N. Y. 180; *State v. Mayor*, etc., of Nashville, 15 Lea (Tenn.) 697; 54 Am. Rep. 427; *Francis v. U. S.*, 22 Ct. of Cl. 403.

Where a public office is abolished, the former incumbent has no right to demand compensation for the unexpired term. *Jones v. Shaw*, 15 Tex. 577. But if all the duties of an office had been performed before it was abolished, all of the salary would be paid. *Ex parte Lawrence*, 1 Ohio St. 431; *People v. McCall*, 65 How. Pr. (N. Y.) 442.

After passage of a law allowing an officer the same fees as those allowed another officer for like services, an increase of the latter does not also increase the former. *Johnston v. Lovett*, 65 Ga. 716. *Kinsey v. Sherman*, 46 Iowa 463.

The legislature, having imposed certain duties upon a public officer, and allowed him a salary for his services, may take those duties and the salary away from him before the expiration of his term of office, and confer them upon another. *Denver v. Hobart*, 10 Nev. 28.

2. See *Garvie v. Hartford*, 54 Conn. 440; *Cox v. Burlington*, 43 Iowa 612; *Goldsborough v. U. S.*, *Taney's Dec.* (U. S.) 80; *U. S. v. White*, *Taney's Dec.* (U. S.) 152; *Weeks v. Texarkana*, 50 Ark. 81; *Hall v. Beveridge*, 81 Ill. 128; *Auditor v. Cochrane*, 9 Bush (Ky.) 7; *Perot v. Mann*, 12 Phila. (Pa.) 353; *Doe v. Washington Co.*, 30 Minn. 392; *Meriwether v. U. S.*, 22 Ct. of Cl. 332; *Cherokee Co. v. Chew*, 44 Kan. 162; *Gross v. Kenfield*, 57 Cal. 626; *Wheelock v. People*, 84 Ill. 551;

ing the continuance in office by the officer by virtue of his first election or appointment,¹ and during which he holds over after the expiration of his term;² and in any event the compensation established by law for official services, when their discharge is undertaken, should control the final allowance, and subsequent legislation should not affect it unless directly and plainly made applicable.³ Where a public officer is employed for a fixed term at a given salary, a continued employment carries with it the rate of compensation already established and existing,⁴ and an officer

Chancellor's Case, 1 Bland (Md.) 595; Territory v. King, 1 Oregon 106; Larew v. Newman, 81 Cal. 588; Twenty Per Cent. Cases, 20 Wall. (U. S.) 79; Apple v. Crawford Co., 105 Pa. St. 300; 51, Am. Rep. 205.

Statutes authorizing particular counties to increase the compensation of county officers, contrary to the provisions of a general law on the subject, are inconsistent with that uniformity of county government prescribed by the constitution of *Wisconsin*. Rooney v. Milwaukee Co., 40 Wis. 23.

Under these provisions an officer cannot, by contract, alter the compensation fixed by law for his services, but is entitled, notwithstanding the contract, to the compensation prescribed. Purdy v. Independence, 75 Iowa 356.

Under a statute prohibiting the increase of an officer's salary during his term of office, if, after the passage of an ordinance fixing a salary for the next term, an officer is elected, his salary is fixed by it, although, because of the necessity of publication, the ordinance did not take effect until after the beginning of the term. Stuhr v. Hoboken, 47 N. J. L. 147.

1. Smith v. Waterbury, 54 Conn. 174.

A statute providing that the salary of an appointee shall not be increased during the term of his appointment or during his employment, cannot be evaded by a resignation followed by a reappointment. State v. Hudson Co., 44 N. J. L. 388; nor can an increase be had by an appointee to fill a vacancy. Larew v. Newman, 81 Cal. 588.

Under a constitutional provision that no officer's salary shall be increased or diminished during his term, if the authorities charged with fixing the salary have not done so before his election, they may do so afterwards. Purcell v. Parks, 82 Ill. 346; State v. McDowell, 19 Neb. 442; Rucker v.

Supervisors, 7 W. Va. 661; Wheelock v. McDowell, 20 Neb. 160.

2. State v. Smith, 87 Mo. 158.

The word "compensation," as used in *Wisconsin* Const., art. 4, § 26, applies only to those officers who receive a fixed salary from the State. Milwaukee Co. v. Hackett, 21 Wis. 613; and see Thompson v. Phillips, 12 Ohio St. 617. The *Pennsylvania* constitutional provision applies to a law enacted by the legislature, not to an ordinance enacted by a city. Baldwin v. Philadelphia, 99 Pa. St. 164.

3. People v. McCall, 65 How. Pr. (N. Y.) 442. And see *In re* Bank of Niagara, 6 Paige (N. Y.) 213; Woodruff v. Imperial F. Ins. Co., 90 N. Y. 521; People v. Manistee Co., 40 Mich. 585; State v. Steele, 57 Tex. 200; State v. Cook, 57 Tex. 205; Meriweather v. U. S., 22 Ct. of Cl. 332.

An act providing a new rule of compensation of officers subsequently coming into office need not also apply to the future services of existing officers in order to be valid. Cricket v. State, 18 Ohio St. 9. See also People v. Detroit, 38 Mich. 636.

Where the statute fixes the compensation of Federal officials, the appointing power cannot diminish it; and an officer who accepts and receipts for less than the amount fixed may recover the rest. Adams v. U. S., 20 Ct. of Cl. 115; Dyer v. U. S., 20 Ct. of Cl. 166; Kehn v. State, 93 N. Y. 291. And see Hewitt v. White, 78 Mich. 117.

4. Capps v. Adams Co., 27 Neb. 360; Kehn v. State, 65 How. Pr. (N. Y.) 488.

But a resolution fixing the salary of A as interpreter to the courts, is not operative to entitle B, his successor, to the same salary. Rosenthal v. Mayor, etc., of N. Y., 6 Daly (N. Y.) 167.

Change to Legal-tender Notes.—In the payment of a debt, legal-tender notes are, in contemplation of law,

lawfully holding over is entitled to payment of the salary attached to the office during the term of his incumbency for the time during which he holds over.¹ A person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary, and cannot legally claim additional compensation for additional incidental services, though subsequently imposed upon him, and though the salary be inadequate;² and additional duties may be attached to an office, and, unless provided for, no compensation other than that previously attached to the office can be recovered for their performance.³ An officer cannot recover

equal to coin; and the act of the legislature making the salary of a State officer payable in legal-tender notes, after it had previously made it payable in coin, is not rendered unconstitutional by that section of the constitution of *Nevada* which declares that the salaries of certain officers shall not be increased or diminished during the term of office. *State v. Rhoades*, 3 Nev. 240.

1. *Hubbard v. Crawford*, 19 Kan. 570; *Sobb v. Carter*, 65 Md. 321. And see *Burns v. Mayor, etc.*, of N. Y., 6 Daly (N. Y.) 156.

No agreement, made by the head of a department with an agent appointed under the act of March 3, 1809, will entitle him to more than the compensation allowed thereby. *U. S. v. McCall, Gilp.* (U. S.) 563.

2. *Decatur v. Vermillion*, 77 Ill. 315; *Gerken v. Sibley Co.*, 39 Minn. 433; *Sidway v. South Park Comrs.*, 120 Ill. 406; *Poughkeepsie v. Willsie*, 36 Hun (N. Y.) 270; *Hand v. Tippecanoe Co.*, 26 Ind. 179; *Wabash Co. v. Sheets*, 17 Ind. 22; *Rowe v. Kern Co.*, 72 Cal. 353; *Becknell v. Amador Co.*, 30 Cal. 237; *Cowan v. Mayor, etc.*, of N. Y., 3 Hun (N. Y.) 632; *Stockwell v. Genesee Co.*, 56 Mich. 221; *Kernion v. Hills*, 1 La. Ann. 419; and see *Bartch v. Cutler* (Utah, 1890), 24 Pac. Rep. 526; *Gilbert v. Marshall Co.*, 18 B. Mon. (Ky.) 427; *Riggs v. Brewer*, 64 Ala. 282; *State v. Draper*, 43 Mo. 220; *Gordon Co. v. Harris*, 81 Ga. 719; *Jones v. Grant Co.*, 14 Wis. 518; *Kewanee Co. v. Knipper*, 37 Wis. 406; *Nowles v. Jasper Co.*, 86 Ind. 179; *Stropes v. Greene Co.*, 84 Ind. 560; *re Parsons*, 54 N. Y. Super. Ct. 451; *Bubb v. Lycoming Co.*, 134 Pa. St. 112; *Massing v. State*, 14 Wis. 502; *Banks v. State*, 60 Md. 305; *Shepard v. Lawrence*, 141 Mass. 479; *Upton v. U. S.*, 19 Ct. of Cl. 46; *Folger v. U. S.*, 103 U. S. 30; *Wilson v. U. S.*, 1 Ct. of

Cl. 206; *Yates v. National Home*, 103 U. S. 674; *Stansberry v. U. S.*, 1 Ct. of Cl. 123; 8 Wall. (U. S.) 33; *Raymond v. Madison Co.*, 5 Mont. 103.

An express promise to pay extra compensation, or an express allowance of it is void. *Adams Co. v. Hunter*, 78 Iowa 328; *Griffin v. Clay Co.*, 63 Iowa 413.

U. S. Rev. St., § 847, gives to circuit-court commissioners for services "the same compensation as is allowed to clerks for like services." *Held*, that this embraces the keeping of a docket, although the docket is not quite like that of the clerk. *U. S. v. Wallace*, 116 U. S. 398.

An officer who collects and keeps fees other than such as are provided by law, is liable in an action by the public for the recovery thereof. *San Luis Obispo Co. v. King*, 69 Cal. 531.

The acceptance of a smaller amount than that to which an officer is legally entitled, does not preclude a recovery of the balance. *Harrison Co. v. Benson*, 83 Ind. 469.

3. *Miami Co. v. Blake*, 21 Ind. 32; *Jay Co. v. Templar*, 34 Ind. 322; *Turpen v. Tipton Co.*, 7 Ind. 172; *Territory v. Carson*, 7 Mont. 417; *Bayha v. Webster Co.*, 18 Neb. 131; *Evans v. Trenton*, 24 N. J. L. 764; *People v. Devlin*, 33 N. Y. 269; 88 Am. Dec. 377; *Palmer v. New York*, 2 Sandf. (N. Y.) 318; *People v. Edmonds*, 19 Barb. (N. Y.) 468; *Lancaster Co. v. Fulton* (Pa. 1889), 18 Atl. Rep. 384; *Haynes v. State*, 3 Humph. (Tenn.) 480; 39 Am. Dec. 187; *U. S. v. Smith*, 1 Bond (U. S.) 68; *Andrews v. U. S.*, 2 Story (U. S.) 202; *Jackson v. U. S.*, 8 Ct. of Cl. 354; and see *Cole v. White Co.*, 32 Ark. 45; *People v. New York*, 1 Hill (N. Y.) 362; *Bussier v. Pray*, 7 S. & R. (Pa.) 447; *Robinson v. Dunn*, 77 Cal. 473; *State v. Holladay*, 67 Mo. 64; *Wright v. Hancock Co.*, 98 Ind. 88; *Woodruff v. State*, 3 Ark. 285; *State*

a reward offered for the performance of an act which it was his official duty to perform, a promise to reward a man for doing his duty being void for want of consideration.¹ Where an officer holds two incompatible offices he forfeits the compensation attached to the first from the time of his acceptance of the second, and that without judgment of ouster.² Where an officer holds two offices or places, however, the functions of which are separate and distinct, and which may both be held by one person at the same time, he is entitled to recover the compensation attached to each,³ and an officer may be employed to discharge duties which are clearly extra-official and outside of the scope of his official duty, and which might be performed by one person as well as another, and he will be entitled to additional compensation therefor.⁴ While sickness may furnish sufficient reason

v. Bloxham (Fla. 1890), 7 So. Rep. 873; *Billings v. Mayor, etc.*, of N. Y., 68 N. Y. 413; *People v. Calhoun Co.*, 36 Mich. 10; *In re New York, etc.*, R. Co., 7 Abb. N. Cas. (N. Y.) 408; *Erie Co. v. Jones*, 119 N. Y. 337; *State v. Kelsey*, 44 N. J. L. 1; *La Grange Co. v. Cutler*, 6 Ind. 354; *Rowe v. Kern Co.*, 72 Cal. 353.

The court has no power to grant an extra allowance to a commissioner for extra services beyond the amount fixed by the fee bill, though such services were imposed by order of court. *Bona v. Davant*, *Riley Eq. (S. Car.)* 44.

One entering upon an employment as an attendant upon a court cannot claim an additional compensation provided by a statute, he not having been employed under the authority conferred by such statute. *Mason v. Mayor, etc.*, of N. Y., 28 Hun (N. Y.) 115.

If a county auditor can recover at all for doing his predecessor's work, he must clearly show that the work should have been done by his predecessor, and that, before doing it, the county was notified. *Severin v. Dearborn Co.*, 105 Ind. 264.

1. *Pool v. Boston*, 5 Cush. (Mass.) 519; *Davies v. Burns*, 5 Allen (Mass.) 349; *Rea v. Smith*, 2 Handy (Ohio) 193; *Robinson v. Dunn*, 77 Cal. 473; *In re Russell*, 51 Conn. 577; 50 Am. Rep. 55.

This rule does not apply to a promised reward claimed by a police officer of another State for arresting a fugitive to that State, it not appearing that it was part of his duty to arrest fugitives from abroad. *Morrell v. Quarles*, 35 Ala. 544.

2. *State v. Comptroller-Gen'l*, 9 S.

Car. 259; and see *Hedrick v. U. S.*, 16 Ct. of Cl. 88.

3. *U. S. v. Saunders*, 120 U. S. 126; *Saunders v. U. S.*, 21 Ct. of Cl. 408; *Collins v. U. S.*, 16 Ct. of Cl. 22; *In re Conrad*, 15 Fed. Rep. 641; *Landram v. U. S.*, 16 Ct. of Cl. 74; *Hartson v. U. S.*, 21 Ct. of Cl. 451; *State v. Harrison*, 116 Ind. 300; *State v. Walker*, 97 Mo. 162; *Philadelphia v. Martin*, 125 Pa. St. 583; *Crosman v. Nightingill*, 1 Nev. 323; *Preston v. U. S.*, 37 Fed. Rep. 417; *Erwin v. U. S.*, 37 Fed. Rep. 470. And see *Pennie v. Reis*, 80 Cal. 266.

A statutory recognition, whether direct or indirect, of the right to hold separate offices implies that the officer may have the salary attached to each. *Collins v. U. S.*, 15 Ct. of Cl. 22.

But while under the statute a township trustee is entitled to two dollars per day for ordinary services from the township fund, and to the same from the county as overseer of the poor, he cannot claim pay from both sources for the same day's services. *Montgomery Co. v. Bromley*, 108 Ind. 158.

4. *Evans v. Trenton*, 24 N. J. L. 764; *Burroughs v. Norton Co.*, 29 Kan. 196; *U. S. v. Duval*, Gilp. (U. S.) 356. And see *Love v. Baehr*, 47 Cal. 364; *Curtis v. Sacramento*, 13 Cal. 290; *McBride v. Grand Rapids*, 47 Mich. 236; *Mayor, etc.*, of Niles v. Muzzy, 33 Mich. 61; 20 Am. Rep. 670; *U. S. v. Brindle*, 110 U. S. 688; *U. S. v. Ripley*, 7 Pet. (U. S.) 18; *U. S. v. Fillebrown*, 7 Pet. (U. S.) 28; *U. S. v. Austin*, 2 Cliff. (U. S.) 325; *Collier v. U. S.*, 22 Ct. of Cl. 125; *Long v. U. S.*, 8 Ct. of Cl. 398; *Brough v. U. S.*, 8 Ct. of Cl. 206.

Whenever services have been ren-

for the removal of a public officer, when his absence on that account has been permitted, he is entitled to compensation until some action is taken on the subject,¹ but no claim can be brought for the salary or perquisites of an office for any period during which the claimant was not actually in office, even though wrongfully hindered from occupying the position, the salary being the reward for express or implied services.² No salary will be paid an officer who, during his term of office, forfeits his position, after the time of such forfeiture.³

The legal right to an office carries with it the right to the emoluments of the office; an attempted suspension or removal which is illegal and void as affecting the title to the office, therefore, does not deprive the officer of his right to the salary,⁴ and the officer having a legal title to the office may recover the salary,

dered which are beneficial to a county, and no specific compensation is provided by law, they may be deemed contingent charges, of the allowance of which the supervisors are the sole judges, unless the legislature itself provides for it. *People v. Haws*, 34 Barb. (N. Y.) 69; 21 How. Pr. (N. Y.) 178.

A re-enactment of an early statute fixing an officer's salary should not be deemed an implied repeal of an intermediate statute giving him a commission for certain services additional to his salary. *Chatfield v. Washington Co.*, 3 Oregon 318.

1. *O'Leary v. Board of Education*, 93 N. Y. 1; 45 Am. Rep. 156; *Devlin v. Mayor, etc.*, of N. Y., 41 Hun (N. Y.) 281; *People v. French*, 91 N. Y. 265; *Sleight v. U. S.*, 9 Ct. of Cl. 369; *Ware v. U. S.*, 7 Ct. of Cl. 565.

Under an act providing that a collector of customs may appoint a deputy to act in the absence or in case of the death or disability of the collector, the collector is entitled to the perquisites and emoluments of the office if the deputy acts during his necessary absence or sickness. But if the collector is disabled or dies, and thus ceases to act through his deputy, the perquisites and emoluments of the office do not belong to the collector or his estate. *Merriam v. Clinch*, 6 Blatchf. (U. S.) 5.

Where a city ordinance provides that a policeman, for absence without leave, shall forfeit his pay, except in cases of sickness properly certified by a physician, he must have produced such certificate to recover his pay. *Wilkes-Barre v. Meyers*, 113 Pa. St. 395.

2. *Smith v. New York*, 37 N. Y. 518; *Queen v. Atlanta*, 59 Ga. 318; *Webster v. Kansas City*, 64 Mo. 493; *Wayne*

Co. v. Benoit, 20 Mich. 176; 4 Am. Rep. 382; *State v. Davis*, 44 Mo. 131; *Steubenville v. Culp*, 38 Ohio St. 13; 43 Am. Rep. 417; *U. S. v. Smith*, 1 Bond (U. S.) 68.

The plaintiff never having filled the office or performed any of its duties, cannot recover the salary, even if the question of his right to office is settled. *McVeaney v. Mayor, etc.*, of N. Y., 1 Hun (N. Y.) 35.

Nor can a *per diem* allowance be recovered for a period during which no services were rendered. *Moren v. Blue*, 47 Ala. 709.

If the prosecution was malicious, the officer can recover in tort from the wrongdoer. *Brunswick v. Fahm*, 60 Ga. 109.

A person is not "in office" until the oath has been taken by him, and therefore is not entitled to salary until that time, although he held the office in question at the time of the election, and was only prevented by the acts of his opponent from performing the duties of the office. *Jump v. Spence*, 28 Md. 1.

3. *Chisholm v. Coleman*, 43 Ala. 204; 94 Am. Dec. 678; *Fassey v. New Orleans*, 17 La. Ann. 299; *State v. Comptroller-Gen'l*, 9 S. Car. 259.

One cannot recover any salary of an office that was abolished before he was commissioned thereto. *Bryon v. Jumel*, 32 La. Ann. 442.

4. *Andrews v. Portland*, 79 Me. 484; *Bailey v. State*, 56 Miss. 637; *Fitzsimmons v. Brooklyn*, 102 N. Y. 536; 55 Am. Rep. 835; *State v. Carr*, 3 Mo. App 6; *Mayor, etc.*, of Memphis v. Woodward, 12 Heisk. (Tenn.) 499. And see *People v. Brennan*, 30 How. Pr. (N. Y.) 417; *People v. Brennan*, 11 Abb. Pr., N. S. (N. Y.) 184; *Dorsey*

notwithstanding it has been paid to the officer *de facto* filling the assumed vacancy.¹ A payment of the salary to the officer *de facto*, however, while the title to the office is in controversy, but before it is determined, is a good defense to a claim by the legal officer,² but the legal officer may recover all of the salary not in fact paid before the right to the office is determined, although it accrued before the determination of the title,³ and the officer *de jure* who was prevented from performing the duties of

v. Smyth, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193. But see *Gorman v. Boise Co.*, 1 Idaho N. S. 655; *Smith v. New York*, 37 N. Y. 518; 1 *Daly* (N. Y.) 219; *People v. Police Comrs.*, 27 Hun (N. Y.) 261; *Bastrop Co. v. Hearn*, 70 Tex. 563.

Whatever may be the power of the legislature, the board of supervisors cannot contract for services for a year, and then rescind the contract and refuse to pay, by abolishing the office or refusing to have the services performed. *McDaniel v. Yuba Co.*, 14 Cal. 444.

A city having a treasurer duly appointed and qualified under the general act of incorporation, cannot defeat his right to commissions for disbursement of the municipal funds by placing them in the hands of the mayor for disbursement. *Beard v. Decatur*, 64 Tex. 7; 53 Am. Rep. 735.

The occupation of an office by an intruder does not have the effect of deferring the time of payment of the salary, until the intruder is ousted. *Carroll v. Siebenthaler*, 37 Cal. 193.

1. *Andrews v. Portland*, 79 Me. 484; *Mayor, etc., of Memphis v. Woodward*, 12 Heisk. (Tenn.) 499; *Savage v. Pickard*, 14 Lea (Tenn.) 46. And see *Williams v. Clayton* (Utah, 1889), 21 Pac. Rep. 398; *Dorsey v. Smith*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193.

A disbursing officer has no right to assume that money appropriated by the legislature in payment of the salary attached to a named office is payable to any other than the officer *de jure*, and his disregard of this rule is at his own risk. *Williams v. Clayton* (Utah, 1889), 21 Pac. Rep. 398.

Where the substantial and responsible duties of the collection of back taxes were performed by one collector, while the actual payment was made to his successor, the former is entitled to the statutory fees. *Watson v. Schnecko*, 13 Mo. App. 208.

2. *Andrews v. Portland*, 79 Me. 484; *McVeany v. Mayor, etc., of N. Y.*, 80 N. Y. 185; 36 Am. Rep. 600; *Saline Co. v. Anderson*, 20 Kan. 298; 27 Am. Rep. 171; *Schloss v. Hewlett*, 81 Ala. 266; *Shaw v. Pima Co. (Arizona, 1888)*, 18 Pac. Rep. 273; *In re Havird* (Idaho, 1890), 24 Pac. Rep. 542; *Wheatley v. Covington*, 11 Bush (Ky.) 18; *Wayne Co. v. Benoit*, 20 Mich. 176; 4 Am. Rep. 382; *Parker v. Dakota Co.*, 4 Minn. 59; *McAffee v. Russell*, 29 Miss. 84; *Dickerson v. Butler*, 27 Mo. App. 9; *Terhune v. Mayor, etc., of N. Y.*, 88 N. Y. 247; *Dolan v. Mayor, etc., of N. Y.*, 68 N. Y. 274; 23 Am. Rep. 168; *Hannon v. Grizzard*, 96 N. Car. 293; *Selby v. Portland*, 14 Oregon 243; 58 Am. Rep. 307; *Luzerne Co. v. Trimmer*, 95 Pa. St. 97; and see *People v. Brennan*, 1 Abb. Pr. (N. Y.) 184; *People v. Brennan*, 30 How. Pr. (N. Y.) 417.

The public is not liable for the damage sustained by an officer by his loss of the fees and emoluments of the office, although it is judicially determined that he was entitled to the office, and although the *ad interim* incumbent is insolvent, so that such fees and emoluments cannot be recovered from him. *Hannon v. Grizzard*, 96 N. Car. 293; and see *Saline Co. v. Anderson*, 20 Kan. 298; 27 Am. Rep. 291.

The rule is the same, whether the compensation is by fixed fees payable from the treasury for the specific service rendered, or by an actual salary payable at recurring periods, and it is immaterial whether the office is held by appointment or election. *McVeany v. Mayor, etc., of N. Y.*, 80 N. Y. 185.

3. *Andrews v. Portland*, 79 Me. 484; *McVeany v. Mayor, etc., of N. Y.*, 80 N. Y. 185; 36 Am. Rep. 600.

An officer *de facto* cannot recover for the salary of the office to which he would have been entitled if he had been an officer *de jure*, even though he faithfully discharged its duties. *McCue v. Wapello Co.*, 56 Iowa 691; 41

the office may recover of the *de facto* officer who performed the duties, the salary which he had drawn while performing them.¹ Where an officer has been prevented, through no fault of his own, from performing the duties of his office, and has in the meantime earned wages in another and different employment, he cannot be compelled, in an action to recover his unpaid salary, to deduct the amount so earned.²

No officer is empowered to pay himself his salary, or to offset a demand made against him for moneys collected by him in his official capacity against an amount due him on account of salary; his duty is to discharge the obligations of his office according to the terms of his acceptance, and get his pay as other officers get theirs.³ But payment may be made to an officer whose salary is

Am. Rep. 134; *Matthews v. Copiah Co.*, 53 Miss. 715; 27 Am. Rep. 715; *Dolan v. Mayor*, etc., of N. Y., 68 N. Y. 274; 36 Am. Rep. 168.

1. *Andrews v. Portland*, 79 Me. 484; *Nichols v. McLean*, 101 N. Y. 526; 54 Am. Rep. 730; *Saline Co. v. Anderson*, 20 Kan. 298; 27 Am. Rep. 171; *Mayfield v. Moore*, 53 Ill. 428; 5 Am. Rep. 52; *Glasscock v. Lyons*, 20 Ind. 1; 83 Am. Dec. 299; *People v. Miller*, 24 Mich. 458; *Wayne Co. v. Benoit*, 20 Mich. 176; 4 Am. Rep. 382; *Dolan v. Mayor*, etc., of N. Y., 68 N. Y. 274; 23 Am. Rep. 168; *Rule v. Tait*, 38 Kan. 765; *Bier v. Gorrell*, 30 W. Va. 95; *Hunter v. Chandler*, 45 Mo. 452. See also *Douglas v. State*, 31 Ind. 429; *U. S. v. Addison*, 6 Wall. (U. S.) 291. But see *Stuhr v. Curren*, 44 N. J. L. 181; and see *DE FACTO OFFICERS*, vol. 5, p. 93.

In an action by a *de jure* officer against a person wrongfully in possession of the office for fees received by the incumbent, plaintiff is entitled to recover the entire amount received by defendant, though the value of defendant's services equals the fees received. *Wenner v. Smith*, 4 Utah 238.

But where the legislature made an appropriation for certain services to be performed by the Secretary of State, and a part of the services were performed by the secretary then in office, and a part by his successor, the latter cannot maintain an action for money had and received against the former, for the excess which he had received over his share of the appropriation; his claim is against the State, and the State can compel the prior incumbent to restore any excess. *Trumbull v. Campbell*, 8 Ill. 502.

2. *Fitzsimmons v. Brooklyn*, 102 N.

Y. 536; 55 Am. Rep. 835; *Andrews v. Portland*, 79 Me. 484; and see *Adams v. Justices*, 21 Ga. 206.

There is no contract between an officer and the State or municipality, by force of which salary is payable. It belongs to him as an incident of his office, and he is entitled to its full amount, not by force of any contract but because the law attaches it to the office, and there is no question of breach of contract or resultant damages. *Fitzsimmons v. Brooklyn*, 102 N. Y. 536; 55 Am. Rep. 835.

But an officer who knowingly accepts an appointment to office tendered at a specified salary, and performed the duties and drew the promised salary, cannot proceed to compel payment of an additional sum on the ground that the salary attached by law to the position was higher than that actually allowed. *People v. Board of Police*, 12 Hun (N. Y.) 653.

3. *New Orleans v. Finnerty*, 27 La. Ann. 681; 21 Am. Rep. 569; *In re Clerks' Fees*, 25 Hun (N. Y.) 593; *Delaware Co. v. Griffin*, 17 Iowa 166. And see *U. S. v. Wendell*, 2 Cliff. (U. S.) 340; *State v. Boyd*, 19 Nev. 356; *Cullom v. Dolloff*, 94 Ill. 330.

Fees, though collected without legal authority by the commissioner of immigration in pursuance of the provisions of *California Pol. Code*, § 2965, as construed by him for administering oaths to masters of vessels, belong to the State, and not to him, as they were collected under color of office. *People v. Van Ness*, 79 Cal. 84.

Payable in What—Under the *Arkansas* statutes making treasurers' certificates receivable in payment of State taxes, the salaries and fees of all State, county, town, or other officers

provided for by constitutional provision without a legislative appropriation therefor,¹ and however provided for, the compensation of public officers depends upon general and continuing laws, irrespective of the annual appropriation acts.² A payment made or a credit given to the officer on account of salary cannot be revoked or recovered by the government unless it was originally given or made through fraud, imposition, or mistake.³

within the State, may be paid in treasurers' certificates. *Ramsey v. Cox*, 28 Ark. 366.

A foreign minister of the United States is entitled to receive his salary in the money of the United States or its actual market equivalent. *Clay v. U. S.*, 8 Ct. of Cl. 210.

When Payable.—Where the terms of a law or resolution prescribing the salary of a public or corporate officer, fix it at a certain rate per month, the salary becomes due and payable monthly, in the absence of some other provision prescribing a time for payment. *Carroll v. Seibenthaler*, 37 Cal. 193. But where an officer is elected for a year, with a salary fixed at a certain sum per month, the Statute of Limitations does not run against his claim for services until the end of the year. *Rosborough v. Shasta River Canal Co.*, 22 Cal. 556.

1. *State v. Weston*, 6 Neb. 16; *Nichols v. Comptroller*, 4 Stew. & P. (Ala.) 154; *Myers v. English*, 9 Cal. 341; *Mitchell v. U. S.*, 18 Ct. of Cl. 281; and see *State v. Hickman* (Mont. 1890), 23 Pac. Rep. 740. But see *Ex parte Carroll*, 10 Ark. 38; *Chisholme v. McGehee*, 41 Ala. 192.

If the salary of a public officer is fixed and the time of payment prescribed by law, no special annual appropriation is necessary to authorize the auditor to issue his warrant for its payment. *Reynolds v. Taylor*, 43 Ala. 420. But see *State v. Weston*, 6 Neb. 16.

In Louisiana, warrants for the salaries of constitutional officers, the amounts of which salaries are fixed by the Louisiana Const., are entitled to payment from the general fund of the State, by preference and priority over all other warrants against such funds. *State v. Burke*, 34 La. Ann. 404.

But when the appropriations for the expenses of the National Board of Health are exhausted, the liability of the United States for salaries ceases. *Dunwoody v. U. S.*, 22 Ct. of Cl. 269.

2. *Collins v. U. S.*, 15 Ct. of Cl. 22; *Humbert v. Dunn*, 84 Cal. 57; *Foun-*

tain v. Mayor, etc., of Jackson, 50 Mich. 260; *Swann v. Buck*, 40 Miss. 268; *State v. Kenney* (Mont. 1890), 23 Pac. Rep. 733; *Kip v. Buffalo*, 123 N. Y. 152; *French v. U. S.*, 16 Ct. of Cl. 419. See *State v. Burke*, 34 La. Ann. 548; *Baggett v. Dunn*, 69 Cal. 75; *Bell v. U. S.*, 35 Fed. Rep. 889; *State v. Bloxham* (Fla. 1890), 7 So. Rep. 873. But see *Hartman v. Mayor, etc.*, of N. Y., 23 Hun (N. Y.) 586; *Gamble v. Philadelphia*, 14 Phila. (Pa.) 223; *Mathewson v. Tripp*, 14 R. I. 587.

The provision of U. S. Const., art. 1, § 9, cl. 7, that "no money shall be drawn from the treasury but in consequence of appropriations made by law," is exclusively a direction to the officers of the treasury; it neither controls courts nor prohibits the creation of legal liabilities. *Collins v. U. S.*, 15 Ct. of Cl. 22.

Where a congressional appropriation act contains no intimation that the amount appropriated for the compensation of a public officer whose salary is fixed by law is to be in full satisfaction, the salary is not reduced, and he may recover the balance from the United States. *Langston v. U. S.*, 21 Ct. of Cl. 10; *U. S. v. Langston*, 118 U. S. 389.

3. *U. S. v. Kuhn*, 3 Cranch (C. C.) 410; *McGinnis v. Mayor, etc.*, of N. Y., 6 Daly (N. Y.) 416; *Richland Co. v. Miller*, 16 S. Car. 236; *Hendrick v. U. S.*, 16 Ct. of Cl. 88. And see *State v. Hinkson*, 7 Mo. 353; *Philadelphia v. Gilbert*, 14 Phila. (Pa.) 212.

A county superintendent's acceptance of the supervisors' allowance of part of the itemized claims presented by him for his services does not create a presumption of acceptance by him in full of all claims, he not being shown to know that the residue had been rejected by the board. *Fulton v. Monona Co.*, 47 Iowa 622. But see *State v. Thompson*, 37 Mo. 87.

An officer who makes out his bills for his services, Sundays excepted, cannot afterwards recover for the Sundays. *Pray v. U. S.*, 106 U. S. 594.

The assignment of his salary by a public officer before it becomes due is contrary to public policy and void;¹ and money due by the government to its officers or agents for services rendered by them as such, while it remains in the hands of the government or in the keeping of its disbursing agents, is not liable to be attached or seized by the creditors of those having such claims upon the government,² and whenever an officer holds money or property merely as the agent of the law, he cannot be subjected to attachment³ or garnish-

1. *Bangs v. Dunn*, 66 Cal. 72; *Schloss v. Hewlett*, 81 Ala. 266; *King v. Hawkins* (Arizona, 1888), 16 Pac. Rep. 434; *Field v. Chipley*, 79 Ky. 260; 42 Am. Rep. 215; *Beal v. McVicker*, 8 Mo. App. 202; *Bliss v. Lawrence*, 58 N. Y. 442; 17 Am. Rep. 273; *Billings v. O'Brien*, 45 How. Pr. (N. Y.) 392; *Shannon v. Bruner*, 36 Fed. Rep. 147. But see *Brackett v. Blake*, 7 Met. (Mass.) 335; 41 Am. Dec. 442; *Conway v. Cutting*, 51 N. H. 407; *State v. Hastings*, 15 Wis. 78; *Mulhall v. Quinn*, 1 Gray (Mass.) 105; 61 Am. Dec. 414; *Macomber v. Doane*, 2 Allen (Mass.) 541; and see *ASSIGNMENTS*, vol. 1, p. 826.

In *People v. Dayton*, 50 How. Pr. (N. Y.) 143, it was held that the fees of a public officer earned or unearned, are capable of assignment, the court distinguishing the case from an assignment of a salary of a public officer not earned at the time of the assignment, upon the ground that unearned fees depend for their allowances upon the performance of the service.

The public service is protected by protecting those engaged in performing public duties, and this not upon the ground of their private interest, but upon that of the necessity of securing the sufficiency of the public service by seeing to it that the funds provided for its maintenance would be received by those who are to perform the work at such periods as the law has appointed for their payment. *Bliss v. Lawrence*, 58 N. Y. 442; 17 Am. Rep. 273.

2. *Mayor, etc., of Baltimore v. Root*, 8 Md. 95; 63 Am. Dec. 692; *Mayor, etc., of Mobile v. Rowland*, 26 Ala. 498; *Clark v. Mobile School Comrs.*, 36 Ala. 621; *McMeekin v. State*, 9 Ark. 553; *Ward v. Hartford Co.*, 12 Conn. 404; *Merwin v. Chicago*, 45 Ill. 133; 92 Am. Dec. 204; *Triebel v. Colburn*, 64 Ill. 376; *Hightower v. Slaton*, 54 Ga. 108; 21 Am. Rep. 273; *Caiaaker v. Mathews*, 25 Ga. 571; *Divine v. Harvie*,

7 T. B. Mon. (Ky.) 439; 18 Am. Dec. 194; *Dewey v. Garvey*, 130 Mass. 86; *Troy, etc., R. Co. v. Com.*, 127 Mass. 43; *Chealy v. Brewer*, 7 Mass. 259; *Hawthorn v. St. Louis*, 11 Mo. 59; 47 Am. Dec. 141; *School Dist. No. 4 v. Gage*, 39 Mich. 484; 33 Am. Dec. 421; *Ladd v. Sale*, 57 N. H. 210; *Bulkley v. Eckert*, 3 Pa. St. 368; 45 Am. Dec. 650; *Memphis v. Laski*, 9 Heisk. (Tenn.) 511; 24 Am. Rep. 327; *Bank of Tenn. v. Dibrell*, 3 Sneed (Tenn.) 379; *Tracy v. Hornbuckle*, 8 Bush (Ky.) 336; *Merrill v. Campbell*, 49 Wis. 535; 35 Am. Rep. 785; *Buchanan v. Alexander*, 4 How. (U. S.) 20; *Hodgson v. Dexter*, 1 Cranch (U. S.) 345; and see *GARNISHMENT*, vol. 8, p. 1096.

The wages, fees, or salary of a county auditor due to him from his county, cannot be subjected to the payment of his debts by proceedings supplementary to execution. *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661.

In *Newark v. Funk*, 15 Ohio St. 462, it was held that salaries of the officers of incorporate cities due and unpaid, may be subjected by judgment creditors of such officers to the payment of their judgments. But this case seems to have been decided upon the peculiar wording of the statute. See *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661.

3. *Stillman v. Isham*, 11 Conn. 124; *Spalding v. Imlay*, 1 Root (Conn.) 551; *Reddick v. Smith*, 4 Ill. 451; *Chicago v. Hasley*, 25 Ill. 485; *Morris v. Penniman*, 14 Gray (Mass.) 220; 74 Am. Dec. 675; *Robinson v. Howard*, 7 Cush. (Mass.) 257; *Wilder v. Bailey*, 3 Mass. 289; *Zurcher v. Magee*, 2 Ala. 255; *Marvin v. Hawley*, 9 Mo. 382; *Ladd v. Gale*, 57 N. H. 210; *Ross v. Clark*, 1 Dall. (Pa.) 254; *Erie v. Knapp*, 29 Pa. St. 173; *Dawson v. Holcomb*, 1 Ohio 275; 13 Am. Dec. 618; *Alston v. Clay*, 2 Hayw. (N. Car.) 171.

Surplus proceeds of land of an at-

ment¹ on account thereof, but if anything arises to change this relation from an official obligation to a personal liability, he would then become amenable to such process.²

tachment debtor, sold for non-payment of taxes, are not liable to attachment in the hands of the county treasurer. *Wilson v. Ridgely*, 46 Md. 235.

A body politic and incorporate cannot be made a defendant in proceedings supplementary to execution, to answer to its indebtedness to an execution debtor. *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661.

In *Bray v. Wallingford*, 20 Conn. 416, it was held that a debt due to a territorial corporation, capable of contracting debts, and liable to be sued for them, may be secured by process of foreign attachment.

1. *Lightner v. Steinagel*, 33 Ill. 511; 85 Am. Dec. 292; *Merwin v. Chicago*, 45 Ill. 133; 92 Am. Dec. 204; *Millison v. Fisk*, 43 Ill. 117; *Field v. Jones*, 11 Ga. 413; *Columbian Book Co. v. DeGolyer*, 115 Mass. 67; *Chealy v. Brewer*, 7 Mass. 259; *People v. Brooks*, 40 Mich. 333; 29 Am. Rep. 534; *McDougal v. Hennepin Co.*, 4 Minn. 184; *Hunt v. Stevens*, 3 Ired. (N. Car.) 365; *Corbyn v. Bollman*, 4 W. & S. (Pa.) 342; *Drane v. McGavock*, 7 Humph. (Tenn.) 132; *Taylor v. Gillean*, 23 Tex. 508; *Aumann v. Black*, 15 W. Va. 773; *Hill v. La Crosse, etc.*, R. Co., 14 Wis. 291; 80 Am. Dec. 873. But see *Clark v. Boggs*, 6 Ala. 809; 41 Am. Dec. 85. And see GARNISHMENT, vol. 8, p. 1096.

The same rule applies to government and to public corporations. *Merwin v. Chicago*, 45 Ill. 133; 92 Am. Dec. 204; *Mayor, etc., of Baltimore v. Root*, 8 Md. 102; 63 Am. Dec. 692; *Bulkley v. Eckert*, 3 Pa. St. 368; 45 Am. Dec. 650; *Jenks v. Osceola Tp.*, 45 Iowa 554; *Ward v. Hartford Co.*, 12 Conn. 404; *Las Animas Co. v. Bond*, 3 Colo. 411; *McDougal v. Hennepin Co.*, 4 Minn. 184; *Fortune v. St. Louis*, 23 Mo. 239; *State v. Eberly*, 12 Neb. 619; *People v. Mayor, etc., of Omaha*, 2 Neb. 166; *Burnham v. Fond du Lac*, 15 Wis. 193; *Erie v. Knapp*, 29 Pa. St. 173; *Bradley v. Richmond*, 6 Vt. 121; *Buffham v. Racine*, 26 Wis. 449; *Memphis v. Laski*, 9 Heisk. (Tenn.) 511; 24 Am. Rep. 327; *Merrell v. Campbell*, 49 Wis. 535; 35 Am. Rep. 785. And see GARNISHMENT, vol. 8, p. 1096.

The exemption of State officers from

garnishment is based in part at least, upon the immunity of the State from being sued. See *Lodor v. Baker*, 39 N. J. L. 49; *Bank of Tenn. v. Dibrell*, 3 Sneed (Tenn.) 379. And the same doctrine applies with equal if not greater force to the officers of the *United States*. *Divine v. Harvie*, 7 T. B. Mon. (Ky.) 439; 18 Am. Dec. 194.

The exemption of municipal corporations from such process is given for reasons of public policy. The corporation existing for the public good, its officers should not be harassed and drawn from their post of duty to appear in suits against the many employes which it must owe from time to time. *Merrell v. Campbell*, 49 Wis. 535; 35 Am. Rep. 785; *People v. Mayor of Omaha*, 2 Neb. 166; *Merwin v. Chicago*, 45 Ill. 133; 92 Am. Dec. 204.

In *Jenks v. Osceola Tp.*, 45 Iowa 554, it was held that the rule that municipal corporations shall not be garnished, is not limited to cases where it would interfere with the discharge of corporate duties, but is universal in its application.

In *School Dist. v. Gage*, 39 Mich. 484; 33 Am. Dec. 421, it was held that a school district is a municipal corporation, and cannot be garnished, even by its own consent, unless the debtor also consents. But in *Las Animas v. Bond*, 3 Colo. 411, it was held that the exemption from garnishment of a municipal corporation may be waived by appearance and submission to liability.

2. *Lightner v. Steinagel*, 33 Ill. 511; *Peirce v. Carleton*, 12 Ill. 358; 54 Am. Dec. 405; *Weaver v. Davis*, 47 Ill. 237; *Triebel v. Colburn*, 64 Ill. 377; *King v. Moore*, 6 Ala. 160; 41 Am. Dec. 44; *Clymer v. Willis*, 3 Cal. 363; 58 Am. Dec. 414; *Langdon v. Lockett*, 6 Ala. 727; 41 Am. Dec. 78; *Jaquett v. Palmer*, 2 Harr. (Del.) 144; *First v. Miller*, 4 Bibb (Ky.) 311; *Watson v. Todd*, 5 Mass. 271; *Woodbridge v. Morse*, 5 N. H. 519; *Crane v. Freese*, 16 N. J. L. 305; *Dubois v. Dubois*, 6 Cow. (N. Y.) 494; *Tucker v. Atkinson*, 1 Humph. (Tenn.) 300; 34 Am. Dec. 650; *Voorhees v. Sessions*, 34 Mich. 99; *Gaither v. Ballew*, 4 Jones (N. Car.) 488; 69 Am. Dec. 763; *Adams v. Lane*, 38 Vt. 640.

There is a large class of officers both under the *United States* government and under those of the several States, whose compensation consists of fees allowed them by the government for particular acts or services, the character of the service and the amount of the fee being designated by statute.¹ Such claims for compensation are usually required to be presented to a designated officer or board for allowance,² and do not become a liability of government until thus audited.³

2. From the Individual for Whom the Officer Acts.—A public officer for whose compensation provision is made by law cannot recover anything for official services except as so provided, even though they were performed upon special request,⁴ and even though services beyond what could be legally required are ren-

There is a distinction between a public officer and a mere agent appointed by a town to distribute money among its inhabitants, and while the former is not chargeable under trustee process, the latter is so when the corporation itself is liable. *Wendell v. Pierce*, 13 N. H. 502.

In *Farmers' Bank v. Beatson*, 7 Gill & J. (Md.) 421; 28 Am. Dec. 226, it was held that an attachment lies against an individual although a receiver has been appointed, and has given bonds with respect to the debtor's estate, where such receiver has not taken possession before the levy of the attachment.

1. Owing to the fact that the compensation of this class of officers is governed entirely by statutes differing largely in different States and as to different officers, and the decisions with reference to it being in the main a mere construction of such statutes, it is found to be impracticable to attempt to deduce any general rules upon the subject; the most that can be done is to refer the reader to the statute either Federal or State by which the office was created and its duties prescribed.

2. See *State v. Kenney* (Mont. 1890), 23 Pac. Rep. 733; *Morgan v. Buffington*, 21 Mo. 549; *White v. Polk Co.*, 17 Iowa 413; *Pistorius v. Saginaw Co.*, 51 Mich. 125; *Com. v. Pattison*, 12 Phila. (Pa.) 242.

A certificate, from the speaker of the House of Representatives, fixing the pay of the general assembly and their officers, to the effect that a certain sum is due a member of the general assembly, for his services as such, is not conclusive upon the auditor. He has a right to examine whether it is correct. *Morgan v. Buffington*, 21 Mo. 549.

The allowance of compensation to an officer of the court, in addition to the sum allowed by law, and not to exceed a certain sum, as the judge may deem just and proper, is a judicial not a clerical act, which must be evidenced by some order entered under the authority of the judge, and purporting to be so. *Mayor, etc., of Baltimore v. Baltimore Co.*, 19 Md. 554.

In fixing the fees allowed, to a surrogate for auditing and stating the accounts of executors, etc., where the matter is left to the discretion of the court, a fair and just compensation for the work done will be allowed. *Pomerooy v. Mills*, 35 N. J. Eq. 442.

Officers compensated by a commission, are, in the absence of agreement, entitled to share equally, although the labor be not equally shared. *White v. Bullock*, 4 Abb. App. Dec. (N. Y.) 578.

3. See *Titus v. U. S.*, 16 Ct. of Cl. 276; *White v. Polk Co.*, 17 Iowa 413; *Com. v. Pattison*, 12 Phila. (Pa.) 242.

The district attorney-general is entitled to a fee of \$2.50 in each case, for which the county is liable, after execution against the clerk returned *nulla bona*. *Wright v. Shelby Co.*, 9 Baxt. (Tenn.) 145.

A resolution of the senate requiring its president and its secretary to certify the accounts of its duly elected and appointed officers for their *per diem* compensation during the recess, is not a law within the meaning of a constitutional provision declaring that no money shall be drawn from the treasury but in pursuance of an appropriation made by law. *Reynolds v. Blue*, 47 Ala. 711.

4. *Brophy v. Marble*, 118 Mass. 549; *Pool v. Boston*, 5 Cush. (Mass.)

dered.¹ If the fees which an officer shall receive are prescribed by statute which omits to provide when, how, or by whom they shall be paid, the person at whose request the service is rendered, is liable,² and the officer is entitled to payment as the services are performed.³ The law will not tolerate the employment of a public officer to discharge his plain official duty at a compensation other or different from, or in addition to the compensation given him by law for his official services,⁴ though extra

219; *Baldwin v. Kouns*, 81 Ala. 272; *Evans v. Trenton*, 24 N. J. L. 764; *Smith v. Smith*, 1 Bailey (S. Car.) 70; *Andrews v. U. S.*, 2 Story (U. S.) 202; *Conover v. U. S.*, 21 How. (U. S.) 463.

That an express promise to pay had been made by the individual for whom the services were rendered is immaterial, such a promise being void. *Hatch v. Mann*, 15 Wend. (N. Y.) 44.

1. *Hatch v. Mann*, 15 Wend. (N. Y.) 44.

2. *Baldwin v. Kouns*, 81 Ala. 272; *Moore v. Porter*, 13 S. & R. (Pa.) 100; *Goodrich v. U. S.*, 42 Fed. Rep. 392; *Caldwell v. Jackson*, 7 Cranch (U. S.) 276; and see *Kitchell v. Madison Co.*, 5 Ill. 163; *Craig v. Lobb*, 12 Leigh (Va.) 627; *Erwin v. U. S.*, 37 Fed. Rep. 470; *Stuart v. Walker*, 10 Minn. 296.

"Fees" are to be distinguished from "costs." Costs are an allowance to a party, incidental to a judgment; fees are a compensation to public officers for services rendered to individuals. *Tillman v. Wood*, 58 Ala. 578.

Although the clerk may recover his fees of the successful party in an action of law when unable to collect them of the adverse party, he cannot recover them of the sureties upon the prosecution bond when the plaintiff is successful. *Carren v. Breed*, 2 Coldw. (Tenn.) 465. See also *Ewing v. Lusk*, 4 Yerg. (Tenn.) 459.

In *Indiana* the fees of a coroner for holding an inquest, or making a *post-mortem* examination, must be collected of the estate of the deceased person, and not merely of the property found with the dead body, unless such estate be insufficient to pay them, and in such case they may be collected of the county. *Bartholomew v. Bryan*, 22 Ind. 397.

3. *Baldwin v. Kouns*, 81 Ala. 272; *Dickerson v. Shelby*, 2 Greene (Iowa) 460; *McDonald v. Crusen*, 2 Oregon 258; *Cavender v. Cavender*, 3 McCrary

(U. S.) 383. And see *Baldwin v. Cash*, 7 W. & S. (Pa.) 427; *People v. Baldwin*, 19 Hun (N. Y.) 308.

An officer may, if he so desires, require the prepayment of fees for the service demanded. *Ripley v. Gifford*, 11 Iowa 367; *McKay v. Maloy*, 53 Iowa 33; *Dickerson v. Shelby*, 2 Greene (Iowa) 460; *McDonald v. Crusen*, 2 Oregon 258.

The officer rendering the services may be required to collect his fees. *State v. Judges*, 21 Ohio St. 1.

A prothonotary cannot bring an action to recover his fees in a suit while it is pending. *Lyon v. McManus*, 4 Binn. (Pa.) 167.

The payment of the clerk's costs in *South Carolina* must be postponed until the termination of the suit, such being the proper construction of the "fee bill" of 1839. *Hyams v. Boyce*, 1 McMull. (S. Car.) 95.

The prothonotary, in an action against an attorney to recover his fees, is entitled to recover interest upon the taxes and fees for issuing writs from the time of the issue, unless there is an agreement for credit, and then, from the time of the credit. *Cone v. Donaldson*, 47 Pa. St. 363.

4. *Vandercook v. Williams*, 106 Ind. 345; *Fort Wayne v. Lehr*, 88 Ind. 62; *Preston v. Bacon*, 4 Conn. 471; *Carroll v. Tyler*, 2 Har. & G. (Md.) 54; *Palo Alto Co. v. Burlingame*, 71 Iowa 201; *Wilcoxson v. Andrews*, 66 Mich. 553; *Peck v. Bank*, 51 Mich. 353; *Willemin v. Bateson*, 63 Mich. 309; *Burk v. Webb*, 32 Mich. 174; *Libby v. Anoka Co.*, 38 Minn. 448; *State v. Auditor*, 32 Mo. 222; *Hubbard v. Texas Co.*, 101 Mo. 210; *State v. Silver*, 9 Neb. 85; *Mallory v. Cortland Co.*, 2 Cow. (N. Y.) 531; *Thomas v. Philadelphia Co.*, 8 S. & R. (Pa.) 64; *Hallman v. Campbell*, 57 Tex. 54; *Van Duzee v. U. S.*, 41 Fed. Rep. 571. And see *Miarna Co. v. Jay*, 18 Ind. 423; *Church v. St. Paul*, etc., R. Co., 33 Minn. 410; *Patty v. Sparkman*, 58 Miss. 76; *Cohen v. Com.*

allowances may be made them for services not rendered by them as officers, but in their private characters.¹ If the law fixes no compensation for the services of an officer it is competent for the parties to agree on a price,² and if not fixed and settled at the time the services were required it would be what they were reasonably worth.³ For services rendered, a public officer may retain any papers or documents in his possession, in and about which he has bestowed labor until the legal fee therefor or the reasonable value thereof shall be paid.⁴ A public officer cannot legally claim a reward offered by an individual for the performance of an act which it was his official duty to perform,⁵ but an officer may perform services which it is not his official duty to

6 Pa. St. 111; *State v. Hardreader*, 12 Lea (Tenn.) 456.

The penalty provided by the *Pennsylvania* act of March 28, 1814, § 26, upon any officer taking greater or other fees than those laid down by said act, cannot be imposed upon officers who have no right to charge fees of any kind. *Garber v. Conner*, 98 Pa. St. 551.

Where, under instructions from the district attorney, the commissioner draws complaints and issues warrants in more than one proceeding against the same party for violation of the same provision of law, he is entitled to fees for each proceeding, and separate fees for separate acknowledgments of the same bond in criminal cases. *Barber v. U. S.*, 35 Fed. Rep. 886.

1. See *Hatch v. Mann*, 15 Wend. (N. Y.) 44; *Carroll v. Tyler*, 2 Har. & G. (Md.) 54; *Irwin v. U. S.*, 37 Fed. Rep. 470.

2. *Leavenworth Co. v. Keller*, 6 Kan. 510; and see *Ripley v. Gifford*, 11 Iowa 367; *State v. Allen*, 23 Neb. 451; *Davis v. Munson*, 43 Vt. 676; 5 Am. Rep. 315.

The *Illinois Constitution* abrogated all prior special statutes relating to the fees and compensation of township and county officers; but the officers in counties where such special acts were in force were not thereby deprived of all claim for fees, but remitted to the general law on the subject, which had never been repealed. *Jefferson Co. v. Jones*, 63 Ill. 531.

3. *Ripley v. Gifford*, 11 Iowa 367; *Leavenworth Co. v. Keller*, 6 Kan. 510; *State v. Allen*, 23 Neb. 451; *Henry v. Tilson*, 17 Vt. 479; *In re Moy Chee Kee*, 33 Fed. Rep. 377; *U. S. v. Hill*, 120 U. S. 169; and see *Com. v. Rodes*, 6 B. Mon. (Ky.) 171; *In re Woodbury*,

17 Blatchf. (U. S.) 517; *Erwin v. U. S.*, 37 Fed. Rep. 470; *In re Clerks' Fees*, Taney's Dec. (U. S.) 453; *In re Vermeule*, 10 Ben. (U. S.) 1.

For services, done by a surveyor under an order of court, for which the law has not fixed the fees, the court has power to fix them, and, on motion, to correct an overcharge. *Jones v. Kenny*, Hard. (Ky.) 103.

An officer is to be allowed a fair and just compensation for the custody of property attached by him, to be determined by the court in the exercise of a sound discretion. *Hesse v. Kimm*, 14 Mo. 395.

The clerk of the supreme court is not bound to render his services gratuitously to a party whom the judge of the court below has allowed to appeal without giving the bond required by law. *Martin v. Chasteen*, 75 N. Car. 96.

4. *Ripley v. Gifford*, 11 Iowa 367; *Dickerson v. Shelby*, 2 Greene (Iowa) 460; *McKay v. Maloy*, 53 Iowa 33.

Where a clerk received a paper for filing, and indorsed on it "not filed for want of funds for fees," and the date, such act was held to be a good filing of the paper upon the date indorsed upon it. *McDonald v. Crusen*, 2 Oregon 258.

5. *Hayden v. Souger*, 56 Ind. 42; 26 Am. Rep. 1; *Marking v. Needy*, 8 Bush (Ky.) 22; *Day v. Putnam Ins. Co.*, 16 Minn. 408; *Warner v. Grace*, 14 Minn. 487; *Kick v. Merry*, 23 Mo. 72; 66 Am. Dec. 658; *City Bank v. Bangs*, 2 Edw. Ch. (N. Y.) 95; *Hatch v. Mann*, 15 Wend. (N. Y.) 45; *Gilmore v. Lewis*, 12 Ohio 281; *Rea v. Smith*, 2 Handy (Ohio) 193; *Smith v. Whildin*, 10 Pa. St. 39; 49 Am. Dec. 572; *Stamper v. Temple*, 6 Humph. (Tenn.) 113; 4 Am. Dec. 296; *Brown*

perform, and for such services he may receive a reward.¹ A public officer who demands and takes, as fees for his services, what is not authorized, or more than is allowed by law, though paid without protest, may be compelled to make restitution,² and no compensation can be recovered for services rendered under an agreement void as against public policy, even at the legal rate; the whole transaction is covered by the same taint, and must be treated as beyond the protection of the courts.³

3. Reimbursement and Indemnity.—Public officers acting faithfully and without fault and pursuant to authority are entitled to be reimbursed for anything reasonably and necessarily dis-

v. Godfrey, 33 Vt. 120; *Davis v. Munson*, 43 Vt. 676; 5 Am. Rep. 315.

An officer cannot always be considered an informer merely because as an officer he acquires information useful to the government if this knowledge is acquired in the ordinary discharge of his duty touching the very subject-matter, or under a special retainer to investigate that matter. *U. S. v. Barrels of Distilled Spirits*, 1 Low. (U. S.) 244. And see *In re Cigars*, 1 Low. (U. S.) 22.

1. *Warner v. Grace*, 14 Minn. 487; *Day v. Putnam Ins. Co.*, 16 Minn. 408; *Morrell v. Quarles*, 35 Ala. 544; *Hayden v. Souger*, 56 Ind. 22; 26 Am. Rep. 1; *Gregg v. Pierce*, 53 Barb. (N. Y.) 387; *State Bank v. Bangs*, 2 Edw. Ch. (N. Y.) 95; *Pille v. New Orleans*, 19 La. Ann. 274; *Murphy v. New Orleans*, 11 La. Ann. 323; *Russell v. Stewart*, 44 Vt. 170; *Davis v. Munson*, 43 Vt. 676; 5 Am. Rep. 315. And see *U. S. v. Barrels of Distilled Spirits*, 1 Low. (U. S.) 244.

It is not necessary, in order to entitle officers of the revenue cutter to a portion of the proceeds of a forfeiture, that they should, at the time of giving information, make claim to part of the forfeiture, or that they should afterwards take part in the prosecution; neither is it necessary that their commissions be given in evidence; it is sufficient for them to show that they acted on board as officers. *Sawyer v. Steele*, 3 Wash. (U. S.) 465.

2. *American Steamship Co. v. Young*, 89 Pa. St. 186; 33 Am. Rep. 748; *Palo Alto Co. v. Burlingame*, 71 Iowa 201. And see *Walker v. Ham*, 2 N. H. 238; *Prior v. Craig*, 5 S. & R. (Pa.) 44; *Reed v. Cist*, 7 S. & R. (Pa.) 183; *American, etc., F. Ins. Co. v. Britton*, 8 Bosw. (N. Y.) 148; *State v.*

Kelly, 32 Ohio St. 421; *Ogden v. Maxwell*, 3 Blatchf. (U. S.) 319.

A clerk of court is not entitled to the *per centum* allowed by law for receiving, keeping, and disbursing money, when no money has been actually received by him, and if, under threat of legal proceedings to recover a *per centum*, a due bill is given him for the amount, he cannot maintain an action upon the due-bill. *Jackson v. Siglin*, 10 Oregon 93.

Where the question at issue is whether plaintiff, as county treasurer, received compensation in excess of the statutory limit of \$2,000 per annum, it is proper to allow him to testify that he received about "\$600 per annum," without producing the minutes of the commissioners' court. *Llano Co. v. Moore*, 77 Tex. 515.

Under *New York Laws* 1873, ch. 335, § 96, providing that no officer except the city marshal shall receive fees, etc., it is no defense to an action to compel a city officer to account for the fees received by him, that no salary has ever been attached to his office. *Mayor, etc., of N. Y. v. Kent*, 21 Hun (N. Y.) 483.

Under a law entitling the Secretary of State to a fee "for filing every bond or other instrument in writing of a public nature," he cannot charge for filing the returns of marriages, births and deaths. *State v. Kelsey*, 44 N. J. L. 1.

3. *Willemín v. Bateson*, 63 Mich. 309; *Wilcoxson v. Andrews*, 66 Mich. 553; *Hawkeye Ins. Co. v. Brainard*, 72 Iowa 122.

An act providing that any officer charging excessive fees shall forfeit ten times the amount of the excess "to the party injured," renders the clerk liable to the county accordingly. *Richland Co. v. Miller*, 16 S. Car. 244.

bursed by them in executing the duties of their offices,¹ and the public or a public corporation has power to indemnify their officers and agents against any charge or liability they may incur in the *bona fide* discharge of their duty, even though their acts were illegal,² or they had mistaken their legal rights and authority.³ But where the corporation has no duty to perform, no rights to defend, no interests to protect and no pecuniary or corporate concern in the subject-matter connected with the discharge of the duties of the officer, it has no power to indemnify him.⁴

1. *Powell v. Newburgh*, 19 Johns. (N. Y.) 284; *Bright v. Chenango Co.*, 18 Johns. (N. Y.) 242; *Harris v. Chickasaw Co.*, 77 Iowa 345; *Lancaster Co. v. Brinthal*, 29 Pa. St. 38; *U. S. v. Flanders*, 112 U. S. 88; *People v. Monroe Co.*, 15 How. Pr. (N. Y.) 225; *Andrews v. U. S.*, 2 Story (U. S.) 202; *U. S. v. Stowe*, 19 Fed. Rep. 807; *McCalmont v. Allegheny Co.*, 29 Pa. St. 417; *Burr v. U. S.*, 2 Ct. of Cl. 217; *Barnett v. Patterson*, 48 N. J. L. 395; and see *Morris v. State*, 96 Ind. 597; *U. S. v. Smith*, 35 Fed. Rep. 490; *Eyster v. Rineman*, 11 Pa. St. 147; *Powell v. U. S.*, 1 Ct. of Cl. 400; *Brattleboro v. Stratton*, 24 Vt. 306; *People v. Mayor*, etc., of N. Y., 32 N. Y. 473; *Wentworth v. U. S.*, 2 Story (U. S.) 452; *Stilwell v. Mayor*, etc., of N. Y., 19 Abb. Pr. (N. Y.) 376; *Daggett v. Ford Co.*, 99 Ill. 334.

No reimbursement can be had for expenses caused by the officer's own default or negligence, or violation of duty. *Godman v. Meixsel*, 65 Ind. 32; *Martland v. Martin*, 86 Pa. St. 120.

The term "salary," of itself, imports a compensation for personal services, and not the repayment of moneys expended in the discharge of the duties of an office. *Sniffen v. New York*, 4 Sandf. (N. Y.) 163.

Where a paymaster had government funds stolen from his possession without any fault on his part, judicious expenditures made by him in the recovery of such stolen funds should not fall on him, but should be borne by the government. *Glenn's Case*, 4 Ct. of Cl. 501.

The language of a statute, that the salaries fixed "shall be in full for all services," excludes the idea that the legislature intended to allow a former provision for the reimbursement of expenses to stand. *State v. Trousdale*, 16 Nev. 357.

De Facto Officer.—A person acting as jailer under apparent title to the office,

will be allowed the amount found due her by the circuit court for feeding prisoners. *Atchison Co. v. Lucas*, 83 Ky. 451.

2. *Cushing v. Stoughton*, 6 Cush. (Mass.) 389; *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 566; *Nelson v. Milford*, 7 Pick. (Mass.) 18; *Fuller v. Groton*, 11 Gray (Mass.) 340; *Hadsell v. Hancock*, 3 Gray (Mass.) 526; *Lawrence v. McAlvin*, 109 Mass. 311; *Friend v. Gilbert*, 108 Mass. 408; *Babbitt v. Savoy*, 3 Cush. (Mass.) 530; *People v. Bay Co.*, 38 Mich. 307; *Pike v. Middleton*, 12 N. H. 278; *State v. Hammon-ton*, 38 N. J. L. 430; 20 Am. Rep. 404; *State v. Hudson Co.*, 37 N. J. L. 269; *Gove v. Epping*, 41 N. H. 545; *Merrill v. Plainfield*, 45 N. H. 134; *Gregory v. Bridgeport*, 41 Conn. 76; 19 Am. Rep. 458; *Minot v. West Roxbury*, 112 Mass. 1; 17 Am. Rep. 52; *Sherman v. Carr*, 8 R. I. 431; *Briggs v. Whipple*, 6 Vt. 95.

Moneys are "necessarily expended" within the meaning of the statute for the protection of county officers, when the expenditures are not only needful and proper, as contradistinguished from those that are needless and improvident, but also reasonable, appropriate and customary in the execution of the particular official duty. *People v. New York*, 32 N. Y. 473.

While a sheriff is within the constitutional provision that the salary or emoluments of a public officer shall not be increased or diminished during his term of office, a statute fixing his compensation for boarding prisoners, where, before its enactment, there was no fixed compensation therefor, is not unconstitutional. *Peeling v. York Co.*, 113 Pa. St. 108.

3. *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 566; *Cushing v. Stoughton*, 6 Cush. (Mass.) 389; *State v. Hammon-ton*, 38 N. J. L. 430; 20 Am. Rep. 404; *Briggs v. Whipple*, 6 Vt. 95.

4. *Gregory v. Bridgeport*, 41 Conn.

An agreement to indemnify an officer against the consequences of his acts, made by an individual for whom he is acting is valid if the parties are in good faith seeking to enforce a legal right and are actuated by no improper motive.¹ But a promise to indemnify an officer for known acts of trespass or for acts known to be illegal cannot be enforced,² and promises to indemnify made as an inducement to a known and voluntary violation of duty are in

76; 19 Am. Rep. 458; *Pearson v. Bailey*, 2 Ill. 507; *Vincent v. Nantucket*, 12 Cush. (Mass.) 105; *Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145; *Parsons v. Goshen*, 11 Pick. (Mass.) 396; *Merrill v. Plainfield*, 45 N. H. 126; *Grove v. Epping*; 41 N. H. 545; *Halstead v. Mayor, etc., of N. Y.*, 3 N. Y. 430; *People v. Lawrence*, 6 Hill (N. Y.) 244; *Muirhead v. U. S.*, 13 Ct. of Cl. 251; *U. S. v. Jarvis, Davies (U. S.)*, 274. And see *State v. Brewer*, 59 Ala. 130; *Nourse v. Warren Co.*, 17 Ind. 135; *Crawford Co. v. Spenny*, 21 Ill. 288; *Morgan Co. v. Johnson*, 31 Ind. 463; *Davis Co. v. Riley Co.*, 9 Kan. 635; *Gordon Co. v. Harris*, 81 Ga. 719; *Minot v. West Roxbury*, 112 Mass. 1; 17 Am. Rep. 52.

Where a statute appropriates a certain sum for the traveling expenses of certain public officers, the comptroller cannot draw his warrant for a further sum within the period covered by the appropriation. *Marshall v. Dunn*, 69 Cal. 223.

A collector is reimbursed by the sale of lands for the printer's fees; he has no legal claim for any of these fees except for the portion charged on lands forfeited to the State. *People v. Long*, 13 Ill. 629.

In *Illinois* the governor may offer a reward on the part of the State for the apprehension of criminals; but sheriffs cannot do so and make the counties liable excepting for the apprehension of horse thieves. *Crawford Co. v. Spenny*, 21 Ill. 288.

1. *Stark v. Raney*, 18 Cal. 622; *Wolfe v. McClure*, 79 Ill. 564; *Stanton v. McMullen*, 7 Ill. App. 326; *Anderson v. Farns*, 7 Blackf. (Ind.) 343; *Davis v. Tibbats*, 7 J. J. Marsh. (Ky.) 264; *Jones v. Henry*, 3 Litt. (Ky.) 427; *Shotwell v. Hamblin*, 23 Miss. 156; 55 Am. Dec. 83; *Forniquet v. Tegarden*, 24 Miss. 96; *Moore v. Allen*, 25 Miss. 363; *Acheson v. Miller*, 2 Ohio St. 203; 59 Am. Dec. 663; *Miller v. Rhoades*, 20 Ohio St. 494; *Marsh v. Gold*, 2 Pick. (Mass.) 284; *Train v. Gold*, 5 Pick.

(Mass.) 380; *Foster v. Clark*, 19 Pick. (Mass.) 229; *Waterman v. Frank*, 21 Mo. 108; *Stewart v. Thomas*, 45 Mo. 42; *Flint v. Young*, 70 Mo. 222; *Van Cleef v. Fleet*, 15 Johns. (N. Y.) 147; *Heinmuller v. Gray*, 44 How. Pr. (N. Y.) 260; *Loew v. Stocker*, 68 Pa. St. 226; *Jobe v. Sellars*, 9 Humph. (Tenn.) 178; *Hunter v. Agee*, 5 Humph. (Tenn.) 57; *Stevens v. Bransford*, 6 Leigh (Va.) 246; *Dabney v. Catlett*, 12 Leigh (Va.) 383; *Davis v. Davis*, 2 Gratt. (Va.) 363.

Where process is directed to be served in a particular manner, a promise to indemnify the officer for serving in that manner is implied from the direction. *Ranlett v. Blodgett*, 17 N. H. 298; 43 Am. Dec. 603; *Gower v. Emery*, 18 Me. 79.

2. *Stanton v. McMullen*, 7 Ill. App. 326; *Buffendeau v. Brooks*, 28 Cal. 641; *Prewitt v. Garrett*, 6 Ala. 128; 41 Am. Dec. 40; *Stark v. Raney*, 18 Cal. 622; *Renfro v. Heard*, 14 Ala. 23; 48 Am. Dec. 82; *Collier v. Windham*, 27 Ala. 291; *Anderson v. Farns*, 7 Blackf. (Ind.) 343; *Kenworthy v. Stringer*, 27 Ind. 498; *Pike v. Middleton*, 12 N. H. 278; *Chapman v. Douglas*, 5 Daly (N. Y.) 244; *Cumpston v. Lambert*, 18 Ohio 81; 51 Am. Dec. 442; *Hunter v. Agee*, 5 Humph. (Tenn.) 57; *Morgan v. Hale*, 12 W. Va. 713.

A bond given to an officer to indemnify him against the consequences of a sale after an illegal seizure is valid, the seizure and not the sale being the unlawful act. *Hunter v. Agee*, 5 Humph. (Tenn.) 57.

Commissioners charged with the construction of a public building or works, and empowered by statute to discharge, at their discretion, the building superintendent whom they should employ, hold that power for the public benefit; and they cannot divest themselves of it by any contract entered into by them with the person so employed, where such contract has not been ratified by the legislature. *Shipman v. State*, 42 Wis. 377.

their nature vicious and void,¹ such contracts being contrary to public policy.² Proper apartments in which to transact official business, and fuel, light and supplies should be furnished, or if supplied by the officers, they are entitled to reimbursement for the expenses thus incurred,³ and such office appurtenances belong to the officer for the time being, and he is absolutely entitled to their possession and use for the purposes of his office.⁴

XVIII. PARTICULAR OFFICERS AND CLASSES OF OFFICERS—1. Federal Officers—*a.* PRESIDENT AND HEADS OF THE DEPARTMENTS—See PRESIDENT OF THE UNITED STATES;⁵ UNITED STATES; *supra*, this title, *Liabilities of Public Officers*.

b. CONGRESS.—See UNITED STATES; *supra*, this title, *Liability of Legislative Officers*.

1. Pike v. Middleton, 12 N. H. 278; Kenworthy v. Struger, 27 Ind. 498; Shotwell v. Hamblin, 23 Miss. 156; 55 Am. Dec. 83; Hodsdon v. Wilkins, 7 Me. 113; 20 Am. Dec. 347; Denny v. Lincoln, 5 Mass. 385; Churchill v. Perkins, 5 Mass. 541; Ayer v. Hutchins, 4 Mass. 370; 3 Am. Dec. 232; Webbers v. Blunt, 19 Wend. (N. Y.) 188; Love v. Palmer, 7 Johns. (N. Y.) 159; Greenwood v. Colcock, 2 Bay (S. Car.) 67.

A contract to indemnify or to pay money in consideration of a failure to return a writ is void. Knipe v. Hobart, 1 Lutw. 596.

2. Stanton v. McMullen, 7 Ill. App. 326; Ayer v. Hutchins, 4 Mass. 370; 3 Am. Dec. 232.

3. See Boone Co. v. Todd, 3 Mo. 140; McClaughry v. Hancock Co., 46 Ill. 356; Wright v. Philadelphia, 14 Phila. (Pa.) 170; Witt v. Mayor, etc., of N. Y., 6 Robt. (N. Y.) 441; Comrs. Court v. Goldthwaite, 35 Ala. 704; St. Louis Co. Ct. v. Ruland, 5 Mo. 268; Odineal v. Barry, 24 Miss. 9; Knox Co. v. Arms, 22 Ill. 175; DeKalb Co. v. Beveridge, 16 Ill. 312; Jefferson Co. v. Bisby, 5 Wis. 134; McCalmont v. Allegheny Co., 29 Pa. St. 417; People v. Stout, 23 Barb. (N. Y.) 349; 4 Abb. Pr. (N. Y.) 22; 13 How. Pr. (N. Y.) 314. But see Watson v. St. Louis Co., 16 Mo. 91; State v. McConnell, 28 Ohio St. 589; Lyon v. Adams, 4 S. & R. (Pa.) 443; Lesly v. White, 1 Spears (S. Car.) 31.

A board of county supervisors which has provided suitable accommodations for the surrogate, cannot be compelled to pay for other accommodations.

People v. Montgomery Co., 34 Hun (N. Y.) 599.

In the absence of any express understanding to the contrary, the county assessor is primarily liable for printing ordered by him for the office. White v. Williams, 49 Ala. 130.

Where no other provision is made for the necessary expenses of the judiciary, in its official duties, the county where the court is held is, in general, liable. Venango Co. v. Durban, 3 Grant Cas. (Pa.) 66.

In a county without a court-house the county clerk must attend the sessions of the board of county commissioners in any suitable room at the county seat they may designate. Stafford Co. v. State, 40 Kan. 21.

A department of the city government which has permitted another department to use buildings, cannot resume possession of them against the will of the department occupying them. New York Health Department v. Van Cott, 51 N. Y. Super. Ct. 413.

4. Conover v. Mayor, etc., of N. Y., 5 Abb. Pr. (N. Y.) 393.

An organization of a board of county freeholders, effected by the election of a director or clerk by a sufficient number of members, duly elected, will authorize the clerk so elected to take possession of the books and seal of the corporation; and will be a good defense for him to an application for a mandamus to compel him to deliver them to another party claiming also to be clerk. State v. Roe, 35 N. J. L. 123.

5. Vol. 19, p. 32.

c. JUDGES OF FEDERAL COURTS.—See UNITED STATES COURTS.

d. UNITED STATES COMMISSIONERS.—See UNITED STATES COURTS.

e. UNITED STATES MARSHALS.—See SHERIFFS.

2. **State Officers.**—See also STATES; GOVERNOR.¹

3. **County Officers.**—(See also COUNTY COMMISSIONERS;² COUNTIES;³ SHERIFFS; RECORDS;⁴ RECORDING ACTS)⁵—*a.* COUNTY TREASURERS.—The county treasurer is the proper custodian of the moneys of the county, and it is his duty to receive, keep and disburse all money belonging to his county in respect to which no specific provision is otherwise made.⁶ Disbursement of public money can be made only upon warrants duly issued by proper authority,⁷ and the treasurer is liable on his bond for the proper performance of all the duties required of him by law, for a breach of any of which an action may be maintained.⁸ Upon relinquishing the

1. Vol. 8, p. 1400.

2. Vol. 4, p. 373.

3. Vol. 4, p. 343.

4. Vol. 20, p. 495.

5. Vol. 20, p. 551.

6. *Libby v. Sibley Co.*, 39 Minn. 433; *Barnes v. Hudman*, 57 Ala. 504; *Iredell Co. v. Wasson*, 82 N. Car. 308.

A county treasurer must pay over to a city treasurer taxes paid under protest as well as taxes paid in the usual way. *Ratterman v. State*, 44 Ohio St. 641.

A county treasurer is not bound to accept county paper in discharge of a judgment debt. *Cannon v. Gartman*, 43 Miss. 581.

7. See *State v. Thorne*, 9 Neb. 458; *Askew v. Columbia Co.*, 32 Ark. 270; *Howell v. Hogins*, 37 Ark. 110; *Priet v. Hubert*, 62 Cal. 9; *Marks v. Trustees*, 56 Ind. 288.

But a mere custodian of moneys collected from taxpayers for a specific purpose, under color of law, has no right to withhold payment, whether the law is invalid or not. *People v. Gallup*, 12 Abb. N. Cas. (N. Y.) 64; 65 How. Pr. (N. Y.) 108.

In an action against the sureties of a county treasurer for moneys collected wherever the law directs the money to be paid only on the warrants or receipts of other public officers, such warrants or receipts must be produced or their

loss accounted for. *State v. Teague*, 9 S. Car. 149.

A county treasurer's warrant for the collection of moneys due the treasury from a township treasurer must show the facts which would presumptively confer jurisdiction to issue it. *Bringard v. Stellwagen*, 41 Mich. 54.

Want of funds is a good excuse for refusal to pay. *Missouri v. Winterbottom*, 123 U. S. 215; *Cook v. Putnam Co.*, 70 Mo. 668. But see *State v. Craig*, 69 Mo. 565.

The fact that no money is in the parish treasury when a proper claim for registry is presented to the treasurer is no reason why the claim should not be registered. *State v. Fisher*, 30 La. Ann. 514.

8. *Livingston Co. v. White*, 30 Barb. (N. Y.) 72; *Townsend v. Everett*, 4 Ala. 607. And see *Wood v. Greene Co.*, 60 Ga. 556; *Shepherd v. Helmers*, 23 Kan. 504; *State Bank v. Chappelle*, 40 Mich. 447; *Shanklin v. Madison Co.*, 21 Ohio St. 575.

The board of county commissioners may sue the county treasurer, either on the bond or independent of it, for the conversion of funds belonging in the county treasury, and in such suit may recover for all the funds converted, State, county, town school, or other wise. *Mower Co. v. Smith*, 22 Minn. 97.

The sureties of a county treasurer are liable for public money received by him as treasurer after the expira-

duties of his office it is the duty of the county treasurer to turn over to his successor in office all the public moneys in his hands,¹ and he is usually required to keep a correct account of the moneys received and disbursed by him and render periodical statements to an officer or board designated by law.² But the periodical settlement is not a judicial act, and is no more conclusive than a settlement between private persons.³ A settlement, however, is *prima facie* evidence that he has paid over all the

tion of his term, so long as he remains in possession of the office, and until he delivers it over to his successor. *Placer Co. v. Dickerson*, 45 Cal. 12.

It is the duty of a county treasurer who has received from the State treasurer a bank-check for money due from the State to the county, to present it for payment within a reasonable time. If he neglects to do this, and the bank fails before the check is paid, the loss will fall upon himself. *State v. Gates*, 67 Mo. 139.

Neither the negligence of the county commissioners, in respect to their supervisory duties over the treasurer, nor their actual malfeasance, facilitating or encouraging a conversion of the public funds by the treasurer, is a defense in an action against the treasurer and his sureties for the conversion. *Waseca Co. v. Sheehan*, 42 Minn. 57.

Special Duties.—A county treasurer is not answerable on his general bond for special duties imposed upon him by the school law. *State v. Johnson*, 55 Mo. 80.

1. *Taggart v. State*, 49 Ind. 42; *Stutsman Co. v. Mansfield*, 5 Dakota 78; *State v. Rechten*, 7 Mo. App. 339; *McKee v. Monterey Co.*, 51 Cal. 275; and see *Thorn v. Adams Co.*, 22 Neb. 825.

When a county treasurer has received, in his official capacity, moneys which he has failed to pay over or account for on going out of office, he is indebted to the county, and it can maintain an action against him at once to enforce its claim. *Sac Co. v. Hobbs*, 72 Iowa 69. *Thorne v. Adams Co.*, 22 Neb. 825.

A county treasurer who has failed to account for moneys in his hands, may be removed from office, even though the moneys were stolen; a resolution, passed by the board of commissioners, that the office is vacant, does not constitute a removal; there must be a judgment of ouster. *State v. Shelden*,

10 Neb. 452; and see *State v. Hay, Wright* (Ohio) 96.

Before the inferior court of *Georgia* can issue execution against a county treasurer for a balance in his hands, ten days' written notice is required, by act of 1825, to be given him, and the order of the court under which the *fiery facias* is issued, must show that such notice has been given. *Foster v. Justices etc.*, 9 Ga., 185.

A county treasurer is not bound to transfer to his successor securities lately held under a trust that has terminated during his term of office, although he has not paid them over to the persons entitled to receive them. Otherwise, it seems, as to funds held under unexpired trusts. *Tompkins Co. v. Bristol*, 15 Hun (N. Y.) 116.

2. See *State v. Miles*, 52 Wis. 488. A county treasurer's report made and filed according to law is admissible in an action on his official bond to show the amount of moneys or securities then in his hands belonging to infants or others. But statements made by him, after the end of his term, to his successor, are not thus admissible. *Tompkins Co. v. Bristol*, 15 Hun (N. Y.) 116. And see *Coxe v. Deringer*, 78 Pa. St. 271.

A county treasurer who receives from his predecessor United States bonds purchased by order of the county and belonging to it is bound to account therefor, and for the premiums accruing thereon, and cannot claim as against the county that they were purchased without authority. *Nixon v. State*, 96 Ind. 111. But he is entitled to a credit against the county for the amount of orders redeemed by him, although the act of the auditor in issuing them was unlawful. *Graham v. State*, 66 Ind. 386.

3. *Hunt v. State*, 93 Ind. 311; *Posey Co. v. Saunders*, 17 Ind. 437; *Richmond Co. v. Wandel*, 6 Lans. (N. Y.) 33; *Howe v. State*, 53 Miss. 57; *Heagy v. State*, 85 Ind. 260. And see *El Do-*

funds in his hands,¹ though it does not bar an action upon his bond,² and it may become conclusive as an estoppel after the lapse of a long period of time.³ The rights, duties, liabilities and compensation of county treasurers have been made the subject of statutory enactment differing in different States to an extent rendering it impracticable if not impossible to deduce any rules of general application.⁴

rado Co. v. Reed, 11 Cal. 130; *Graham v. State*, 66 Ind. 386.

Under the provisions of *Iowa Code*, §§ 303, 917, giving to county boards of supervisors power to examine and settle the accounts of the county, and to settle with the treasurer, said supervisors are clothed with discretion as to the best means of protecting the interest of the county in case of a defalcation by the treasurer, and are authorized, in such case to take a promissory note in place of the official bond. *Sac Co. v. Hobbs*, 72 Iowa 69.

1. *State v. Smith*, 65 Mo. 465; *Doolittle v. Atchison etc. R. Co.*, 20 Kan. 329.

In an action on the relation of a county auditor upon the bond of the county treasurer for money not accounted for, a settlement-sheet between them, jointly signed and certified by both as "a true and correct statement of delinquent taxes collected by the treasurer" for a certain period, as "reported by the treasurer to the auditor of said county, and the amount payable into the State treasury was held to be admissible; also parol evidence to show the circumstances under which the sheet was made. *Hostetler v. State*, 62 Ind. 183.

2. *State v. Smith*, 65 Mo. 465; *Helvey v. Huntington Co.*, 6 Blackf. (Ind.) 317.

The fact that the board of supervisors of a county have approved the reports of the county treasurer, which distinctly show on their face a claim to excessive and illegal commissions, and thereby allowed to him the amount of the commissions, is not a conclusive adjudication which will protect him and his sureties, in a suit upon his official bond, against a recovery for the amount of excessive and illegal commissions so retained by him. *Howe v. State*, 53 Miss. 57.

As to the method of the final settlement of the accounts of a county treasurer, which is generally statutory see *Brown v. Com.*, 2 Rawle (Pa.) 40; *Com. v. Reigart*, 14 S. & R. (Pa.) 216;

Hostetler v. State, 62 Ind. 183; *McKee v. Monterey Co.*, 51 Cal. 275; *Howe v. State*, 53 Miss. 57.

In *Pennsylvania* under the statute of 1834, the accounts of county treasurers, must be settled by the county auditors, and not by the auditor general. *Com. v. Laub*, 3 W. & S. (Pa.) 435.

3. See *People v. Lattimore*, 19 Cal. 365.

The settlement of the account of a county treasurer, in *Pennsylvania*, by the auditors, after the time limited for an appeal, is conclusive upon the county as well as the officer. And it cannot be opened for the correction of errors by auditors settling the account of a subsequent year. *Northumberland Co. v. Bloom*, 3 W. & S. (Pa.) 542.

4. The following is a list of authorities bearing upon special and particular powers, duties and liabilities conferred or imposed upon county treasurers by statute: *Caldwell v. Quinn*, 54 Ala. 64; *Coleman v. Pike Co.*, 83 Ala. 326; *Territory v. Bashford* (Arizona, 1887), 12 Pac. Rep. 671; *Mills v. Bellmen*, 48 Cal. 124; *Butte Co. v. Morgan*, 76 Cal. 1; *Perry v. Woodberry* (Fla. 1890), 7 So. Rep. 483; *Wilder v. State*, 47 Ga. 522; *Wood v. Greene Co.*, 60 Ga. 558; *Randolph v. Pope Co.*, 19 Ill. App. 100; *People v. Brislin*, 80 Ill. 423; *Taggart v. State*, 49 Ind. 42; *Hollingsworth v. State*, 111 Ind. 289; *Grove v. Bowman*, 55 Iowa 129; *Sac Co. v. Hobbs*, 72 Iowa 69; *Cedar Rapids etc. R. Co. v. Cowan*, 77 Iowa 535; *Richards v. Osceola Bank*, 79 Iowa 707; *Blake v. Johnson Co.*, 18 Kan. 266; *Nasho Co. v. Leahy*, 24 Kan. 54; *Hynes v. Police Jury*, 22 La. Ann. 71; *State v. Fisher*, 30 La. Ann. 514; *Wilson v. Ridgely*, 46 Md. 235; *First Nat. Bank v. Shepard*, 22 Minn. 196; *State v. Sappington*, 67 Mo. 529; 58 Mo. 454; *Cole Co. v. Schmidt* (Mo. 1889), 10 S. W. Rep. 888; *Herman v. Crete*, 9 Neb. 350; *Schoharie Co. v. Pindar*, 3 Lans. (N. Y.) 8; *Baldwin v. Crary*, 30 Hun

b. COUNTY CLERKS—(See also *infra*, this title, *Clerks of Courts; County Recorders*).—The county clerk is often

(N. Y.) 422; *Clark v. Sheldon*, 57 Hun (N. Y.) 586; *People v. Robinson*, 76 N. Y. 422; *Tompkins Co. v. Bristol*, 99 N. Y. 316; *Warrin v. Baldwin*, 105 N. Y. 534; *Parker v. Saratoga Co.*, 106 N. Y. 392; *Clarke v. Saratoga Co.*, 107 N. Y. 553; *Board of Education v. Bateman* (N. Car. 1889), 8 S. E. Rep. 882; *Feigert v. State*, 31 Ohio St. 432; *Ratterman v. State*, 44 Ohio 641; *Marco v. Co. Treasurer*, 4 S. Car. 96; *Kempner v. Galveston Co.*, 73 Tex. 216; *Burk v. Galveston Co.*, 76 Tex. 267; *Wimbish v. Com.*, 75 Va. 839; *Iowa Co. v. Vivian*, 31 Wis. 217; *Milwaukee v. Pabst*, 70 Wis. 352.

Where a county treasurer was ordered by the supervisors "to procure an extension of the time of payment" of certain indebtedness, it was held that his power was not limited to an extension merely, but authorized him to borrow money to pay the obligations as they matured, and to issue new obligations in place of those thus maturing. *Parker v. Saratoga Co.*, 106 N. Y. 392.

A county treasurer cannot maintain an action to compel the county judge to pay over money not received, but which might have been received had the county commissioner's court made, as it might have done, a different contract. *McConnell v. Wall*, 67 Tex. 323.

A county treasurer may be sued personally for money paid to him in his official capacity for illegal taxes, where it is paid under protest, with notice that suit will be brought to recover it. *Rushton v. Burke* (Dakota 1889), 43 N. W. Rep. 815.

As to compensation of county treasurers, see *Barbour Co. v. Clark*, 50 Ala. 416; *Lawrence Co. v. Hudson*, 41 Ark. 494; *Luis Bispo Co. v. King*, 69 Cal. 531; *Territory v. Cavanaugh*, 3 Dak. 325; *People v. Long*, 13 Ill. 629; *Fell v. McLean Co.*, 43 Ill. 216; *Keily v. Sangamon Co.*, 58 Ill. 494; *Blanchard v. La Salle*, 99 Ill. 278; *Woolen v. Jefferson Co.*, 4 Ind. 331; *Grant Co. v. Miles*, 21 Ind. 438; *Stuckey v. Bartholomew Co.*, 27 Ind. 251; *Lagrange Co. v. Newman*, 35 Ind. 10; *Wells v. Shoemaker*, 39 Ind. 115; *Hunsaker v. Alexander Co.*, 42 Ill. 389; *Scott v. Henry Co.*, 51 Ind. 502; *Fountain Co. v. La Tourette*, 60 Ind. 460; *Foresman v.*

Johnson, 65 Ind. 132; *Morgan Co. v. Gregory*, 74 Ind. 218; *Harrison Co. v. Benson*, 83 Ind. 469; *Jefferson Co. v. Wollard*, 1 Greene (Iowa) 430; *Dela-ware Co. v. Griffin*, 17 Iowa 166; *People v. Bay Co.*, 38 Mich. 307; *Stuart v. Walker*, 10 Minn. 296; *Yost v. Scott Co.*, 25 Minn. 366; *Beatty v. Sibley Co.*, 32 Minn. 470; *Libby v. Anoka Co.*, 38 Minn. 448; *Gerken v. Sibley Co.*, 39 Minn. 433; *Harrison v. Wilkinson Co.*, 35 Miss. 74; *State v. Allen*, 23 Neb. 451; *In re New York Cent. etc. R. Co.*, 7 Abb. N. Cas. (N. Y.) 408; *Otsego Co. v. Hendryx*, 58 Barb. (N. Y.) 279; *People v. Baldwin*, 19 Hun (N. Y.) 308; *Warrin v. Baldwin*, 35 Hun (N. Y.) 334; *Erie Co. v. Jones* (Supreme Ct.), 1 N. Y. Supp. 557; *People v. Supervisors*, 73 N. Y. 173; *Seneca Co. v. Allen*, 99 N. Y. 532; *Erie Co. v. Jones*, 119 N. Y. 339; *State v. Kelly*, 32 Ohio St. 421; *Stephens v. Com.*, 4 Watts (Pa.) 173; *Biehn's Appeal*, 132 Pa. St. 561; *Bastrop Co. v. Hearn*, 70 Tex. 563; *Llano Co. v. Moore*, 77 Tex. 515; *Allen v. Com.*, 83 Va. 94; *Jones v. Grant Co.*, 14 Wis. 518; *Kewanee Co. v. Knipfer*, 37 Wis. 496; *Oconto Co. v. Hall*, 47 Wis. 208; *Pease v. Wyoming Ter.*, 1 Wy. Ter. 392; *Union Pac. R. Co. v. Donnellan*, 2 Wyoming Ter. 459.

A county treasurer, in the absence of a statute, has no claim for compensation which can be asserted by way of defense or set-off to an action against him for taxes not turned over, no action concerning his compensation having been had by the legislature or the county commissioners. *State v. Baldwin*, 14 S. Car. 135.

A county treasurer cannot claim commissions on the proceeds of county bonds brought into the treasury without his instrumentality. *Territory v. Cavanaugh*, 3 Dak. 325.

County commissioners who have authorized a loan, and caused the county treasurer to serve in receiving and disbursing the money, cannot afterwards set up that the loan was invalid, to defeat the claim of the treasurer to commissions. *Lagrange Co. v. Newman*, 35 Ind. 10.

In an action by a county treasurer for his commission on money received by the county from the sale of bonds, the legality of the bonds is not a question

made also clerk of the court and county recorder, either *ex officio* or otherwise.¹ They are distinct and separate offices, however, though they may be held by the same person.²

c. COUNTY RECORDERS.—See RECORDING ACTS.

d. COLLECTORS OF TAXES.—See TAXATION.

e. COUNTY AUDITORS.—See COUNTIES.³

4. Town Officers.—See TOWNSHIPS

5. Municipal Officers.—A municipal officer is an officer of a local public corporation, as of a borough, city, incorporated town or village, or the like.⁴ The right to elect or appoint such officers as their constitutions in their nature require is a common law incident of every corporation, and need not be conferred by charter.⁵ It is customary for the charter or constitution of the

in issue. *Llano Co. v. Moore*, 77 Tex. 515.

1. *People v. Colborne*, 20 How. Pr. (N. Y.) 378; *People v. Darrack*, 9 Cal. 324; *State v. McDiarmiel*, 27 Ark. 176; *People v. McCallum*, 1 Neb. 182; and see *Huddleston v. Pearson*, 6 Ind. 337; *Temple v. People*, 6 Ill. App. 378; *State v. Whittemore*, 12 Neb. 252; *State v. Sovereign*, 17 Neb. 173.

The provision of the *Nebraska* act of 1869—making county clerks *ex officio* clerks of the district courts—does not require of them that they shall give other and additional bonds for the discharge of their duties as clerks of such courts. *People v. McCallum*, 1 Neb. 182.

2. See *People v. Durick*, 20 Cal. 94. But see *People v. Stewart*, 6 Ill. App. 62.

A county clerk is only liable for negligence in making a search, to the person for whom it is made. *Day v. Reynolds*, 23 Hun (N. Y.) 131.

Election, Powers and Duties.—As to the powers, duties, liabilities and compensation of county clerks when acting as clerk of the court or county recorder, see RECORDING ACTS; *infra*, this title, *Clerk of Court*. As to his election or appointment, compensation and liabilities and for a construction of the varied powers and duties imposed upon him in the different States when acting as county clerk, see generally *Thompson v. Stickney*, 6 Ala. 579; *Seymour v. Jefferson Co.*, 28 Ark. 254; *Mitchell v. Stoner*, 9 Cal. 203; *People v. Placer Co.*, 17 Cal. 411; *People v. Warfield*, 20 Ill. 159; *Temple v. People*, 6 Ill. App. 378; *Kane Co. v. Pierce*, 60 Ill. 481; *Jones v. Cavins*, 4 Ind. 305; *Gulick v. New*, 14 Ind. 93; 77 Am. Dec. 49; *State v. Bonebrake*, 4 Kan. 211; *Amrine v. Kansas Pac. R. Co.*, 7 Kan. 178; *Mis-*

souri River etc. R. Co. v. Morris, 7 Kan. 210; *Chicago etc. R. Co. v. Stafford Co.*, 36 Kan. 121; *Stafford Co. v. State*, 40 Kan. 21; *Simpson v. Loving*, 3 Bush (Ky.) 458; *Wortham v. Grayson Co. Ct.*, 13 Bush (Ky.) 53; *State v. Recorder*, 33 La. Ann. 223; *People v. Treadway*, 17 Mich. 480; *People v. Calhoun Co.*, 36 Mich. 10; *Raymond v. Madison Co.*, 5 Mont. 103; *State v. Sherwood*, 42 Mo. 179; *State v. Holliday*, 61 Mo. 524; *Lamb v. Stanton*, 8 Neb. 279; *State v. Steuffer*, 10 Neb. 506; *State v. Whittemore*, 12 Neb. 252; *State v. Sovereign*, 17 Neb. 173; *Radford v. Dixon Co.* (Neb. 1890), 45 N. W. Rep. 275; *Jaquith v. Putney*, 48 N. H. 138; *Woodruff v. Woodruff*, 4 N. J. L. 375; *State v. Deacon*, 44 N. J. L. 559; *Miller v. Lewis*, 4 N. Y. 553; *People v. Snedeker*, 14 N. Y. 52; *Curtis v. McNair*, 68 N. Y. 198; *Jenkins v. McGill*, 4 How. Pr. (N. Y.) 205; *Mitchell v. Westervelt*, 6 How. Pr. (N. Y.) 265; 6 How. Pr. (N. Y.) 311; *In re Fourth Ave.*, 11 Abb. Pr. (N. Y.) 189; *Central Park Case*, 12 Abb. Pr. (N. Y.) 107; *People v. Duchess Co.*, 24 Wend. (N. Y.) 181; *Wilson Collegiate Inst. v. Van Horne*, 3 Den. (N. Y.) 171; *Day v. Reynolds*, 23 Hun (N. Y.) 131; *State v. Smith*, 1 Oregon 250; *Brown v. Com.*, 2 Rawle (Pa.) 40; *Heriot v. McCauley*, *Riley Eq.* (S. Car.) 19; *State v. County Com'rs*, 31 S. Car. 81; *Rose v. Newman*, 26 Tex. 131; 80 Am. Dec. 646; *Perrin v. Reed*, 33 Vt. 62; *State v. Richter*, 37 Wis. 275; *State v. Manitowoc Co.*, 48 Wis. 112.

3. Vol. 4, p. 343.

4. See Abb. Law. Dict., tit., Municipal Corporations.

5. *Dillon's Mun. Corp.*, § 206; and see *Lafayette v. State*, 69 Ind. 218; *People v. Stevens*, 51 How. Pr. (N. Y.) 103.

corporation, however, to provide as to all the principal officers, and prescribe the various functions and duties of their offices.¹ The corporation has full control, unless specially restricted, over all offices and officers existing under its by-laws.²

a. ELECTION AND APPOINTMENT.—Residence for a certain period within the municipality is usually required in express terms as a condition of eligibility to hold municipal office.³ In the absence of such a provision, however, non-residents have been held competent to hold such an office.⁴ The provisions of the municipal charter as to the mode of election or appointment and duration of term must be strictly observed, an ordinance making eligible those who by charter are not so,⁵ or abridging the term

But see *Mayor etc. of Hoboken v. Harrison*, 30 N. J. L. 73.

The legislature may prescribe the qualifications of city, town, or village officers. *State v. Von Baumbach*, 12 Wis. 310.

1. See *Mayor etc. of Hoboken v. Harrison*, 30 N. J. L. 73; *People v. Bedell*, 2 Hill (N. Y.) 196; *Field v. Girard College*, 54 Pa. St. 233; *People v. Canty*, 55 Ill. 33; *Hoffman v. Jersey City*, 34 N. J. L. 172; *People v. Pinckney*, 32 N. Y. 377.

Where a corporation under its charter has power to create by ordinance an office, and fill the same, it also has power to abolish it. *Waldraven v. Memphis*, 4 Coldw. (Tenn.) 431.

A corporation created by the legislature for the purposes of local municipal government cannot, without a provision to that effect, be dissolved by the mere failure to elect officers. The inhabitants of the designated locality are the corporators, and the officers are their mere servants or agents. *Welch v. Ste Genevieve*, 1 Dill. (U. S.) 130.

2. *People v. Hill*, 7 Cal. 97; *Samis v. King*, 40 Conn. 298; *Madison v. Korbly*, 32 Ind. 74; *Ashley's Case*, 4 Abb. Pr. (N. Y.) 35; *People v. Mayor etc. of N. Y.*, 5 Barb. (N. Y.) 43; *People v. Conover*, 17 N. Y. 64; *Caulfield v. State*, 1 S. Car. 461; *Waldraven v. Memphis*, 4 Coldw. (Tenn.) 431.

The legislature has power to appoint officers within a city for a specific purpose, as for laying out a street, etc., and the acts of these officers are the acts of the city precisely as if they had been done by the municipal authorities. *Daley v. St. Paul*, 7 Minn. 390.

As to what officers are municipal officers see *Enkle v. Edgar*, 63 Cal. 188; *State v. Castell*, 22 La. Ann. 15; *Britton v. Steber*, 62 Mo. 370; *State v.*

Walsh, 69 Mo. 408; *Seiple v. Elizabeth*, 27 N. J. L. 407; *Fisher v. Cortland*, 42 Hun (N. Y.) 173; *Sellers v. Corvallis*, 5 Oregon 273.

A State officer may be connected with some of the municipal functions, yet he must derive his powers from and exercise them in obedience to a State statute. An officer elected under a municipal charter does not come within these requirements. *Britton v. Steber*, 62 Mo. 370.

3. See *State v. Williams*, 99 Mo. 291; *Scovill v. Cleveland*, 1 Ohio St. 126; *Dillon on Mun. Corp.*, § 195.

4. *State v. Blanchard*, 6 La. Ann. 515; *State v. Swearingen*, 12 Ga. 23. And see *Com. v. Jones*, 12 Pa. St. 265.

Where a charter provides that the board of aldermen shall consist of two members from each ward, and that no person shall be eligible as mayor or alderman unless he has resided in the town one year, a person resident in one ward may be elected alderman from another. *Jones v. Mills*, 11 Ill. 350.

5. See *People v. Weber*, 89 Ill. 347; *Mayor etc. of Monroe v. Hoffman*, 29 La. Ann. 651; 29 Am. Rep. 345; *Kearney v. Andrews*, 10 N. J. Eq. 70; *State v. Mayor etc. of Jersey City*, 26 N. J. L. 444; *State v. Mayor etc. of Paterson*, 35 N. J. L. 190; *Douglass v. Essex Co.*, 38 N. J. L. 214; *Kennedy v. New York*, 79 N. Y. 361; *Rex v. Mayor of Weymouth*, 7 Mod. 373; *Rex v. Brumstead*, 2 B. & Ad. 699; *Rex v. Spencer*, 3 Burr. 1827; *Rex v. Chitty*, 5 A. & E. 607; 31 E. C. L. 399; *Huddleson v. Ruffin*, 6 Ohio St. 604; *Bellows v. Cincinnati*, 11 Ohio St. 544.

Where a city charter, like that of Newark, New Jersey, vests in the common council the power to appoint and remove subordinate officers, an ordinance which assumes to divest the coun-

of office fixed by charter,¹ or the choice of an officer in a manner different from that prescribed by law or ordinance,² being unauthorized and void.

At common law, the appointing power was to be exercised by the corporation at large unless otherwise provided by charter,³ and the corporators of a municipal organization of the present time may compel its officers by *mandamus* to make appointments or hold elections in accordance with the charter and ordinances of the corporation.⁴ Where no mode of election is prescribed, a city

cil of the power and to bestow it on the mayor and council, is invalid. *State v. Newark*, 47 N. J. L. 117.

1. *Vason v. Augusta*, 38 Ga. 542; *Stadler v. Detroit*, 13 Mich. 346; *East St Louis v. Kase*, 9 Ill. App. 409; *Jacksonville v. Allen*, 25 Ill. App. 54.

The failure of a municipal corporation to elect its officers on the day fixed in the charter does not take away from the corporation the right to hold the election afterwards, when the annual day of election has passed by without fraud or design; and its officers hold over until the election or appointment and qualification of their successors. *Lynch v. Lafland*, 4 Coldw. (Tenn.) 96.

2. See *Saunders v. Lawrence*, 141 Mass. 380; *Baker v. Port Huron Police Com'rs*, 62 Mich. 327; *Clarendon v. Philadelphia*, 13 Phila. (Pa.) 54; *State v. Bryson*, 44 Ohio St. 457; *State v. Hudson*, 29 N. J. L. 104; *Stone v. Small*, 54 Vt. 498; *State v. Michellon*, 42 N. J. L. 405; *Mayor etc. of Monroe v. Hoffman*, 29 La. Ann. 651; 29 Am. Rep. 345.

Before one can be recognized as a public officer under an appointment from the president of the council acting as mayor, the facts on which the president's right to appoint rests must be made to appear. *State v. Trenton Board of Health*, 49 N. J. L. 349.

The proper authorities of a municipal corporation however may hold an election for corporate officers at a time different from that fixed by ordinance. *Tharin v. Seabrook*, 6 Rich. (S. Car.) 113.

A notice required by statute when municipal officers are to be elected must be deemed dispensed with where a subsequent statute, providing for an election to fill a certain office, says nothing of notice, and there is not time to give it before the election. *Powell v. Jackson Common Council*, 51 Mich. 129.

As to the appointment and election of particular officers, and under particular charter, or statutory provisions, see generally *Holden v. People*, 90 Ill. 434; *Launtz v. People*, 113 Ill. 137; 55 Am. Rep. 405; *State v. Jonas*, 27 La. Ann. 179; *Smith v. Thursby*, 28 Md. 244; *French v. Cowan*, 79 Me. 426; *People v. Wayne Co.*, 13 Mich. 233; *State v. Smith*, 22 Minn. 218; *State v. McKee*, 69 Mo. 504; *Beck v. Hanscom*, 29 N. H. 213; *State v. Mayor of Paterson*, 35 N. J. L. 190; *State v. Michellon*, 42 N. J. L. 405; *State v. McDermott*, 45 N. J. L. 251; *State v. Farr*, 47 N. J. L. 208; *Palmer v. Foley*, 44 How. Pr. (N. Y.) 308; 45 How. Pr. (N. Y.) 110; *Menges v. Albany*, 47 How. Pr. (N. Y.) 245; *Lynch v. St. John*, 56 How. Pr. (N. Y.) 144; *People v. Kneissel*, 58 How. Pr. (N. Y.) 404; *Wade v. Strack*, 3 Thomp. & C. (N. Y.) 165; 1 Hun (N. Y.) 96; *People v. Tremain*, 9 Hun (N. Y.) 573; *O'Connor v. Mayor etc. of N. Y.*, 11 Hun (N. Y.) 176; *People v. Schroeder*, 12 Hun (N. Y.) 413; *People v. Conover*, 26 Barb. (N. Y.) 516; *Devoy v. Mayor etc. of N. Y.*, 35 Barb. (N. Y.) 264; 22 How. Pr. (N. Y.) 226; *Devoy v. Mayor etc. of N. Y.*, 39 Barb. (N. Y.) 169; *People v. Blake*, 49 Barb. (N. Y.) 9; *Pitkin v. McNair*, 56 Barb. (N. Y.) 75; *People v. Pinckney*, 32 N. Y. 377; *People v. Raymond*, 37 N. Y. 428; *Muller v. Mayor etc. of N. Y.*, 63 N. Y. 353; *Costello v. Mayor etc. of N. Y.*, 63 N. Y. 48; *People v. Kilbourn*, 68 N. Y. 479; *People v. Fire Com'rs*, 73 N. Y. 437; *Van Bokkelen v. Canaday*, 73 N. Car. 198; *Darby v. Wilmington*, 76 N. Car. 133; *State v. Squire*, 39 Ohio St. 197; *Com. v. Omensetter*, 9 Phila. (Pa.) 489; *Com. v. Henszey*, 9 Phila. (Pa.) 490; *Com. v. Callen*, 101 Pa. St. 375; *Com. v. Evans*, 102 Pa. St. 394; *Taggart v. Com.*, 102 Pa. St. 354; *Dean v. Gleason*, 16 Wis. 1.

3. *Dillon on Mun. Corp.*, § 206.

4. See *McConihe v. State*, 17 Fla.

council, authorized to elect certain officers, may appoint them by resolution, an election by ballot not being necessary.¹

Charter provisions making some municipal officer or board the judge of the qualifications and election of its officers are constitutional and valid,² and afford a cumulative remedy only, the jurisdiction of the court remaining unless it appears with unequivocal certainty that the legislature intended to take it away;³ and

238; *People v. Faerbury*, 51 Ill. 149; *Stow v. Common Council*, 79 Mich. 595; *People v. Bird*, 55 Hun (N. Y.) 610; *Newark v. Stout*, 52 N. J. L. 35. But see *People v. Kneissel*, 58 How. Pr. (N. Y.) 404.

The city corporation may scrutinize the election of its members, but cannot require electors to declare, on oath, for whom they voted. *Johnston v. Charleston*, 1 Bay (S. Car.) 441.

1. *Low v. Comrs.*, R. M. Charl. (Ga.) 302; and see *Russell v. Chicago*, 22 Ill. 283; *Wilder v. Chicago*, 26 Ill. 182; *State v. Newark*, 46 N. J. L. 140; *Com. v. Pittsburgh*, 14 Pa. St. 177; *People v. Bedell*, 2 Hill (N. Y.) 196; *Union Pac. R. Co. v. Ryan*, 2 Wyoming Ter. 391; *Selleck v. Common Council*, 40 Conn. 359.

Where a village is incorporated under a special law, there being no provision to the contrary, the general law fixes the time for the election of village officers. *State v. Cornwall*, 35 Minn. 176.

Under a regulation adopted by a city council, providing that "a majority of the members elected and voting shall be necessary to choose any officer elected by the board," a candidate who receives six votes of the twelve members present, three not voting, is legally elected. *Morton v. Jungerman* (Ky. 1890), 12 S. W. Rep. 944. And see *Kimball v. Marshall*, 44 N. H. 465.

The record of the choice of an individual as hog-reeve and field-driver, and proof of his service in said office for one year, is evidence from which a jury may legally infer that the meeting at which the individual was chosen was legally warned. *Northwood v. Barrington*, 9 N. H. 369.

After an assessor has been elected by a board of aldermen, and the ballot declared and recorded, the board can not, at an adjourned session, held the next day, reconsider the election and elect another instead. *State v. Phillips*, 79 Me. 506.

2. *Mayor v. Morgan*, 7 Mart. (La.), N. S. 1; *Seay v. Hunt*, 55 Tex. 545;

Wanunack v. Holloway, 2 Ala. 31; and see *Govan v. Jackson*, 32 Ark. 553; *People v. Mahaney*, 13 Mich. 481; *People v. Cicott*, 16 Mich. 283; 97 Am. Dec. 141; *Steele v. Martin*, 6 Kan. 430; *State v. Fitzgerald*, 44 Mo. 425; *Smith v. New York*, 37 N. Y. 518; *Com. v. Leech*, 44 Pa. St. 332; *Ewing v. Filley*, 43 Pa. St. 384; *Brush v. Lemma*, 77 Ill. 496.

It is not a valid reason for refusing to obey the law, on the part of a majority of the select council, that members of the common council may have been fraudulently retained and others fraudulently excluded, since each branch is the sole judge of the election and qualification of its own members; nor that they are about to propose a change of the law, for while the law remains they are bound by it, and must obey its requirements. *Lamb v. Lynd*, 44 Pa. St. 336.

When a city charter makes the common council the final judges of the election of aldermen, *mandamus* will not lie to compel them to reinstate one whom they had excluded without a proper hearing on the merits. *People v. Fitzgerald*, 41 Mich. 2.

Where a city council is the sole judge of the election and qualifications of its members, it cannot, after having seated a member on investigation, at a subsequent meeting order a second investigation. *Certiorari* may issue in such case without waiting for the report and final order. *State v. Camden*, 47 N. J. L. 64; 54 Am. Rep. 117.

3. See *Ex parte Heath*, 3 Hill (N. Y.) 42; *McVeany v. Mayor etc.* of N. Y., 59 How. Pr. (N. Y.) 106; *People v. Metzker*, 47 Cal. 524; *Grier v. Shackelford*, *Treadw. Const.* (S. Car.) 642; *Wammacks v. Holloway*, 2 Ala. 31; *Gass v. State*, 34 Ind. 424; *Macklot v. Davenport*, 17 Iowa 379; *Hummer v. Hummer*, 3 Greene (Iowa) 42; *State v. Funck*, 17 Iowa 365; *Batman v. Megowan*, 1 Metc. (Ky.) 533; *Kane v. People*, 4 Neb. 509; *Com. v. McCloskey*, 2 Rawle (Pa.) 369; *State v. Marlow*, 15 Ohio St. 114; *State v.*

even where the legislative intent is clear that the municipal action shall be final, the courts will inquire whether, in point of law, there was an office or vacancy to be filled.¹

b. **POWERS AND DUTIES.**—The powers and duties of municipal officers are such only as are conferred upon them by statute or charter,² and as are implied from necessity in order to carry out the purposes of their organization.³ The municipal author-

Fitzgerald, 44 Mo. 425; *People v. Bird*, 20 Ill. App. 568; *Ex parte Strahl*, 16 Iowa 369; *Com. v. Baxter*, 35 Pa. St. 263; *Com. v. Messer*, 44 Pa. St. 341; *People v. Witherell*, 14 Mich. 48; *O'Docherty v. Archer*, 9 Tex. 295; *Sellick v. Common Council*, 40 Conn. 359.

The court will not reverse the action of the comptroller of New York city in removing the auditor of accounts for carelessness and inattention in performing the duties of his office, although it is not improbable that the punishment is out of proportion to the offense. *People v. Grant*, 12 Daly (N. Y.) 294.

1. *Com. v. Leech*, 44 Pa. St. 332; *Com. v. Messer*, 44 Pa. St. 341. See *Simon v. Portland Common Council*, 9 Oregon 437; *State v. De Gress*, 72 Tex. 242.

Where there is a tie in the election for mayor between the incumbent and another candidate, and the city council fails to choose one of them for mayor by lot, as required by the city charter, equity will not interfere to restrain the incumbent from exercising the functions of the office. *Huels v. Hahn*, 75 Wis. 468.

2. See *Naylor v. Glasier*, 5 Duer (N. Y.) 161; *Briggs v. Mayor etc. of N. Y.*, 2 Daly (N. Y.) 304; *Wilson v. Shreveport*, 29 La. Ann. 673; *People v. Ransom*, 56 Barb. (N. Y.) 514; *Treadway v. Schnauber*, 1 Dak. Ter. 236; *Smith v. Deweese*, 41 Tex. 594; *Robertson v. Groves*, 4 Oregon 210; *Indianapolis School Com'rs v. Watson*, 74 Ind. 133; *Greathouse v. Dunn*, 60 Cal. 311; *Jane v. Alley*, 64 Miss. 446; *Gage v. Chicago*, 2 Ill. App. 332; *Gale v. Mayor etc. of N. Y.*, 8 Hun (N. Y.) 370; *Gage v. Hornelsville*, 41 Hun (N. Y.) 87; *Graves v. Otis*, 2 Hill (N. Y.) 466; *Nelson v. Mayor etc. of N. Y.*, 5 Hun (N. Y.) 190.

A mayor has no authority, unless expressly conferred by the city charter or ordinances, to employ counsel in behalf of the city. *Fletcher v. Lowell*, 15 Gray (Mass.) 103.

A "counsel to the corporation" has no larger powers, as such, to bind his clients, than those connected with the ordinary relations of attorney and client. *People v. Mayor etc. of N. Y.*, 11 Abb. Pr. (N. Y.) 66.

In an action against a town on a verbal lease, evidence of a conversation between the plaintiff and the mayor of the town is inadmissible to establish the lease, unless accompanied by proof that the mayor had authority to contract for the lease. *Halbut v. Forrest City*, 34 Ark. 246.

3. *Wilson v. Shreveport*, 29 La. Ann. 673; and see *Labrie v. Manchester*, 59 N. H. 120; 47 Am. Rep. 179; *Sherlock v. Winnelka*, 68 Ill. 530; *Fagan v. Mayor, etc. of N. Y.*, 84 N. Y. 348; *Sharp v. Mayor etc. of N. Y.*, 40 Barb. (N. Y.) 256; *Larned v. Briscoe*, 62 Mich. 393; *Geary v. Kansas City*, 61 Mo. 378; *Lyon v. Grand Rapids*, 30 Mich. 253; *Perry v. Cheboygan*, 55 Mich. 250; *Mayor etc. of N. Y. v. Sands*, 105 N. Y. 210; *Williamsport v. Richter*, 81 Pa. St. 508.

Where a city needs a right of way, and is unable to obtain it advantageously, it is within its power to employ some third person to secure it, and an agreement to pay him for his services was binding. *Stewart v. Council Bluffs*, 58 Iowa, 642.

No express authority is given to municipal officers to enter into the contract of suretyship; nor is there any general authority from which the power can be fairly deduced, under a plea of usage, necessity, or convenience, or public interest. *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. Ann. 294.

Where the special duties of a comptroller of a municipal corporation are not defined by law, proof of his usage to receive and file notices affecting the indebtedness of the city is sufficient, in an action against the corporation, to cast on them the burden of proof that his duties did not include the subject in question. *Hall v. Buffalo*, 2 Abb. App. Dec. (N. Y.) 301.

ities, acting under authority derived from their charter or other statutory enactment, must strictly follow its provisions,¹ and provisions conferring power on municipal officers must be strictly construed, and cannot be extended beyond the intent of the act and the want to be provided for.² In many jurisdictions, municipal officers are prohibited from contracting with, or becoming either directly or indirectly interested in any contract with the

1. Mayor etc. of Little Rock v. State Bank, 8 Ark. 227; Glass v. Ashbury, 49 Cal. 571; Gurnee v. Chicago, 40 Ill. 165; Jeffersonville v. Patterson, 32 Ind. 140; Logansport v. Legg, 20 Ind. 315; Larned v. Briscoe, 62 Mich. 393; Keeler v. Milledge, 24 N. J. L. 142; and see Gage v. Hornelsville, 41 Hun (N.Y.) 87; Webster v. Chicago, 62 Ill. 302; Francis v. Blair, 89 Mo. 291; Lytle v. Buffalo, 48 Hun (N.Y.) 175; Louisville v. Higdon, 2 Metc. (Ky.) 526; Mayor, etc. of Monroe v. Monroe, 29 La. Ann. 651; Moser v. White, 29 Mich. 59; Central Bridge Corp. v. Lowell, 15 Gray (Mass.) 106; Andrews v. King, 77 Me. 224.

Charter provisions, that no improvement shall be ordered "except by ordinance, which shall set apart a specific appropriation for the work ordered, based upon an estimate of the cost," is a fact of which a contractor is bound to take notice; and he cannot recover for work done under order of the city engineer, which he might have known was in excess of the appropriation. Perkinson v. St. Louis, 4 Mo. App. 322.

The acts of a street commissioner of a city, within the scope of the trust committed to him, are *prima facie* the acts of the city; whether they are within the general authority conferred upon him is a question for the jury. Gilpatrick v. Biddeford, 51 Me. 182.

The engineer of a city which has power, by its charter, to provide by ordinance for the construction and repair of sidewalks, has no authority to order a sidewalk to be built without an ordinance. Louisiana v. Miller, 66 Mo. 467.

2. See Mudge v. Williamsport, 78 Pa. St. 158; Christ v. Polk Co., 48 Iowa 302; Davies v. New York, 48 N. Y. Super. Ct. 194; American etc. Soc. v. Wistar, 11 Phila. (Pa.) 212; Advertiser etc. Co. v. Detroit, 43 Mich. 116; Schroder v. City Council, 2 Treadw. Const. (S. Car.) 726.

Town and city officers attempting to

interfere with the rights of individuals, must show, to acquire jurisdiction, that the very case has arisen in which they were authorized to proceed. Carron v. Martin, 26 N. J. L. 594; 69 Am. Dec. 584.

A municipal charter giving a mayor all the powers and jurisdiction of a justice of the peace "within the corporate limits," confers no jurisdiction of misdemeanors committed in the county under the Alabama act of Feb. 8, 1877, giving such jurisdiction to justices of the peace. Murphy v. State, 68 Ala. 31.

As to the powers and duties and jurisdiction of particular officers, and of officers under special charter and statutory provisions, see generally, Knight v. Haight, 51 Cal. 169; Spring Valley Water Works v. Ashbury, 52 Cal. 126; Ballard Pavement Co. v. Mandel, 2 MacArthur (D. C.) 351; Springfield Water Com'rs v. Hall, 98 Ill. 371; People v. Hazlewood, 116 Ill. 319; East St. Louis v. Launtz, 20 Ill. App. 644; Miller v. State, 106 Ind. 415; White v. New Orleans, 15 La. Ann. 667; State v. Heath, 20 La. Ann. 518; Chapman v. Lowell, 4 Cush. (Mass.) 378; Pedrick v. Bailey, 12 Gray (Mass.) 161; Tyng v. Boston, 133 Mass. 372; People v. East Saginaw, 33 Mich. 164; Barber v. Saginaw City, 34 Mich. 52; Attorney Genl. v. Preston, 56 Mich. 177; St. Peter v. Bauer, 19 Minn. 327; Planters' Compress Assoc. v. Hanes, 52 Miss. 469; St. Charles v. Stewart, 49 Mo. 132; Campbell v. St. Louis, 71 Mo. 106; Weeks v. Forman, 16 N. J. L. 237; State v. Trenton, 42 N. J. L. 72; *In re* Eleventh Ave., 49 How. Pr. (N. Y.) 208; McGarry v. New York Co., 7 Robt. (N. Y.) 464; Miller v. Mayor of N. Y., 5 Thomp. & C. (N. Y.) 219; 3 Hun (N. Y.) 35; Drake v. Mayor etc. of N. Y., 7 Lans. (N. Y.) 340; Board of Com'rs v. Glennon, 21 Hun (N. Y.) 244; *In re* Wright, 29 Hun (N. Y.) 357; 65 How. Pr. (N. Y.) 119; Lyth v. Buffalo, 48 Hun (N. Y.) 175; Slater v. Wood, 9 Bosw. (N. Y.) 15; People v.

municipality, or in any matter or transaction to be paid for by the municipality.¹

(1) *The Mayor*.—Every municipal corporation is provided with an executive head, usually styled the mayor, whose duty usually is to see that municipal ordinances are executed, and to preside at corporate meetings.² Judicial duties are often annexed to those which properly appertain to the office, however, and he is authorized to judicially administer not only the ordinances of the corporation, but also the laws of the State.³ But no jurisdiction

Connolly, 4 Abb. Pr., N. S. (N. Y.) 375; *People v. Civil Service etc. Board*, 17 Abb. N. Cas. (N. Y.) 64; *People v. Flagg*, 16 Barb. (N. Y.) 503; *Mayor etc. of N. Y. v. Tucker*, 1 Daly (N. Y.) 107; *Board of Com'rs v. Gurrin*, 6 Daly (N. Y.) 349; *Bleeker v. New York*, 7 Daly (N. Y.) 439; *Twogood v. Mayor etc. of N. Y.*, 11 Daly (N. Y.) 167; *Muller v. Mayor etc. of N. Y.*, 63 N. Y. 355; *Harris v. People*, 64 N. Y. 143; *People v. Dunlap*, 66 N. Y. 162; *Hogan v. Mayor etc. of N. Y.*, 68 N. Y. 17; *People v. New York Fire Com'rs*, 49 N. Y. Super. Ct. 369; *New York Health Department v. Van Cott*, 51 N. Y. Super. Ct. 413; *Intendant etc. v. Sorrell*, 1 Jones (N. Car.) 49; *Bowers v. Supplee*, 11 Phila. (Pa.) 223; *Kerr v. Trego*, 47 Pa. St. 292; *Terry v. Milwaukee*, 15 Wis. 490; *Brickwell v. Hamele*, 57 Wis. 490. And see also the other cases cited in this section.

1. See *Anna v. O'Callahan*, 3 Ill. App. 176; *McGregor v. Logansport*, 79 Ind. 166; *Case v. Johnson*, 91 Ind. 477; *Fitch v. Mayor etc. of N. Y.*, 40 Hun (N. Y.) 512; *Roosevelt v. Draper*, 23 N. Y. 318; *Doll v. State*, 45 Ohio St. 445; *Stevenson v. Bay City*, 26 Mich. 44; *Dwight v. Palmer*, 74 Ill. 295.

If an act of the legislature, authorizing the board exercising the corporate authority of a city to convey its lands to a corporation, vests the board with any discretion in the matter, a member of such board, who is a stockholder or director in the corporation, cannot act officially in the board in relation to the matter, or in making the conveyance, and if he does, and his vote or signature to the deed was requisite to complete the conveyance, the deed will be set aside. *San Diego v. San Diego etc. R. Co.*, 44 Cal. 106.

The fact that the mayor became, prior to his election, the assignee of a contract for street improvement as collateral security, does not affect the validity of the contract nor incapacitate

him from countersigning a warrant issued for the collection of the assessment. *Beaudry v. Valdez*, 32 Cal. 269.

To a note given to the trustees of Clarksville for borrowed proceeds of sales of lots, it is no defense that the borrower was himself, at the time, one of the trustees. *Ewing v. Clarksville*, 61 Ind. 139.

2. *Dillon on Mun. Corp.*, § 208.

The mayor, in cities organized under the general incorporation act (*Iowa Rev.*, ch. 51) is not *ex officio* a member of the city council, nor has he any right to preside over that body, or to vote therein. *Cochran v. McCleary*, 22 Iowa 75.

Notice to the mayor of the existence of a nuisance, and a request to remove it, is sufficient to bind the city. *Nichols v. Boston*, 98 Mass. 39; 97 Am. Dec. 132.

As to special powers and duties of mayors under particular charters, see generally *North Lawrence v. Hoysradt*, 6 Kan. 170; *Test v. Com.*, 4 Dana (Ky.) 522; *Morley v. Weakley*, 86 Mo. 451; *Barnes v. Gottschalk*, 3 Mo. App. 111; *State v. Jersey City*, 30 N. J. L. 93; *North v. Cary*, 4 Thomp. & C. (N. Y.) 357; *Hatch v. Cincinnati*, 17 Ohio St. 48; *State v. Hudson*, 44 Ohio St. 137; *Daniel v. Mayor etc. of Memphis*, 11 Humph. (Tenn.) 582; *Lynch v. Lafland*, 4 Coldw. (Tenn.) 96.

3. See *Bain v. Mitchell*, 82 Ala. 304; *Robinson v. Benton Co.*, 49 Ark. 49; *State v. Monroe*, 16 La. Ann. 395; *Gulick v. New*, 14 Ind. 93; 77 Am. Dec. 49; *Cluggish v. Rogers*, 13 Ind. 538; *Com. v. Leight*, 1 B. Mon. (Ky.) 107; *Maguire v. Hughes*, 13 La. Ann. 281; *Warwick v. Mayo*, 15 Gratt. (Va.) 528; *Ex parte Smith*, Hempst. (U. S.) 200; *Louisiana v. Hardin*, 11 Mo. 551; *Waldo v. Wallace*, 12 Ind. 569; *Howard v. Shoemaker*, 35 Ind. 111; *Muscatine v. Steck*, 7 Iowa 505; *Ex parte Strahl*, 16 Iowa 369; *Luehr-*

to try civil causes exists in the mayor unless conferred upon him by charter or statute.¹

(2) *Municipal Councils*.²—See also MUNICIPAL CORPORATIONS.³

c. COMPENSATION.—The general rule that an office cannot be regarded as a contract between the officer and the sovereign power, is applicable to municipal offices,⁴ a municipal corporation having the power, unless restrained by its charter, to abolish an office created by ordinance, or reduce or otherwise regulate its

man *v. Shelby Co. Taxing District*, 2 Lea (Tenn.) 425; *State v. Wood*, 9 Bosw. (N. Y.) 15; *Morrison v. McDonald*, 21 Me. 550; *People v. Maynard*, 14 Ill. 419; *Starr v. Wilmington City Council*, 3 Har. (Del.) 294; *Prell v. McDonald*, 7 Kan. 426; 12 Am. Rep. 423; *Martindale v. Palmer*, 52 Ind. 411; *Com. v. Dallas*, 3 Yeates (Pa.) 300; *Sellers v. Corvallis*, 5 Oregon 273.

A mayor, who in no sense belongs to the judiciary, may be authorized to arrest and fine lewd and disorderly women; in so doing he but exercises the police power which in this respect has always been well distinguished from the judicial power, both here and in *England*. *Shafer v. Mumma*, 17 Md. 331; 79 Am. Dec. 656.

Where special power is given to a mayor or other magistrate to convict offenders against city ordinances in a summary manner, without trial by jury, it must appear that he has strictly pursued such power. The record should show upon its face everything necessary to constitute a legal conviction. It should also appear with precision of what offense the defendant was convicted. *Keeler v. Milledge*, 24 N. J. L. 142.

The mayor of a city, who performs the duties of a justice of the peace in criminal actions prosecuted in the name of the State, is not entitled to recover of the county the fees allowed to justices by *Iowa Code*, § 3806. *Upton v. Clinton Co.*, 52 Iowa 311.

Such power conferred upon a mayor is held to be unconstitutional in *Louisiana*. *Hayes v. Hayes*, 10 La. Ann. 642; *State v. Judge*, 9 La. Ann. 62; *Lafon v. Dufroco*, 9 La. Ann. 350.

1. *Smith v. Deweese*, 41 Tex. 594.

2. It is not in the power of a common council to bind its legislative capacities by any private arrangement or stipulations, so as to disable itself from enact-

ing any law that might be deemed essential for the public good. *Mayor etc. of N. Y. v. Britton*, 12 Abb. Pr. (N. Y.) 367, note; *Britton v. Mayor etc. of N. Y.*, 21 How. Pr. (N. Y.) 251.

A common council can only act by resolution or by-laws adopted at a meeting; and the proceedings of such meeting cannot be left in parol. *Moser v. White*, 29 Mich. 59.

The clerk of a municipal corporation may amend its records according to his own knowledge of the truth, so long as he has the custody of them. *Mott v. Reynolds*, 27 Vt. 206. But the journal of a public body, as the city council, cannot be amended by a vote passed by a subsequent board, so as to recite an order as passed which before appeared only as reported. *Covington v. Ludlow*, 1 Metc. (Ky.) 265.

As to the powers, rights, and duties of municipal councils and their members under particular charters or statutes, see generally *Wilson v. Mayor etc. of San Jose*, 7 Cal. 275; *Red v. Augusta*, 25 Ga. 386; *Russell v. Chicago*, 22 Ill. 283; *Wilder v. Chicago*, 26 Ill. 182; *De Wolf v. Chicago*, 26 Ill. 443; *Sylvester v. Macauley*, 1 Wilson (Ind.) 19; *State v. La Porte*, 28 Ind. 248; *State v. Mainey*, 65 Ind. 404; *Mayor etc. of Nachitoches v. Redmond*, 28 La. Ann. 274; *Ball v. Fagg*, 67 Mo. 481; *State v. Jersey City*, 27 N. J. L. 493; *Douglass v. Essex Co.*, 38 N. J. L. 214; *Hyde v. Brooklyn*, 21 How. Pr. (N. Y.) 339; *State v. Buffalo*, 2 Hill (N. Y.) 434; *Peterson v. Mayor etc. of N. Y.*, 4 E. D. Smith (N. Y.) 413; *Wetmore v. Story*, 22 Barb. (N. Y.) 414; *Demarest v. Wickham*, 67 Barb. (N. Y.) 312; *Davies v. New York*, 45 N. Y. Super. Ct. 373; *Com. v. Kepner*, 10 Phila. (Pa.) 510; *Coogan v. State*, 1 S. Car. 468; *Wilson v. Ormo Trustees*, 52 Wis. 131.

3. Vol. 15, p. 1028.

4. See *supra*, this title, *Compensation*.

compensation, or add to or otherwise change its duties.¹ But when the services to be performed are professional or private, rather than public or official, an employment under an ordinance for a fixed time at a fixed sum for the period, has been held to be a contract and not subject to be impaired by any action of the corporation.² As in case of all other powers and rights conferred upon officers of municipal corporations, the power to fix the salaries of officers must be exercised by the officer or body provided for that purpose and in strict conformity to the terms of the charter or statute conferring the authority.³

1. *In re* Senate Resolution, 12 Colo. 340; *Com. v. Bacon*, 6 S. & R. (Pa.) 322; *Augusta v. Sweeney*, 44 Ga. 463; 9 Am. Rep. 172; *Madison v. Kelso*, 32 Ind. 79; *University of Ala. v. Walden*, 15 Ala. 655; *Carr v. St. Louis*, 9 Mo. 191; *Iowa City v. Foster*, 10 Iowa 189; *Cox v. Burlington*, 43 Iowa 612; *Love v. Mayor etc. of Jersey City*, 40 N. J. L. 456; *Warner v. People*, 2 Den. (N. Y.) 272; 43 Am. Dec. 740; *Gillespie v. Mayor etc. of N. Y.*, 6 Daly (N. Y.) 286; *Conner v. Mayor etc. of N. Y.*, 5 N. Y. 285; *Barker v. Pittsburgh*, 4 Pa. St. 49; *Smith v. Philadelphia Co.*, 2 Par. Eq. Cas. (Pa.) 293; *Haswell v. Mayor etc. of N. Y.*, 81 N. Y. 255; *Long v. Mayor etc. of N. Y.*, 81 N. Y. 425; *Waldraour v. Memphis*, 4 Coldw. (Tenn.) 431; *Brazil v. McBride*, 69 Ind. 244; *Stevens v. Minneapolis*, 29 Minn. 219; and see *Crane v. Des Moines*, 47 Iowa 105; *Mayor etc. of Hoboken v. Gear*, 27 N. J. L. 265; *Butcher v. Camden*, 29 N. J. Eq. 478; *Green v. Mayor etc. of N. Y.*, 5 Abb. Pr. (N. Y.) 503; 2 Hilt. (N. Y.) 203; *Devoy v. Mayor etc. of N. Y.*, 39 Barb. (N. Y.) 169; *Barrett v. New Orleans*, 32 La. Ann. 101; *Doolan v. Manitowoc*, 48 Wis. 312.

An increase by a city council of the duties of a city officer does not imply any obligation to increase his salary. *Covington v. Mayberry*, 9 Bush (Ky.) 304.

An ordinance passed by a city, under the authority of its charter, providing that its officers shall receive salaries, and that the fees collected by them shall be paid into the city treasury, is valid, and repeals by implication a prior ordinance under which the officers retained certain fees as compensation for their services, but received no salaries. *Des Moines v. Hillis*, 55 Iowa 643.

Statutes, authorizing cities to provide by ordinance for the payment of

salaries to their officers, in lieu of the fees theretofore retained by such officers under prior statutes, are not void as delegating powers of legislation to cities. *Des Moines v. Hillis*, 55 Iowa 643.

2. *Dillon on Mun. Corp.* § 232; *citing Chase v. Lowell*, 7 Gray (Mass.) 33; *Caverly v. Lowell*, 1 Allen (Mass.) 289; *Chicago v. Edwards*, 58 Ill. 252; and see *McInery v. Galveston*, 58 Tex. 334.

One who accepts a municipal office, under an agreement with the city to accept a certain sum as compensation, cannot after settling with the city on the basis agreed upon, demand more. *Hobbs v. Yonkers*, 32 Hun (N. Y.) 454.

But this rule does not apply when the employment was unauthorized, *Emmert v. De Long*, 12 Kan. 67; or when the services were voluntarily performed without contract, *Jacksonville v. Aetna, etc., Engine Co.* 20 Fla. 110.

3. See *McCormick v. Syracuse*, 25 Hun (N. Y.) 300; *Davidson v. Mayor etc. of N. Y.*, 13 Daly (N. Y.) 252; *Fountain v. Mayor etc. of Jackson*, 50 Mich. 15; *Coleman v. Cadillac*, 49 Mich. 322; *Edgecomb v. Lewiston*, 71 Me. 343; *Calais v. Whidden*, 64 Me. 249; *People v. Detroit*, 38 Mich. 636; *O'Gorman v. Mayor etc. of N. Y.*, 67 N. Y. 486; *McInery v. Galveston*, 58 Tex. 334; *Whetmore v. Mayor etc. of N. Y.*, 67 N. Y. 21; *Taylor v. Mayor etc. of N. Y.*, 67 N. Y. 87; *People v. Police Com'rs*, 46 Hun (N. Y.) 476.

A person accepting and entering into an office of a municipal corporation must be deemed to have notice of all the provisions of its charter, and can recover compensation for his services only in the manner therein provided. *Baker v. Utica*, 19 N. Y. 326.

Where a city marshal paid fees collected by him into the city treasury, under protest and with a claim that he was entitled to the same, he cannot

d. LIABILITY OF THE MUNICIPALITY FOR THE ACTS OF ITS OFFICERS.—The usual rule of the non-liability of the public for the acts of its officers applies to municipal corporations with reference to the exercise of the powers intrusted to it as one of the political divisions of the State, to be exercised for the general welfare of the public as a part of the sovereign power of the State.¹

recover them from the city, if they were in excess of those authorized by law to be so collected. *Christ v. Des Moines*, 53 Iowa 144.

As a general principle, an ordinance by city councils to pay a municipal officer his salary should be founded upon another ordinance fixing the salary of the office; for public officers ought to have a fixed compensation, so as not to be dependent upon councils, who are but trustees of public functions, and ought not to vote money as matter of grace or favor. *Smith v. Com.*, 41 Pa. St. 335.

As to the salaries of particular municipal officers under special charter and statutory provisions and the manner of their payment and collection, see generally *Sacramento v. Bird*, 15 Cal. 294; *Redwood v. Grimmerstein*, 68 Cal. 515; *Dwight v. Palmer*, 74 Ill. 295; *Purdy v. Independence*, 75 Iowa 356; *Paducah v. Calhoun*, 78 Ky. 323; *Caverly v. Lowell*, 1 Allen (Mass.) 289; *Shepard v. Lawrence*, 141 Mass. 479; *Preble v. Bangor*, 64 Me. 115; *Rae v. Mayor etc. of Flint*, 51 Mich. 526; *Neiswanger v. Kansas City*, 71 Mo. 36; *Roberts v. Lincoln*, 6 Neb. 352; *Bingham v. Camden*, 29 N. J. Eq. 464; *State v. Woodruff*, 39 N. J. L. 72; *State v. Jersey City*, 34 N. J. L. 429; *Leveridge v. New York*, 3 Sandf. (N. Y.) 263; *People v. Stout*, 23 Barb. (N. Y.) 338; *Phillips v. Mayor etc. of N. Y.*, 1 Hilt. (N. Y.) 483; *People v. Green*, 3 Thomp. & C. (N. Y.) 108; *Pittman v. Mayor etc. of N. Y.*, 6 Thomp. & C. (N. Y.) 89; 3 Hun (N. Y.) 370; *Cregier v. Mayor etc. of N. Y.*, 11 Daly (N. Y.) 171; *People v. Seabury*, 23 How. Pr. (N. Y.) 121; *Eickhoff v. Mayor etc. of N. Y.*, 49 How. Pr. (N. Y.) 47; *Wines v. Mayor etc. of N. Y.*, 9 Hun (N. Y.) 659; *People v. Orange Co.*, 18 Hun (N. Y.) 19; *Norris v. Brooklyn*, 19 Hun (N. Y.) 296; *Bird v. Mayor etc. of N. Y.*, 33 Hun (N. Y.) 396; *Dennat v. Mayor etc. of N. Y.*, 66 N. Y. 585; *Billings v. Mayor etc. of N. Y.*, 68 N. Y. 413; *Riley v. Mayor etc. of N. Y.*, 96 N. Y. 331; *People v. Starkweather*, 42 N. Y. Super. Ct. 325;

Rothrock v. School District, 133 Pa. St. 487; *Austin v. Johns*, 62 Tex. 179; *Cramer v. Stone*, 33 Wis. 212; *Powers v. Oshkosh*, 56 Wis. 660.

1. *Dargan v. Mobile*, 31 Ala. 469; 70 Am. Dec. 505; *School District v. Williams*, 38 Ark. 454; *Sherbourne v. Yuba Co.*, 21 Cal. 113; 81 Am. Dec. 151; *Jewett v. New Haven*, 38 Conn. 368; 9 Am. Rep. 382; *Torbush v. Norwich*, 38 Conn. 225; 9 Am. Rep. 395; *Judge v. Meriden*, 38 Conn. 90; *Mead v. New Haven*, 40 Conn. 72; 16 Am. Rep. 14; *McElroy v. Albany*, 65 Ga. 387; 38 Am. Rep. 791; *Wilcox v. Chicago*, 107 Ill. 334; 47 Am. Rep. 434; *Robinson v. Evansville*, 87 Ind. 334; 44 Am. Rep. 770; *Summers v. Daviess Co.*, 103 Ind. 262; 53 Am. Rep. 512; *Ogg v. Lansing*, 35 Iowa 495; 14 Am. Rep. 499; *Calwell v. Boone*, 51 Iowa 687; 33 Am. Rep. 154; *Greenwood v. Louisville*, 13 Bush (Ky.) 226; 26 Am. Rep. 263; *Prather v. Lexington*, 13 B. Mon. (Ky.) 559; 56 Am. Dec. 585; *Pollock v. Louisville*, 13 Bush (Ky.) 221; 26 Am. Rep. 260; *Stewart v. New Orleans*, 9 La. Ann. 461; 16 Am. Dec. 218; *Bennett v. New Orleans*, 14 La. Ann. 120; *Brown v. Vinalhaven*, 65 Me. 402; 20 Am. Rep. 709; *New Bedford v. Taunton*, 9 Allen (Mass.) 207; *Tindley v. Salem*, 137 Mass. 171; 50 Am. Rep. 289; *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196; *Bryant v. St. Paul*, 33 Minn. 289; 53 Am. Rep. 31; *Rowland v. Gallatin*, 75 Mo. 134; 42 Am. Rep. 395; *Wheeler v. Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 368; *Maximilian v. Mayor etc. of N. Y.*, 62 N. Y. 160; 20 Am. Rep. 468; *Ham v. Mayor etc. of N. Y.*, 70 N. Y. 459; *Freeman v. Philadelphia*, 13 Phila. (Pa.) 154; *Elliott v. Philadelphia*, 75 Pa. St. 347; 15 Am. Rep. 591; *Ashby v. Erie*, 85 Pa. St. 286; *Welsh v. Rutland*, 56 Vt. 228; 48 Am. Rep. 762; *Richmond v. Long*, 17 Gratt. (Va.) 375; 94 Am. Dec. 461; *Wallace v. Menasha*, 48 Wis. 79; 33 Am. Rep. 804; *Grumbine v. Mayor etc. of Washington*, 2 McArthur (D. C.) 578; 29 Am. Rep. 626; *New York etc. Lumber Co. v. Brooklyn*, 71 N. Y. 580; *Diehm v. Cincinnati*, 15 Ohio St. 305; *Gibbes*

v. Beaufort, 20 S. Car. 213; *Detroit v. Laughna*, 34 Mich. 402; *Bamber v. Rochester*, 26 Hun (N. Y.) 587; 63 How. Pr. (N. Y.) 103; *Barney v. Lowell*, 98 Mass. 570; and see *Walcott v. Swampscott*, 1 Allen (Mass.) 101; *Smith v. Rochester*, 76 N. Y. 506; *Hafford v. New Bedford*, 16 Gray (Mass.) 297; *Haskell v. New Bedford*, 108 Mass. 208; *Schultz v. Milwaukee*, 49 Wis. 254; 35 Am. Rep. 779; *Doster v. Atlantic*, 72 Ga. 233; *Bladen v. Philadelphia*, 60 Pa. St. 464; *Elliott v. Philadelphia*, 73 Phila. (Pa.) 128; *Wild v. Patterson*, 47 N. J. L. 406; *Zollikoffer v. Havemeyer*, 4 Thomp. & C. (N. Y.) 478; *Waller v. Dubuque*, 60 Iowa 541; *Terhune v. Mayor etc. of N. Y.*, 88 N. Y. 247; *Theall v. Yonkers*, 21 Hun (N. Y.) 265; *Thompson v. Mayor etc. of N. Y.*, 52 N. Y. Super. Ct. 427; *Torney v. Mayor etc. of N. Y.*, 12 Hun (N. Y.) 542; *Quinn v. Patterson*, 27 N. J. L. 35; *O'Meara v. Mayor etc. of N. Y.*, 1 Daly (N. Y.) 425; *Van Valkenburgh v. Mayor etc. of N. Y.*, 43 Barb. (N. Y.) 109; *Rogers v. Buffalo*, 51 Hun (N. Y.) 637; *Terry v. Mayor etc. of N. Y.*, 8 Bosw. (N. Y.) 504.

Municipal corporations are not liable for the negligence, misconduct or wrongful acts of their police officers. *Campbell v. Montgomery*, 53 Ala. 527; 25 Am. Rep. 656; *McElroy v. Albany*, 65 Ga. 387; 33 Am. Rep. 791; *Cook v. Macon*, 54 Ga. 468; *Harris v. Atlanta*, 62 Ga. 200; *Attaway v. Mayor etc. of Cartersville*, 68 Ga. 740; *Odell v. Schroeder*, 58 Ill. 353; *Calwell v. Boone*, 51 Iowa 687; 33 Am. Rep. 154; *Pollock v. Louisville*, 13 Bush (Ky.) 221; 25 Am. Rep. 260; *Buttrick v. Lowell*, 1 Allen (Mass.) 172; 79 Am. Dec. 721; *Corsicana v. White*, 57 Tex. 382; *Grumbine v. Mayor etc. of Washington*, 2 McArthur (D. C.) 578; 29 Am. Rep. 626; *Little v. Madison*, 49 Wis. 605; 35 Am. Rep. 793; *Hart v. Bridgeport*, 13 Blatchf. (U. S.) 289. Or of their fire departments, *Jewett v. New Haven*, 38 Conn. 368; 9 Am. Rep. 382; *Torbush v. Norwich*, 38 Conn. 225; 9 Am. Rep. 395; *Wilcox v. Chicago*, 107 Ill. 334; 47 Am. Rep. 434; *Robinson v. Evansville*, 87 Ind. 334; 44 Am. Rep. 770; *Greenwood v. Louisville*, 13 Bush (Ky.) 226; 26 Am. Rep. 263; *Burrill v. Augusta*, 78 Me. 118; 57 Am. Rep. 788; *Hafford v. New Bedford*, 16 Gray (Mass.) 297; *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196; *Grube v. St. Paul*, 34 Minn. 402; *Welch v. Rutland*,

56 Vt. 228; 48 Am. Rep. 762; *Hayes v. Oshkosh*, 33 Wis. 314; 14 Am. Rep. 760; *Heller v. Mayor etc. of Sedalia*, 53 Mo. 159; 14 Am. Rep. 444; *McKenna v. St. Louis*, 6 Mo. App. 320. But see *Clarissy v. Metropolitan Fire Department*, 7 Abb. Pr., N. S. (N. Y.) 352; or firemen, *Jewett v. New Haven*, 38 Conn. 368; 9 Am. Rep. 382; *Torbush v. Norwich*, 38 Conn. 225; 9 Am. Rep. 395. Or of its collectors, assessors and health officers, *Ogg v. Lansing*, 35 Iowa 495; 14 Am. Rep. 499; *Liberty v. Hurd*, 74 Me. 101; *Mitchell v. Rockland*, 52 Me. 118; 45 Me. 406; 41 Me. 363; 66 Am. Dec. 252; *Spring v. Hyde Park*, 137 Mass. 554; 50 Am. Rep. 334; *Bryant v. St. Paul*, 33 Minn. 289; 53 Am. Rep. 31; *Alger v. Easton*, 119 Mass. 77; *Dunbar v. Boston*, 112 Mass. 75; *Rossire v. Boston*, 4 Allen (Mass.) 57. And see *Ham v. Mayor etc. of N. Y.*, 70 N. Y. 459. Or of its magistrates, *Grumbine v. Mayor etc. of Washington*, 2 McArthur (D. C.) 578; 29 Am. Rep. 629. And it has been held that they are not liable for the negligence or misconduct of its selectmen, *Cushing v. Bedford*, 125 Mass. 526; or aldermen, *Child v. Boston*, 4 Allen (Mass.) 41; 81 Am. Dec. 680.

A city is not liable to an individual on whose land the superintendent of streets, with his men, has entered for the purpose of removing obstructions, in the mistaken belief that the land is a public way. *Manners v. Haverhill*, 135 Mass. 165.

The police commissioners of New Haven, being agents of the State and not of the city, the city is not under obligation to pay the rent of voting places for State and Federal elections, which the law imposes on these commissioners the duty of procuring. *Perkins v. New Haven*, 53 Conn. 214.

A county is not liable for the negligence of a physician for the poor, unless it is shown to have been negligent in his selection. *Summers v. Daviess Co.*, 103 Ind. 262; 53 Am. Rep. 512.

The official counsel to a municipal corporation is not the counsel to the two boards of the common council merely, so as to be absolutely subject to their orders in respect to suits in which the city may be a party; but he is an agent or trustee for the whole body of citizens, and is ultimately responsible for his conduct to them; and in so far as he acts as an attorney or counselor of the court, he is subject to all the rules and

the officers who exercise such power being the agents and servants of the public at large and not of the municipality, though appointed or elected by it;¹ neither can a municipal corporation be held liable for the acts of its officers and agents, which are wholly *ultra vires* and beyond the power of the corporation to perform,² nor for the illegal or unauthorized acts of its officers, though done *colore officii*, unless they were previously authorized or subsequently ratified.³ But for the acts of its officers, agents and servants committed in the execution of its general powers,

regulations of the court, and is responsible to the court in like manner as any other attorney or counselor in like cases. *Lowber v. Mayor etc. of N.Y.*, 5 Abb. Pr. (N. Y.) 325.

1. *Prather v. Lexington*, 13 B. Mon. (Ky.) 559; 56 Am. Dec. 585; and see cases cited in the preceding note.

2. *Smith v. Rochester*, 76 N. Y. 506; *Herzo v. San Francisco*, 33 Cal. 134; *Browning v. Owen Co.*, 44 Ind. 11; *Haag v. Vanderburgh Co.*, 60 Ind. 511; 28 Am. Rep. 654; *Shelby Co. v. Deprez*, 87 Ind. 509; *Seele v. Deering*, 79 Me. 343; 1 Am. St. Rep. 314; *Morrison v. Lawrence*, 98 Mass. 219; *Cavanagh v. Boston*, 139 Mass. 426; 52 Am. Rep. 716; *Hilsdorf v. St. Louis*, 45 Mo. 94; 100 Am. Dec. 352; *Hunt v. Boonville*, 65 Mo. 620; 27 Am. Rep. 290; *Rowland v. Gallatin*, 75 Mo. 134; 42 Am. Rep. 195; *Mayor etc. of Albany v. Cunliff*, 2 N. Y. 165; *Cuyler v. Rochester*, 12 Wend. (N. Y.) 165; *Hart v. Bridgeport*, 13 Blatchf. (U. S.) 289; *Cheaney v. Brookfield*, 60 Mo. 53; *Worley v. Columbia*, 88 Mo. 100; *O'Dell v. Schroeder*, 58 Ill. 353.

A town is not liable for damages caused by flooding, caused by the erection of a dam by order of the selectmen, they having no legal authority to order its erection. *Anthony v. Adams*, 1 Met. (Mass.) 284; *Walling v. Schreveport*, 5 La. Ann. 660; 52 Am. Dec. 608.

A town is not liable for an injury caused by fireworks discharged by citizens, in violation of an ordinance, even though the council and officers took an active part in the celebration. See *Ball v. Woodbine*, 61 Iowa, 83; 47 Am. Rep. 805; *Cumberland v. Willison*, 50 Md. 128.

In determining the liability of a municipal corporation for the acts of its officers, an irregular exercise of granted power must be distinguished from a total want of power. Every person dealing therewith is charged with knowl-

edge of the extent of the powers conferred by the charter. *Treadway v. Schnauber*, 1 Dak. Ter. 236.

Acts of city officers, under a void ordinance, are made good by a recognition of the void ordinance, in an ordinance, passed before the performance of those acts appropriating the proceeds of a sale authorized by the first ordinance. *Holland v. San Francisco*, 7 Cal. 361.

3. *Trammell v. Russelville*, 34 Ark. 105; 36 Am. Rep. 1; *Mauley v. Atchison*, 9 Kan. 358; *Brown v. Vinalhaven*, 65 Me. 402; 20 Am. Rep. 709; *Woodcock v. Calais*, 66 Me. 234; *Thayer v. Boston*, 19 Pick. (Mass.) 511; 31 Am. Dec. 157; *McCarthy v. Boston*, 135 Mass. 197; *Smith v. Rochester*, 76 N. Y. 510; *Cheaney v. Brookfield*, 60 Mo. 53; *Donnelly v. Tripp*, 12 R. I. 97; *Everson v. Syracuse*, 100 N. Y. 577; *Barnes v. Philadelphia*, 3 Phila. (Pa.) 409; and see *Small v. Danville*, 51 Me. 359; *Emmert v. Delong*, 12 Kan. 67; *Barton v. New Orleans*, 16 La. Ann. 317; *Elliott v. Philadelphia*, 75 Pa. St. 347; 45 Am. Rep. 591; *Wakefield v. Newport*, 60 N. H. 374; *Ross v. Philadelphia*, 115 Pa. St. 222; *Ready v. Tuskaloosa*, 6 Ala. 327; *Chicago v. Shober etc.* Lith. Co., 6 Ill. App. 560.

To render a municipal corporation liable for torts committed by persons claiming to act for it, or by its authority, it must appear they were expressly authorized to do the act by the municipal government, or that they were done *bona fide* in pursuance of a general authority to act for the municipality on the subject to which they relate, or that in either case the act was adopted and ratified by the corporation. *Chicago v. McGraw*, 75 Ill. 566.

A direction to an officer to remove obstructions in a certain alley does not make the city liable for the removal of property outside the limits of the alley, though the officer believed it to be in-

and for its own corporate or private benefit it is liable to the same extent as an individual or a private corporation;¹ and where a duty is imposed upon a municipal corporation by law, which is absolute and perfect, as distinguished from a judicial or discretionary one, the corporation is liable for the default or failure of its

side of those limits. *Hanvey v. Rochester*, 35 Barb. (N. Y.) 177.

A city or town is not liable for the wrongful acts of one acting as a pound-keeper, but who has never qualified by giving bonds as required by law. *Rounds v. Bangor*, 46 Me. 541.

1. *Bailey v. Mayor etc. of N. Y.*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Byrnes v. Cohoes*, 67 N. Y. 204; *Rochester White Lead Works v. Rochester*, 3 N. Y. 467; 53 Am. Dec. 316; *Witt v. Mayor etc. of N. Y.*, 5 Robt. (N. Y.) 248; *Harrisburg v. Saylor*, 87 Pa. St. 216; *Thayer v. Boston*, 19 Pick. (Mass.) 511; 31 Am. Dec. 157; *Sprague v. Tripp*, 13 R. I. 38; 43 Am. Rep. 11; *Aldrich v. Tripp*, 11 R. I. 141; 23 Am. Rep. 434; *Durkee v. Kenosha*, 59 Wis. 123, 48 Am. Rep. 480; *Hildreth v. Lowell*, 11 Gray (Mass.) 345; *Johnson v. Municipality No. One*, 5 La. Ann. 100; *Lewis v. Elizabeth*, 25 N. J. Eq. 298; *Master-ton v. Mt. Vernon*, 58 N. Y. 391; *Wilde v. New Orleans*, 12 La. Ann. 15; *Hooe v. U. S.*, 1 Cranch (U. S.) 98; *Perry v. Worcester*, 6 Gray (Mass.) 544; *Wal-dron v. Haverhill*, 143 Mass. 582; and see *Hunt v. Boonville*, 65 Mo. 620; 27 Am. Rep. 299; *Hecker v. Mayor etc.*, 18 Abb. Pr. (N. Y.) 369; 28 How. Pr. (N. Y.) 211; *Dayton v. Pease*, 4 Ohio St. 80; *Clayburgh v. Chicago*, 25 Ill. 535; 79 Am. Dec. 346; *Chicago v. Dermody*, 61 Ill. 431; *Burns v. Mayor etc. of N. Y.*, 5 Thomp. & C. (N. Y.) 371; 3 Hun (N. Y.) 212; *Cumberland etc. Canal Co. v. Portland*, 62 Me. 504; *Boston v. Simmons*, 150 Mass. 461; *Williams v. Dunkirk*, 3 Lans. (N. Y.) 44; *Ironton v. Kelly*, 38 Ohio St. 50; *Walsh v. Mayor etc. of N. Y.*, 41 Hun (N. Y.) 299; *Vincent v. Brooklyn*, 31 Hun (N. Y.) 122; *Wallace v. Muscatine*, 4 Greene (Iowa) 373; *Ross v. Madison*, 1 Ind. 281; *Cotes v. Davenport*, 9 Iowa 527; *Templin v. Iowa City*, 14 Iowa 59; *Mayor etc. of N. Y. v. Bailey*, 2 Den. (N. Y.) 433; *Lloyd v. Mayor etc. of N. Y.*, 5 N. Y. 369; 55 Am. Dec. 347; *Mayor etc. of Mem-phiss v. Lasser*, 9 Humph. (Tenn.) 757; *Uhl v. Shelby Co. Taxing District*, 6 Lea (Tenn.) 610; *Torney v. Mayor etc.*

of N. Y., 12 Hun (N. Y.) 542; *Semple v. Mayor etc. of Vicksburg*, 62 Miss. 63; 52 Am. Rep. 181; *Sheldon v. Kala-mazoo*, 24 Mich. 383; *Sharp v. Mayor etc. of N. Y.*, 40 Barb. (N. Y.) 256; *Prather v. New Orleans*, 24 La. Ann. 41; *Pontchartrain R. Co. v. New Orleans*, 27 La. Ann. 162; *Peters v. Mayor etc. of N. Y.*, 8 Hun (N. Y.) 405; *People v. Green*, 5 Thomp. & C. (N. Y.) 376; *Howell v. Buffalo*, 15 N. Y. 512. But see *Condict v. Jersey City*, 46 N. J. L. 157.

Water commissioners of a city are the agents of a city in such a sense as to render it liable for their negligence, although they were selected by the governor and senate. *Bailey v. Mayor etc. of N. Y.*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Clark v. Mayor etc. of N. Y.*, 3 Barb. (N. Y.) 290; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434.

A city is liable for an injury caused by the negligence of its servants in laying its own gas pipes. *Scott v. Mayor*, 1 H. & N. 59.

A city is presumably responsible for acts of highway commissioners who are declared by statute to be always subject to the orders of the city council, as it is for acts of city officers. *Inman v. Tripp*, 11 R. I. 520; 23 Am. Rep. 520.

All persons aggrieved by the unauthorized acts and omissions of the public administrator have the same remedy against the city that they would have against an executor. They may sue the city directly, and need not seek an accounting in the surrogate's court. *Glover v. Mayor etc. of N. Y.*, 7 Hun (N. Y.) 232; and see *Matthews v. Mayor etc. of N. Y.*, 1 Sandf. (N. Y.) 132.

If a city lets rooms in a public building with the services of a janitor, it is responsible for a personal injury caused by his negligence in the care of the building to one lawfully there by invitation of the hirer. *Worden v. New Bedford*, 131 Mass. 23; 41 Am. Rep. 185.

The legislature has power to relieve a municipal corporation from liability for any nonfeasance or misfeasance of the city officers. *Gray v. Brooklyn*, 50 Barb. (N. Y.) 365.

officers or agents in its performance.¹ A municipal corporation, however, like an individual, is not liable for the negligence or wrongful acts of independent contractors, though engaged in the prosecution of its corporate or private affairs,² unless the necessary or probable effect of the work contracted for would be to injure others.³ In order to hold a municipal corporation liable for the acts of an officer, it must appear that he was its officer either generally or in respect to the particular wrong complained of and not an independent public officer,⁴ and that the act was

1. *New York etc. Lumber Co. v. Brooklyn*, 78 N. Y. 580; *Mayor etc. of Helena v. Thompson*, 29 Ark. 569; *McLaughlin v. Municipality No. Two.*, 5 La. Ann. 504; *Clayburgh v. Chicago*, 25 Ill. 535; 79 Am. Dec. 346; *Sexton v. St. Joseph*, 60 Mo. 153; *Mayor etc. of Albany v. Cunliff*, 2 N. Y. 165; *Lloyd v. Mayor etc. of N. Y.*, 5 N. Y. 369; 55 Am. Dec. 347; *McCullough v. Mayor etc. of Brooklyn*, 23 Wend. (N. Y.) 458; *Lacour v. Mayor etc. of N. Y.*, 3 Duer (N. Y.) 406; *Hickok v. Plattsburgh*, 15 Barb. (N. Y.) 427; *Conrad v. Ithaca*, 16 N. Y. 158; *Fitz Patrick v. Slocum*, 89 N. Y. 358; *Barton v. Syracuse*, 36 N. Y. 54; *Sterrett v. Houston*, 14 Tex. 153; *Richmond v. Long*, 17 Gratt. (Va.) 375; 94 Am. Dec. 461; *Sawyer v. Corse*, 17 Gratt. (Va.) 230; 99 Am. Dec. 49; *Walling v. Mayor etc.*, 5 La. Ann. 660.

A city is liable for the negligence of its common council, acting in a special capacity by virtue of an act of the legislature, as commissioners for the improvement of a canal. *New York etc. Lumber Co. v. Brooklyn*, 71 N. Y. 580.

Where officers of a village refuse to interfere for the protection of a taxpayer who is to sustain injury from an obstruction threatened by a trespasser, he may bring suit and make the officers co-defendants with the trespasser. *Overton v. Olean*, 37 Hun (N. Y.) 47.

Where the duty is imposed upon the officer instead of the corporation, however, the contrary rule obtains. *Maxmilian v. Mayor etc. of N. Y.*, 62 N. Y. 160; 20 Am. Rep. 196; *Gray v. Brooklyn*, 2 Abb. App. Dec. (N. Y.) 267; *Ham v. Mayor etc. of N. Y.*, 37 N. Y. Super. Ct. 458; *Martin v. Mayor etc. of Brooklyn*, 1 Hill (N. Y.) 545; *Sutton v. Board of Police*, 41 Miss. 236.

2. *Herrington v. Lansingburgh*, 36 Hun (N. Y.) 598; *Barry v. St. Louis*, 17 Mo. 121; *East St. Louis v. Giblin*, 3 Ill. App. 219; *Pritchard v. Keeper*, 53

Ill. 117; *Reed v. Allegheny*, 79 Pa. St. 300; *Kelley v. Mayor etc. of N. Y.*, 4 E. D. Smith (N. Y.) 291; *Pack v. Mayor etc. of N. Y.*, 8 N. Y. 222; *Painter v. Pittsburgh*, 46 Pa. St. 213. And see *Treadwell v. Mayor etc. of N. Y.*, 1 Daly (N. Y.) 123; *Kelly v. Mayor etc. of N. Y.*, 11 N. Y. 432; *McCarty v. Bauer*, 3 Kan. 237.

But a city contracting with parties to perform certain work, and retaining a supervisory control over it with power to dismiss persons employed by the contractors, is liable for damages caused by negligence of the contractors. *Chicago v. Joney*, 60 Ill. 383; *Chicago v. Dermody*, 61 Ill. 431.

A stipulation in a city's contract, that her engineer shall have power to direct changes in the time and manner of conducting the work, is not such a reservation of power as will make her liable for the injury occasioned by the negligence of the contractor. Nor is additional liability incurred by the city's taking a bond to indemnify her against any loss or damage resulting from a failure of the contractor to perform his duty. *Erie v. Caulkins*, 85 Pa. St. 247; 27 Am. Rep. 642.

3. See *Logansport v. Dick*, 70 Ind. 65; 36 Am. Rep. 166; *Sullivan v. Holyoke*, 135 Mass. 273; *Sewall v. St. Paul*, 20 Minn. 511; *Pearson v. Zahle*, 78 Ky. 170; *Broadwell v. Kansas City*, 75 Mo. 213; 42 Am. Rep. 406.

The fact that a municipal corporation employs an independent contractor to remove a nuisance does not prevent a party injured from recovering from the corporation damages occasioned by the continuance of the injury after the employment of such contractor, and until abated. *Vanderslice v. Philadelphia*, 103 Pa. St. 102.

4. *Dillon on Mun. Corp.*, § 974; and see *New York etc. Lumber Co. v. Brooklyn*, 71 N. Y. 580; *Tindley v. Salem*, 137 Mass. 171; 50 Am. Rep. 289; *McCaughey v. Tripp*, 12 R. I.

performed by such officer while in the legitimate exercise, either of some duty of a corporate nature devolving upon him by the authority of the corporation,¹ or of some absolute and mandatory corporate duty imposed upon the corporation by law,² and that it was not an act as to which discretionary powers of a public or legislative character, with authority to judge as to the emergency requiring their exercise, had been conferred upon him.³

449; *Nash v. New York*, 4 Sandf. (N. Y.) 1; *Cincinnati v. Cameron*, 33 Ohio St. 336; *O'Leary v. Board of Com'rs*, 79 Mich. 281; *Worley v. Columbia*, 88 Mo. 106.

Where a city is granted power by its charter to appoint an inspector of steam boilers within its limits, and to impose a penalty upon the maintaining of steam boilers not inspected, it is a public and not a private duty in the city to appoint an inspector, and it therefore cannot be held liable for damage resulting from the negligence of such inspector in performing his duties. *Mead v. New Haven*, 40 Conn. 72; 16 Am. Rep. 14.

A city, like a private corporation, is responsible for the act of its agents in borrowing money—that act involves no exercise of sovereign power. *De Voss v. Richmond*, 18 Gratt. (Va.) 338; 98 Am. Dec. 647.

Under the charter of Lowell, the board of aldermen is merely the agent of the city in constructing the sewers, and the city is liable for an injury occasioned by any negligence in the course of their construction, as here, on the part of workmen in blasting a ledge. *Murphy v. Lowell*, 124 Mass. 564.

Fellow Servants.—In *Turner v. Indianapolis*, 96 Ind. 51, it was held that the principle of the non-liability for injuries caused by the negligence of a fellow servant does not apply in favor of a municipal corporation. See also *Coots v. Detroit*, 75 Mich. 628; but see *McDermott v. Boston*, 133 Mass. 349; *Flynn v. Salem*, 134 Mass. 351; *Toledo v. Com.*, 41 Ohio St. 149.

1. See *Murphy v. Lowell*, 124 Mass. 564; *Hand v. Brookline*, 126 Mass. 324; *Thayer v. Boston*, 19 Pick. (Mass.) 511; 31 Am. Dec. 157; *Skinkle v. Covington*, 1 Bush (Ky.) 617; *Pittsburg v. Grier*, 22 Pa. St. 54; *Moulton v. Scarborough*, 71 Me. 267; 36 Am. Rep. 308; *Fennimore v. New Orleans*, 20 La. Ann. 124; *Henly v. Mayor*, 2 Cl. & F. 331; *Lee v. Sandy Hill*, 40 N. Y. 442; *Small v. Danville*, 51 Me. 359.

But see *Alcorn v. Philadelphia*, 5 Phila. (Pa.) 130; *Alcorn v. Philadelphia*, 44 Pa. St. 348.

A certain town had never voted to accept the provisions of the statutes relating to road commissioners. *Held*, notwithstanding, that persons elected to the office were road commissioners *de facto*, so that the town was not liable for a trespass committed by them in the performance of their official duties. *Clark v. Easton*, 146 Mass. 43.

It is no defense to a suit against the city, by a laborer for his wages, that the city officer by whom the laborer was hired disobeyed the lawful orders of the city government by which he was directed to suspend the work. *Chicago v. Roth*, 26 Ill. 456.

2. See *Sewall v. St. Paul*, 20 Minn. 511; *Kobs v. Minneapolis*, 22 Minn. 159; *Hewison v. New Haven*, 37 Conn. 475; 9 Am. Rep. 342; *Ready v. Tuscaloosa*, 6 Ala. 327; *Hilliard v. Richardson*, 3 Gray (Mass.) 349; 63 Am. Dec. 743; *Baker v. Boston*, 12 Pick. (Mass.) 184; 22 Am. Dec. 421; *Sheldon v. Kalamazoo*, 25 Mich. 383; *Eastman v. Meredith*, 36 N. H. 295; 72 Am. Dec. 302; *Chicago v. Joney*, 60 Ill. 383; *Chicago v. Robbins*, 2 Black (U. S.) 418; *Cowley v. Sunderland*, 6 H. & N. 565; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Altenuis v. Mayor etc. of N. Y.*, 6 Duer (N. Y.) 446; *Ellis v. Mayor etc. of N. Y.*, 1 Daly (N. Y.) 102.

A city is liable for the negligence of its agents in the performance of a public duty, if they are specially employed by the city for the particular work, and are not acting as public officers. *Mulcairns v. Janesville*, 67 Wis. 24.

The assumption by the corporation of the defense of one of its officers will not render it liable for his default. *Rounds v. Bangor*, 46 Me. 541; *Buttrick v. Lowell*, 1 Allen (Mass.) 172; 79 Am. Dec. 721.

3. *Carroll v. St. Louis*, 4 Mo. App. 191; *Wilson v. Mayor etc. of N. Y.*, 1 Den. (N. Y.) 595; 43 Am. Dec. 71; *Lacour v. Mayor etc. of N. Y.*, 3 Duer

e. LIABILITY OF THE OFFICER TO THE CORPORATION.—The usual rule of the non-liability to actions for damages in favor of the public, of a public officer, applies to public officers elected pursuant to statute by a municipal corporation;¹ but this principle, it is believed, does not apply where the corporation is injured by the negligence of its own corporate officers,² though even in such case, in the absence of statutory regulation, a recovery can be had for want of fidelity and integrity only, and not for honest mistakes.³

f. REMOVALS FROM OFFICE.—The power to remove an officer of a municipal corporation is incident to the corporation at large, and unless delegated to a select body or part, it must be exercised by the whole corporation at a duly convened corporate assembly;⁴ but the power to try all impeachments of city officers may be and usually is conferred upon some particular municipal officer or board, and if the judgment extends only to removal and disqualification to hold corporate office, such a delegation of power is not unconstitutional, as authorizing the exercise of judicial

(N. Y.) 406; *Cole v. Medina*, 27 Barb. (N. Y.) 218; *Dewey v. Detroit*, 15 Mich. 307; *White v. Yazoo City*, 27 Miss. 357; *Griffin v. Mayor etc. of N. Y.*, 9 N. Y. 456; 61 Am. Dec. 700; *Hill v. Charlotte*, 72 N. Car. 55; 21 Am. Rep. 451; *Western College v. Cleveland*, 12 Ohio St. 375; *Campbell v. City Council*, 53 Ala. 527; 25 Am. Rep. 656; *Davis v. City Council*, 51 Ala. 139; *Carr v. Northern Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342; *Grant v. Erie*, 69 Pa. St. 420; 8 Am. Rep. 272; *Kelly v. Milwaukee*, 18 Wis. 83; *Alton v. Hope*, 68 Ill. 167; *Joliet v. Verley*, 35 Ill. 58; 85 Am. Dec. 342; *Goodrich v. Chicago*, 20 Ill. 445; *Bennett v. New Orleans*, 14 La. Ann. 120; *Lawrence v. Freeland*, 55 Hun (N. Y.) 610; *Richmond v. Long*, 72 Gratt. (Va.) 375; 94 Am. Dec. 461.

The city ordinance that authorizes firemasters, or the intendant, to pull down such houses, blow up such buildings, etc., as may be judged necessary in time of fire, gives these officers the right to judge whether it is necessary so to do. *White v. City Council*, 2 Hill (N. Y.) 572.

An action cannot be maintained against a city because of the fall of a dangerous wall left standing after a fire at a point remote from the public street, although the city may have possessed the power to compel the removal of the wall. *Cain v. Syracuse*, 95 N. Y. 83.

1. See *Sherburne Parish v. Fiske*, 8 Cush. (Mass.) 264; *Hancock v. Haz-*

ard, 12 Cush. (Mass.) 112; 59 Am. Dec. 171; *White v. Phillipson*, 10 Met. (Mass.) 108; *Lincoln v. Chapin*, 132 Mass. 470; *Trafton v. Alfred*, 15 Me. 258; *Kendall v. Stokes*, 3 How. (U. S.) 87; *Wilson v. Mayor etc. of N. Y.*, 1 Den (N. Y.) 595; 43 Am. Dec. 719; *Com. v. Genther*, 17 S. & R. (Pa.) 135; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46. And see, *supra*, this title, *Duties of Public Officers; Liabilities of Public Officers*.

2. *Dillon on Mun. Corp.*, § 236.

3. See *Palmer v. Carroll*, 24 N. H. 314; *Hedges v. Dam*, 72 Cal. 520; *People v. Lewis*, 7 Johns. (N. Y.) 73; *Seaman v. Patten*, 2 Cal. (N. Y.) 312; *Rollins v. Board of Com'rs*, 15 Colo. 103. And see cases above cited.

But in *Blair v. Lantry*, 21 Neb. 247, where a mayor and council drew an order on a fund in the absence of an appropriation, such action, under the law being illegal, it was held that, notwithstanding their good faith, they were liable to the city for the amount thus drawn.

4. *State v. Jersey City*, 1 Dutch. (N. J.) 536; *State v. Chamber of Commerce*, 20 Wis. 63; *Rex v. Richardson*, 1 Burr. 539; *Lord Bruce's Case*, 2 Stra. 819; *Rex v. Taylor*, 3 Salk. 231; *Rex v. Feversham*, 8 T. R. 356; *Fane's Case*, Doug. 153.

The rule now is, with relation to municipal corporations as organized in this country, that the governing body has the right as such, as a common law

powers by a legislative or municipal body.¹ The expulsion of a municipal officer does not disqualify him for re-election to the same office unless so provided by the charter,² and it has been held that an officer whose office was created under the implied power conferred by necessity can be removed only for cause, after due notice and opportunity to defend himself.³ Where the power to remove an officer is conferred by charter or statute, it must be strictly construed and its provisions accurately followed.⁴

incident of the powers of the municipality, to try its officers upon charges of official misconduct, and upon conviction to remove them. *Richards v. Clarksburg*, 30 W. Va. 491; *Willard's Appeal*, 4 R. I. 595; and see *Ellison v. Raleigh*, 89 N. Car. 125.

1. *State v. Ramos*, 10 La. Ann. 420; and see *People v. Bearfield*, 35 Barb. (N.Y.) 254; *Langdon v. Mayor etc. of N. Y.*, 27 Hun (N.Y.) 288; 63 How. Pr. (N.Y.) 134.

Under a charter allowing the mayor and council to appoint policemen to serve during their pleasure, their judicial action in discharging one for alleged malfeasance is conclusive on him; otherwise, if they merely act therein ministerially. *Oliver v. Americus City Council*, 69 Ga. 165.

The power of appointment of an officer, conferred by the legislature upon a city council, does not carry with it the power of removal, or to abridge the term of office. *Caulfield v. State*, 1 S. Car. 461.

See generally as to removals under particular charter and statutory provisions, *Mayor etc. of Mobile v. Squires*, 49 Ala. 339; *Shaw v. Mayor etc. of Macon*, 19 Ga. 468; *Vason v. Augusta*, 38 Ga. 542; *Demarest v. Mayor etc. of N. Y.*, 42 Barb. (N. Y.) 186; *People v. French*, 12 Hun (N.Y.) 254; *People v. Mayor etc. of N. Y.*, 16 Hun (N.Y.) 309; *People v. Fire Comr's*, 28 Hun (N.Y.) 495; *People v. Starks*, 33 Hun (N.Y.) 384; *People v. Board of Fire Comr's*, 43 Hun (N.Y.) 554; *In re Nichols*, 6 Abb. N. Cas. (N. Y.) 474; 57 How. Pr. (N.Y.) 395; *People v. Public Park Comr's*, 60 How. Pr. (N.Y.) 130; *In re Emmet*, 65 How. Pr. (N.Y.) 266; *People v. Board of Fire Comr's*, 72 N. Y. 445; *People v. Campbell*, 82 N. Y. 247; *People v. Mayor of N. Y.*, 82 N. Y. 491; *People v. Brooklyn Fire Department Comr's*, 103 N. Y. 370; *People v. Campbell*, 50

N. Y. Super. Ct. 82; *State v. Newark*, 46 N. J. L. 140.

2. *State v. Jersey City*, 25 N. J. L. 536.

3. *Willard's Appeal*, 4 R. I. 595.

The common council of a *West Virginia* town or village possesses the common law power of removing its mayor from office for cause. *Richards v. Clarksburg*, 30 W. Va. 491.

In exercising his power of removing heads of departments for cause, the mayor acts judicially, and a writ of prohibition will lie against him, if he exceeds his jurisdiction. *People v. Cooper*, 57 How. Pr. (N.Y.) 416.

The mayor of Cincinnati has no power to remove from office the superintendent of police of that city, although the board which appointed him have been removed from office. *State v. Hudson*, 44 Ohio St. 137.

4. *State v. Vincennes University*, 5 Ind. 77; *State v. Lingo*, 26 Mo. 496; *State v. Bryce*, 7 Ohio, pt. 2, 82; *State v. Chamber of Commerce*, 20 Wis. 63; *Reg. v. Sutton*, 10 Mod. 76; *Reg. v. Ricketts*, 7 Ad. & El. 966; 34 E. C. L. 263. And see *Madison v. Korbly*, 32 Ind. 74; *State v. Jersey City*, 25 N. J. L. 536; *Com. v. Sutherland*, 3 S. & R. (Pa.) 145; *Com. v. Shaver*, 3 W. & S. (Pa.) 338; *State v. McGarry*, 21 Wis. 496.

The charter of a city having provided for a board of police commissioners, and vested in them the power of removing the chief of police, only giving to the mayor the power of suspending the said officer for a short time, if the mayor removes the officer from his office he exceeds his power, and is responsible to the officer in a civil action for damages. *Burch v. Hardwicke*, 30 Gratt. (Va.) 24; 32 Am. Rep. 640.

The fact that a city of one class becomes a city of another class does not vacate the office of police judge, the statute not so providing. *State v. White*, 20 Neb. 37.

6. Court Officers.—See also COURTS.¹

a. CLERKS OF COURTS.²—The clerk is the amanuensis of the court, and must act by its authority in order to give validity to his proceedings.³ Except as specially provided for by law, a clerk

1. Vol. 4, p. 447.

2. Under the statutes of *Pennsylvania*, the clerks of the county and district courts, registers of wills and recorders of deeds, are not municipal but State officers, placed by the constitution of the State directly and exclusively under the control of the legislature. *Smith v. Philadelphia*, 5 Phila. (Pa.) 1.

3. Mayor etc. of *Baltimore v. Baltimore Co.*, 19 Md. 554; and see *Kearney's Case*, 13 Abb. Pr. (N. Y.) 459; 22 How. Pr. (N. Y.) 309.

Clerks, except in cases specially provided for by law, are authorized to administer oaths only in open court. *State v. Isaac*, 3 La. Ann. 359; *Green-vault v. Farmers' etc. Bank*, 2 Doug. (Mich.) 498.

The authority of a clerk of the court, in *Virginia*, to administer an oath out of court, only extends to cases in which, without regard to circumstances, the making of the affidavit is a necessary prerequisite to the performance of the official act which the clerk is called upon to perform. *Com. v. Williamson*, 4 Gratt. (Va.) 554.

Appointment or Election.—While in the absence of statutory provision the court would probably have power to appoint a clerk as a part of the machinery necessary to the exercise of its functions, their appointment or election has been generally provided for by statute, the provisions differing in different jurisdictions. See *Bonner v. State*, 7 Ga. 473; *Leeman v. Hinton*, 1 Duv. (Ky.) 37; *Ex parte Lehman*, 60 Miss. 967; *Ex parte Camden Co.*, T. U. P. Charlt. (Ga.) 191; *State v. White*, T. U. P. Charlt. (Ga.) 123; *Driscoll v. Jones* (S. Dak. 1890), 44 N. W. Rep. 726; *State v. Matthews*, 94 Mo. 117; *State v. Long*, 17 Neb. 502; *Harbeck v. Mayor etc. of N. Y.*, 10 Bosw. (N. Y.) 366; *Carolan v. McDonald*, 15 Tex. 327; *People v. Mobley*, 2 Ill. 215; *State v. Turk, Mart. & Y. (Tenn.)* 287; *Stevens v. Wyatt*, 16 B. Mon. (Ky.) 546; *State v. Cadle*, 2 Greene (Iowa) 400; *State v. Trull*, 2 Treadw. (S. Car.) 766; *Stonestreet v. Harrison*, 5 Litt. (Ky.) 161; *State v. Sims*, 18 S. Car. 460; *People v. Staton*, 73 N. Car. 546; 21 Am.

Rep. 479; *Reister v. Hemphill*, 2 S. Car. 325; *Com. v. Mather*, 121 Mass. 65.

A clerk of the court of common pleas in Ohio must be appointed by the act of the court in open court; and the appointment must be entered on the minutes. But an order appointing a clerk may be rescinded before his bond is accepted, the oath administered etc. *State v. Hamilton*, 7 Ohio 143.

The appointment of a clerk in vacation must be confirmed by an order of the court at its next succeeding term, or the appointment will then cease to be of effect. *State v. Chrisman*, 2 Ind. 126.

Compensation.—Clerks of the court are usually compensated for their services by fees allowed by law for each designated act or service, though in some instances they are paid by a fixed salary. As to the amount of compensation allowed them for the various duties they are required to perform and the manner of its payment and how its collection can be enforced, see generally *Branch Bank v. Thompson*, 9 Ala. 295; *McCord v. Boyd*, 12 Ala. 760; *Parker v. McGaha*, 13 Ala. 344; *Foster v. Blount*, 18 Ala. 687; *Com'rs Court v. Goldthwaite*, 35 Ala. 704; *South & North Ala. R. Co. v. Bradley*, 84 Ala. 468; *Desha Co. v. Jones*, 51 Ark. 524; *Dobbins v. Yuba Co.*, 5 Cal. 414; *Bolander v. Gentry*, 36 Cal. 127; 95 Am. Dec. 162; *Burke v. Edgar*, 67 Cal 182; *Ball v. Duncan*, 30 Ga. 938; *Rutherford v. Jones*, 12 Ga. 618; *Neilsen v. Loudon*, 83 Ga. 196; *Carpenter v. People*, 8 Ill. 147; *Edgar Co. v. Mayo*, 8 Ill. 82; *Longwith v. Butler*, 8 Ill. 74; *Hoard v. Bulkley*, 8 Ill. 154; *Kerp v. Fuchs*, 43 Ill. 492; *Mason v. Holcomb*, 73 Ill. 611; *Cullom v. Dolloff*, 94 Ill. 330; *Daggett v. Ford Co.*, 99 Ill. 334; *People v. Gross*, 101 Ill. 343; *People v. Toomey*, 122 Ill. 308; *Cook Co. v. Sennot*, 125 Ill. 423; *Wabash Co. v. Sivey*, 16 Ind. 425; *Ex parte McKee*, 28 Ind. 100; *Hancock Co. v. Mitchell*, 93 Ind. 307; *Taylor v. Washington Co.*, 110 Ind. 462; *Ex parte Harrison*, 112 Ind. 329; *Culbertson v. Jefferson Co.*, 1 Greene (Iowa) 416; *Dickerson v. Shelby*, 2 Greene (Iowa) 460; *Sprout v. Kelly*, 37 Iowa 44; *Peet v. White*, 43

of the court cannot exercise judicial powers,¹ though judicial

- Iowa 400; Washington Co. v. Jones, 45 Iowa 260; Moore v. Mahaska Co., 61 Iowa 177; Packer v. Corlett, 71 Iowa 249; Palo Alto Co. v. Burlingame, 71 Iowa 201; Leavenworth Co. v. Keller, 6 Kan. 510; Bedilion v. Cowley Co., 27 Kan. 592; Com. v. Rodes, 6 B. Mon. (Ky.) 171; Morrison v. Rodes, 7 T. B. Mon. (Ky.) 20; Com. v. Rodes, 1 Dana (Ky.) 595; Bates v. Foree, 4 Bush (Ky.) 430; Fitzpatrick v. New Orleans, 27 La. Ann. 457; Bradford v. Jones, 1 Md. 351; Bowie v. Maryland etc. College, 27 Md. 268; State v. Carman, 27 Md. 706; Gardner v. Gardner, 2 Gray (Mass.) 434; Lord v. Essex Co., 98 Mass. 484; Mapes v. Olmsted Co., 11 Minn. 367; Armstrong v. Ramsey Co., 25 Minn. 344; Church v. St. Paul etc. R. Co., 33 Minn. 410; Wilcox v. Sibley Co., 34 Minn. 214; Davenport v. Hennepin Co., 40 Minn. 335; Buckingham v. Smith, 23 Miss. 521; Burt v. Harwood, 39 Miss. 756; Myers v. Marshall Co., 55 Miss. 344; Patty v. Sparkman, 58 Miss. 76; *Ex parte* Thomas, 59 Miss. 522; Harris v. Buffington, 28 Mo. 53; Kretschmar v. St. Louis, 29 Mo. 124; State v. Auditor, 32 Mo. 222; *In re* Lewis, 52 Mo. 550; Thornton v. Thomas, 65 Mo. 272; Allen v. Cowan, 96 Mo. 193; Hubbard v. Texas Co., 101 Mo. 210; Ford v. Kansas City etc. R. Co., 29 Mo. App. 616; State v. Silver, 9 Neb. 85; Washoe Co. v. Humboldt Co., 14 Nev. 123; Wilson Collegiate Inst. v. Van Horne, 3 Den. (N. Y.) 171; *In re* Post, 3 Edw. Ch. (N. Y.) 365; Mallory v. Cortland Co., 2 Cow. (N. Y.) 531; Doubleday v. Broome Co., 2 Cow. (N. Y.) 533; Bright v. Chennango, 18 Johns. (N. Y.) 242; Chambers v. Appleton, 47 N. Y. Super. Ct. 524; State v. Gwyn, Phill. (N. Car.) 445; Martin v. Chasteen, 75 N. Car. 96; State v. McConnell, 28 Ohio St. 589; McDonald v. Crusen, 2 Oregon 258; Jackson v. Siglin, 10 Oregon 93; Cohen v. Com., 6 Pa. St. 111; Hutchinson v. Com., 6 Pa. St. 124; Com. v. Hutchinson, 10 Pa. St. 466; Com. v. Steel, 8 Pa. St. 128; Steel v. Com., 18 Pa. St. 451; Cone v. Donaldson, 47 Pa. St. 363; Lyon v. McManus, 4 Binn. (Pa.) 167; Lyon v. Adams, 4 S. & R. (Pa.) 443; Ramsey v. Alexander, 5 S. & R. (Pa.) 338; Thomas v. Philadelphia Co., 8 S. & R. (Pa.) 64; Moore v. Porter, 13 S. & R. (Pa.) 100; Baldwin v. Cash, 7 W. & S. (Pa.) 425; Cash v. Baldwin, 7 W. & S. (Pa.) 426; Pairo v. American Ins. Co., 8 W. & S. (Pa.) 374; Payran v. M'Williams, 9 W. & S. (Pa.) 154; Hyams v. Boyce, 1 McMull. (S. Car.) 95; Richland Co. v. Miller, 16 S. Car. 244; Carren v. Breed, 2 Coldw. (Tenn.) 465; Sible v. State, 3 Heisk. (Tenn.) 137; State v. Self, 6 Baxt. (Tenn.) 211; Avery v. State, 7 Baxt. (Tenn.) 328; Perkins v. State, 9 Baxt. (Tenn.) 1; Head v. Barry, 1 Lea (Tenn.) 753; Lee v. Dameron, 1 Lea (Tenn.) 131; State v. Gaines, 4 Lea (Tenn.) 352; State v. Harkreader, 12 Lea (Tenn.) 456; Baxter v. Comptroller, 14 Lea (Tenn.) 122; State v. Henderson, 15 Lea (Tenn.) 274; Rice v. Turner, 1 Yerg. (Tenn.) 447; Dibrell v. Eastland, 3 Yerg. (Tenn.) 533; Ewing v. Lusk, 4 Yerg. (Tenn.) 459; Lucky v. Watkins, 8 Yerg. (Tenn.) 191; Stewart v. Crosby, 15 Tex. 513; State v. Norrell, 53 Tex. 427; Hallman v. Campbell, 57 Tex. 54; Hanrick v. Ake, 75 Tex. 142; Henry v. Tilson, 17 Vt. 479; Craigen v. Lobb, 12 Leigh (Va.) 627; Allen v. Com., 6 Gratt. (Va.) 529; Johnson v. MacCoy, 32 W. Va. 552; Hitchcock v. Merrick, 15 Wis. 522; Amy v. Shelby Co., 1 Flip. (U. S.) 104; Leach v. Kay, 2 Flip. (U. S.) 590; Cavender v. Cavender, 3 McCrary (U. S.) 383; *In re* Vermeule, 10 Ben. (U. S.) 1; U. S. v. Bassett, 2 Story (U. S.) 389; *In re* Goodrich, 4 Dill. (U. S.) 230; *Ex parte* Lee, 4 Cranch (C. C.) 197; *Ex parte* Prescott, 2 Gall. (U. S.) 146; Blair v. Chicago etc. R. Co., 11 Biss. (U. S.) 320; *In re* Woodbury, 17 Blatchf. (U. S.) 517; Clerk's Fees, Taney (U. S.) 453; *Ex parte* Plitt, 2 Wall Jr. (C. C.) 453; U. S. v. Hill, 120 U. S. 169; U. S. v. Averill, 130 U. S. 335; Blake v. Hawkins, 19 Fed. Rep. 204; U. S. v. Hill, 25 Fed. Rep. 375; Fagan v. Cullen, 28 Fed. Rep. 843; Blain v. Home Ins. Co., 30 Fed. Rep. 667; *In re* Moy Chee Kee, 33 Fed. Rep. 377; Strong v. U. S., 34 Fed. Rep. 17; McKinistry v. U. S., 34 Fed. Rep. 211; Goodrich v. U. S., 42 Fed. Rep. 392; Morrison v. Bernards, 35 Fed. Rep. 400; Pleasants v. U. S., 35 Fed. Rep. 270; Thomas v. Chicago etc. R. Co., 37 Fed. Rep. 548; Erwin v. U. S., 37 Fed. Rep. 470; Jones v. U. S., 39 Fed. Rep. 410; McDermott v. U. S., 40 Fed. Rep. 217; Hill v. U. S., 40 Fed. Rep. 441; Van Duzee v. U. S., 41 Fed. Rep. 571.
1. Frerson v. Harris, 5 Coldw.

functions, as, for instance, the power to tax costs in actions pending in the court of which he is an officer,¹ or the assessment of damages in case of default in such actions,² or to issue warrants for the arrest of persons who have been indicted,³ are in many instances and in many States conferred upon him by statutory enactment.⁴ The clerk is the legal custodian of the records and files of the court⁵ as well as of money or property coming into the hands of the court through the exercise of its judicial func-

(Tenn.) 146; 94 Am. Dec. 220; Succession of Tanner, 22 La. Ann. 91; Staley v. Sellers, 65 N. Car. 467; Bates v. Fayetteville Bank, 65 N. Car. 81; Johnson v. Com., 80 Ky. 377; Mason v. Fuller, 12 La. Ann. 68; Casby v. Thompson, 42 Mo. 133; Neda v. Fontenot, 2 La. Ann. 782; and see Brittain v. Mull, 94 N. Car. 595; Jones v. Desern, 94 N. Car. 32; People v. Loewy, 29 Cal. 264; Mason v. Hall, 12 La. Ann. 94; People v. Colleton, 59 Mich. 573; State v. Green, 34 La. Ann. 1027; Lyne v. Bank of Ky., 5 J. J. Marsh. (Ky.) 558.

The clerk has full power to grant letters of administration. The action of the judge is only required where opposition is made to the appointment of the applicant. Davie v. Stevens, 10 La. Ann. 496.

A court cannot delegate its judicial functions to its clerk, so that he may set aside a judgment on performance of a condition. Strickland v. Cox, 102 N. Car. 411.

The clerk has not, and the court cannot confer upon him authority to hear evidence, *ex parte* or otherwise, and try the question whether a demurrer or answer has been served upon the opposite attorney. The court alone can try such a question. Oliphant v. Whitney, 34 Cal. 25.

1. See Officers of Court v. Fisk, 7 How. (Miss.) 403; Williams v. Jones, 2 Hill (S. Car.) 555; Ellison v. Stevenson, 6 T. B. Mon. (Ky.) 271. But see Hair v. Logan, 10 Ala. 431.

He may revise and amend the taxation of costs, without an order of court, at any time before the proceedings are recorded; after that his power ceases, and the taxation can be amended only under an order of court. Williams v. Jones, 2 Hill (S. Car.) 555.

A clerk has no authority to insert, in a bill of fees, a charge for sheriffs' commissions, when the sheriff himself makes no such charge in his return. Bryans v. Buckmaster, 1 Ill. 408.

2. See Prentiss v. Spalding, 2 Dougl. (Mich.) 84.

But he has no authority to enter judgment for a sum other than that called for by the verdict and the statute. Robostelli v. New York etc. R. Co., 34 Fed. Rep. 507.

The functions exercised by a clerk in entering judgment upon default for the amount claimed, under a statute authorizing him so to enter it, in certain cases, are ministerial, not judicial functions. Graydon v. Thomas, 3 Oregon 250.

3. In re Durant, 60 Vt. 176; see Yonge v. Broxson, 23 Ala. 684; Jacobs v. Measures, 13 Gray (Mass.) 74; Smith v. Morse, 2 Cal. 524.

The clerk of the city court of Charleston has authority to issue commissions for the examination of witnesses. Haviland v. Simons, 4 Rich. (S. Car.) 338; and see Goody v. Corlies, 1 Strobb. (S. Car.) 199.

4. See Gerald v. Gerald, 5 La. Ann. 245; Spencer v. Credle, 102 N. Car. 68; Durham etc. R. Co. v. Richmond etc. R. Co., 106 N. Car. 16; State v. Smith, 1 Oregon 250; Gerald v. Gerald, 5 La. Ann. 245.

A deputy prothonotary cannot appoint referees under the Delaware act of assembly to bind lands. Carlisle v. Carlisle, 2 Harr. (Del.) 318.

5. Cameron v. Savage, 40 Ill. 76; Anonymous, 40 Ill. 77. And see Lucky v. Watkins, 8 Yerg. (Tenn.) 191; King v. Penn, 43 Ohio St. 57; Wooster v. McGee, 1 Tex. 17.

The office of clerk is not necessary to the existence of a court. The court may keep its own minutes and make its own adjournments without a clerk. Mealing v. Pace, 14 Ga. 596.

No paper is "filed" unless it has the proper indorsement of a clerk. Merely placing it in the court-papers is no "filing." Amy v. Shelby Co., 1 Flip. (U. S.) 104; and see Baker v. Snyder, 58 Cal. 617.

tions;¹ and he is required to keep the minutes of the court,² make its adjournments,³ and it may be generally stated that it is his duty to relieve the court of all its clerical or mechanical labor not calling for the exercise of its judicial discretion, and judgment,⁴ and besides the powers and duties originally inherent in the office, other and additional functions have been conferred by

1. See *Mazygk v. M'Ewen*, 2 Bailey (S. Car.) 28; *Murray v. Charles*, 5 Ala. 678; *Elliott v. Jones*, 47 Iowa 124; *State v. Watson*, 38 Ark. 96; *Davis v. Bell*, 57 Miss. 320; *Waters v. Carroll*, 9 Verg. (Tenn.) 102; *Annsworth v. Scotten*, 29 Ind. 495; *State v. Connelly*, 104 N. Car. 794.

A clerk of a court has no right to employ money deposited in his office for his own purposes. *Mott v. Pettit*, 1 N. J. L. 298; *Prewett v. Marsh*, 1 Stew. & P. (Ala.) 17; 21 Am. Dec. 645.

A fund in *custodia legis*, controlled by, and subject to the orders and decrees of the chancery court, cannot be paid out by the clerk and master to any one, except in obedience to the order of the court; and a party cannot resort to a different forum and recover of the clerk and master of the chancery court and sureties, the money, and thus oust the chancery court of its jurisdiction of the same. *Craig v. Governor*, 3 Coldw. (Tenn.) 244; *In re Kellinger*, 9 Paige (N. Y.) 62; *Farmers' L. & T. Co. v. Walworth*, 1 N. Y. 433; *Rountree v. Barnett*, 69 N. Car. 73.

Clerks of circuit courts are not authorized by law to receive money upon judgments, executions, or replevin bonds of which the law makes them custodians; and a practice of that kind, though general, would confer no right upon such officials to assume such agency. A payment to a clerk of such demands, unless authorized by the party, or especially directed by a court having control of the fund, furnishes no protection to the party making the payment. *Durant v. Gabby*, 2 Metc. (Ky.) 91; *Chinn v. Mitchell*, 2 Metc. (Ky.) 92.

2. See *Boardman v. Paige*, 11 N. H. 431; *Smith v. Cumins*, 52 Iowa 143; *Day v. Graham*, 6 Ill. 436; *Ellis v. Bristol Co.*, 2 Gray (Mass.) 370; *Mealing v. Pace*, 14 Ga. 596; *Crowell v. Deen*, 21 Ill. App. 363; *Dibrell v. Eastland*, 3 Verg. (Tenn.) 533.

A clerk commits a breach of his bond, if he fails to insert in a transcript of a record anything properly belong-

ing to it. *Com. v. Chambers*, 1 Dana (Ky.) 12.

But a clerk of the circuit court has no authority to enter, on his own motion, any decree not warranted by the entries upon the judge's calendar. *Smith v. Cumins*, 52 Iowa 143.

The record which the clerk is required to make of all the proceedings in a suit, is the final record of the cause, answering to the judgment roll of the common law, and is the only legal evidence of the judgment, to be established by the production of the record itself, an examined copy, or a copy attested by the clerk. *Ansley v. Carlos*, 9 Ala. 973.

The clerk is not bound to enter any rule ordered by the court in a case, however, unless the attorney requests him to do so, and furnishes him with a draft of the rule, or a sufficient memorandum to enable him to enter it. *Thompson v. Pippitt*, 18 N. J. L. 176; and see *State v. Wood*, 3 Ired. (N. Car.) 23; *Levin v. Hanley*, *Wright (Ohio)* 588.

3. See *Mealing v. Pace*, 14 Ga. 596. In *Massachusetts* the clerk in vacation may strike out an entry that judgment was entered by consent, and may continue the case under the general rule, to be dealt with at subsequent terms like other continued cases. *Cowley v. McLaughlin*, 137 Mass. 221.

Under *Georgia Code*, § 3242, it is only where an unavoidable accident causes the absence of the judge that the clerk of the superior court or his deputy can adjourn an adjourned term from day to day for two days. *Norrie v. McCullough*, 74 Ga. 602.

4. See *Hodges v. Holeman*, 5 Dana (Ky.) 136; *Spencer v. Credle*, 102 N. Car. 68; *Roberts v. People*, 9 Colo. 458; *Morrison v. Silverburgh*, 13 Ill. 551; *The Salomoni*, 29 Fed. Rep. 534; and see also cases cited *supra*, this title, *Compensation*.

The office of the clerk of a county court is essentially ministerial in its character. So far as the entry of the orders of the court is concerned, he is without discretion, and is not guilty of

statute differing largely in their nature in almost if not every jurisdiction in which they were enacted.¹

It is a duty of the clerk of the court, the performance of which may be enforced by *mandamus*,² and for a breach of which he is liable in an action for damages to the party injured,³ to permit all persons having an interest in particular public records in his office to inspect and copy them at reasonable times and subject to reasonable regulations.⁴ Mere idle curiosity, however, is

a misdemeanor in making such entries, although the orders of the persons assuming to be the justices of said court were not authorized by law. *State v. Bowen*, 41 Mo. 217.

The entry of a default by the clerk in a case authorized by the statute, is a ministerial act, and the disqualification of the judge of his court to try or render judgment in the case does not disqualify the clerk from performing it; but under *California Stat.* 1864, 399, in a tax collection case, the entry is a work of supererogation. *People v. De Carrillo*, 35 Cal. 37.

A clerk may issue a warrant of attachment in an action wherein he is plaintiff, on making the necessary affidavit. His act is a ministerial one only. *Evans v. Etheridge*, 96 N. Car. 42.

1. As to such powers and duties see generally *Stevenson v. O'Hara*, 27 Ala. 362; *Clark Co. v. Scott*, 21 Ark. 467; *Smith v. Morse*, 2 Cal. 524; *People v. Thurber*, 13 Ill. 554; *Hughes v. Streeter*, 24 Ill. 647; 76 Am. Dec. 777; *Seymour v. Haines*, 104 Ill. 557; *Carpenter v. Montgomery*, 7 Blackf. (Ind.) 415; *Anderson v. Sutton*, 2 Duv. (Ky.) 480; *Com. v. Craig*, 6 T. B. Mon. (Ky.) 45; *Hockaday v. Com.*, 4 T. B. Mon. (Ky.) 13; *Laha v. Daly*, 1 Bush (Ky.) 221; *Vance v. Vanarsdale*, 1 Bush (Ky.) 504; *Lyne v. Bank of Ky.*, 5 J. J. Marsh. (Ky.) 558; *Neda v. Fontenot*, 2 La. Ann. 782; *State v. Walton*, 24 La. Ann. 115; *Rodemer v. Detmold*, 9 Gill (Md.) 249; *Hammond v. Norris*, 2 Har. & J. (Md.) 132; *Washington Co. v. Nesbitt*, 6 Md. 468; *State v. Jones*, 8 Md. 88; *Atwell v. Grant*, 11 Md. 101; *Magruder v. Tuck*, 25 Md. 217; *State v. Barrett*, 40 Minn. 65; *Officers of Court v. Fisk*, 7 How. (Miss.) 403; *Ayres v. Taylor*, 25 Miss. 200; *Coonce v. Munday*, 3 Mo. 373; *State v. Maccauig*, 8 Neb. 215; *In re Clerk's Fees*, 25 Hun (N. Y.) 593; *Rhodes v. Buie*, 2 Dev. (N. Car.) 524; *Fite v. Lander*, 7 Jones (N. Car.) 247; *Maxwell v. Blair*, 95 N. Car. 317;

Topping v. Windley, 99 N. Car. 4; *Spencer v. Credle*, 102 N. Car. 68; *Sharpe v. Connelly*, 105 N. Car. 87; *State v. Merry*, 34 Ohio St. 137; *Stephens v. Downey*, 53 Pa. St. 424; *Haviland v. Simons*, 4 Rich. (S. Car.) 338; *Gooday v. Corlies*, 1 Strobh. (S. Car.) 199; *State v. Jones*, 5 Strobh. (S. Car.) 155; *Barcroft v. Snodgrass*, 1 Coldw. (Tenn.) 430; *State v. Hamilton*, 11 Humph. (Tenn.) 47; *State v. Jones*, 2 Lea (Tenn.) 716; *State v. Cole*, 6 Lea (Tenn.) 492; *State v. Brady*, 1 Swan (Tenn.) 36; *Carlee v. Smith*, 8 Tex. 134; *Smith v. Wilson*, 15 Tex. 132; *Com. v. Williamson*, 4 Gratt. (Va.) 554; *Jones v. U. S.*, 39 Fed. Rep. 410.

2. *Boylan v. Warren*, 39 Kan. 301; 7 Am. St. Rep. 551.

3. *Lum v. McCarty*, 39 N. J. L. 287; *Lyman v. Windsor*, 23 Vt. 575; *Lyman v. Edgerton*, 29 Vt. 305; 70 Am. Dec. 415.

4. See *Bun v. People*, 7 Colo. 202; *Buck v. Collins*, 51 Ga. 395; 21 Am. Rep. 236; *Boylan v. Warren*, 39 Kan. 301; 7 Am. St. Rep. 551; *In re McLean*, 8 Rep. 813; *State v. Rachac*, 37 Minn. 372; *State v. Hoblitzelle*, 85 Mo. 624; *State v. Williams*, 96 Mo. 13; *People v. Richards*, 99 N. Y. 620; *Lum v. McCarty*, 39 N. J. L. 287; *Fleming v. Hudson Co.*, 30 N. J. L. 280; *Hanson v. Eichstaedt*, 69 Wis. 538.

The injury for which damages can be recovered must have been the proximate result of the refusal to permit the records to be inspected. *Lyman v. Edgerton*, 29 Vt. 305; 70 Am. Dec. 415.

Those who are in the business of making and furnishing abstracts of titles to others for compensation, are entitled to the right of inspection of public records for that purpose, subject however to such reasonable rules as may be prescribed by the officer having custody of the records, to secure their safety and convenient access to them by others. *State v. Rachac*, 37 Minn. 372.

not such an interest as will support the right of inspection.¹ So he may be compelled by *mandamus* or order of the court to issue all process required by law to be issued by him,² or he may be held liable upon his official bond for damages for his refusal,³ and if he misplaces papers presented to him which it is his duty to file, he is chargeable with official negligence.⁴ Where a clerk is required to furnish copies of records upon the payment of a prescribed fee, his refusal may be made the subject of an action for damages,⁵ or a *mandamus* may issue to compel the performance of such duty,⁶ and he will be held liable for a failure to use reasonable diligence in the preparation of such copies.⁷ So if he receives money or property in his official capacity and unlawfully converts or withholds it, he is liable on his official bond,⁸ without regard to whether he had a right to distribute or dispose of it or

1. *Randolph v. State*, 82 Ala. 527; 60 Am. Rep. 761; and see *Burton v. Tuite*, 78 Mich. 363.

2. *Gooch v. Gregory*, 65 N. Car. 143; and see *Patterson v. Wilkins*, Wright (Ohio) 501.

Motion is the most prompt and economical remedy to compel a clerk of court to issue a writ or process which he refuses to a party entitled to have it; though an action for damages or a *mandamus* is also maintainable. *Moore v. Muse*, 47 Tex. 210.

A general order of the circuit court, granting to the clerk twenty days, in addition to the time allowed by the statute, for issuing executions, excuses the clerk for failing to issue executions within the time prescribed by the statute. *Davidson v. Wiley*, 31 Ala. 452.

3. *Gooch v. Gregory*, 65 N. Car. 142; *State v. Merritt*, 65 N. Car. 558; *McFarland v. Burton* (Ky. 1890), 12 S. W. Rep. 336; *Williamson v. Kerr*, 88 N. Car. 10.

In California, a bill in equity will not lie to compel the clerk of the court to issue an execution on a money judgment, as there is a perfect remedy by action on his bond. *Goodwin v. Glazer*, 10 Cal. 333.

In some jurisdictions a clerk of court cannot, without authority, issue execution or process to execute a decree. *Wall v. Woolbright*, 71 Ga. 256; *Wickliff v. Robinson*, 18 Ill. 145; *Campbell v. Townsend*, 26 Tex. 511.

4. *Rosenthal v. Davenport*, 38 Minn. 543; *Strain v. Babb*, 30 S. Car. 342.

Negligence on the part of the person presenting papers for filing is not implied from the fact that papers relating to different matters are presented in one

package without explanation, they being properly indorsed so as to show their character. *Rosenthal v. Davenport*, 38 Minn. 543.

5. *Boyd v. Burke*, 14 How. (U. S.) 575; and see *Flemming v. Hudson Co.*, 30 N. J. L. 280; *Rowland v. McGee*, 4 Bibb (Ky.) 439.

6. *Strong's Case*, Kirby (Conn.) 345; *Silver v. People*, 45 Ill. 225; *Ex parte Goodell*, 14 Johns. (N. Y.) 325.

7. *Chase v. Heaney*, 70 Ill. 268; *Smith v. Holmes*, 54 Mich. 104; *Clark v. Marshall*, 34 Mo. 429; *Savings Bank v. Ward*, 100 U. S. 195.

Where the clerk of the court neglected to copy the return of a sheriff upon a summons, by reason of which judgment was reversed by the appellate court, and the plaintiff lost his debt, the clerk is liable in an action for damages for such neglect. *Clark v. Wilcox*, 31 Tex. 322.

But no action will lie against a clerk of the district court, in charge of the records of mechanics and other liens, for a false certificate furnished a purchaser that there were no liens against the property purchased, where the only lien is one for materials furnished the grantor, which was filed against the land after it had been conveyed to the purchaser with warranty, for he cannot be injured by such certificate. *United States Wind Engine etc. Co. v. Linville*, 43 Kan. 455.

8. *Henry v. State*, 98 Ind. 381; *State v. Norwood*, 12 Md. 177; *Thomas v. Connelly*, 104 N. Car. 342; *Schnur v. Schnur*, 47 Wis. 632; *Scott Co. v. McFadden*, 88 Ind. 333; *Smith v. Johnson*, 5 N. J. L. 511; *State v. Robinson*, 2 Ind. 40; *Steptoe v. Auditor*, 3 Rand. (Va.) 221; *Little v. Richard-*

not;¹ and clerks of the court are liable in damages to the person injured for any negligence or omission in the performance of any duty imposed upon them which is ministerial in its nature.² But due care is all he is required to exercise, and he is not liable for a mere mistake in judgment,³ nor is he liable officially for de-

son, 6 Jones (N. Car.) 305; *State v. Record*, 56 Ind. 107; *Wilmington v. Nutt*, 78 N. Car. 177; *Havens v. Lathene*, 75 N. Car. 505; *State v. Blair*, 76 N. Car. 78; *Billings v. Teeling*, 40 Iowa 607. And see *Taunton v. Sproat*, 2 Gray (Mass.) 428; *State v. Cole*, 13 Lea (Tenn.) 367; *Vogel v. St. Louis*, 84 Mo. 432; *Sullivan v. State*, 121 Ind. 342; *Yohe v. Com.* (Pa.), 13 Atl. Rep. 546; *Watson v. Smith*, 26 Pa. St. 395; *Ide Co. v. Woods*, 79 Iowa 148; *Summey v. Johnston*, 1 Winst. (N. Car.) 98.

One who, as clerk of a court, has officially received a fine imposed by the court, cannot question the validity of the fine or his official duty in regard to it. *Casper v. State*, 47 Wis. 535.

A clerk is not responsible, however, for money paid to his deputy, without the intervention of the court, by a defendant. Otherwise if the money be paid, in like manner, to himself. *Stuart v. Madison*, 1 Call (Va.) 481.

Where judgment is had upon a note, the surety will not be entitled to a motion against the clerk of the court for failing to pay over to him, for his reimbursement, moneys received on the judgment from the principal, after the surety has satisfied the same by the payment of the proper amount to the judgment creditor. *Allen v. Wood*, 11 Heisk. (Tenn.) 401.

1. *Henry v. State*, 98 Ind. 381. See *Bowers v. Fleming*, 67 Ind. 541.

2. See *Williams v. Hart*, 17 Ala. 102; *Collins v. McDaniels*, 66 Ga. 203; *Spain v. Clements*, 63 Ga. 786; *Billings v. Lafferty*, 31 Ill. 318; *Governor v. Dodd*, 81 Ill. 163; *Hubbard v. Switzer*, 47 Iowa 681; *Haverly v. McClellan*, 57 Iowa 182; *Parkes v. Davis*, 16 Iowa 20; *Anderson v. Johett*, 14 La. Ann. 624; *Maxwell v. Pike*, 2 Me. 8; *Rosenthal v. Davenport*, 38 Minn. 543; *McNutt v. Livingston*, 7 Smed. & M. (Miss.) 641; *Brown v. Lester*, 13 Smed. & M. (Miss.) 392; *Brock v. Hopkins*, 5 Neb. 231; *Ryan v. State Bank*, 10 Neb. 524; *Wright v. Wheeler*, 8 Ired. (N. Car.) 184; *Topping v. Windley*, 99 N. Car. 4; *Work v. Hoofnagle*, 1 Yeates (Pa.) 506; *Pass v. Dib-*

rell, 8 Verg. (Tenn.) 470; *Wright v. Shelby Co.*, 9 Baxt. (Tenn.) 145; *Ellis v. Rogers*, 2 Swan (Tenn.) 64; *Auditor v. Nicholas*, 2 Munf. (Va.) 31; *Russell v. Clayton*, 3 Call (Va.) 41; *Munroe v. Webb*, 4 Munf. (Va.) 73. But see *Com. v. Thompson*, 2 Bush (Ky.) 559.

Where the clerk of a court of law has, by misconduct, enabled one of two judgment creditors to gain an improper preference, he will be liable, on his official bond, to the other creditor, for the loss so sustained by such creditor. *Bank of Newbern v. Jones*, 2 Dev. Eq. (N. Car.) 284.

If a clerk omits to set aside an office judgment, when directed to do so by the defendant's attorney, equity will relieve against the omission. *Mayo v. Bentley*, 4 Call (Va.) 528.

The clerk of the probate court was ordered to sell property of an estate, in order to effect a partition among the heirs; he made the sale accordingly, and took a note, payable to himself and his successors for the purchase money. The heirs sued the purchasers and the clerk, praying they might have judgment against the purchaser for the amount due; and against the clerk for any amount he might have collected; and if the note had become worthless, by the neglect of the clerk, against him for the amount so permitted to be lost. It was held that the suit was well brought. *Watts v. Robison*, 6 Tex. 206.

In a suit against a clerk of court for refusing to record a document, it was held on a general demurrer, that it was essential either to aver that the appellee was at the time the clerk of the district court, or else that he was required by law to record such instrument. *George v. Vaughn*, 55 Tex. 129.

3. *Brock v. Hopkins*, 5 Neb. 231; *Danforth v. Rupert*, 11 Iowa 547; *Clevenger v. Clevenger*, 1 Heisk. (Tenn.) 105. And see *McFarland v. Burton*, (Ky. 1890), 12 S. W. Rep. 336. But see *Greenlee v. Sudderth*, 65 N. Car. 470.

When the clerk of an inferior court has performed his duty in preparing and sending to the supreme court the transcript of a case, and such transcript

fault in the performance of acts to perform which no positive and mandatory duty has been imposed upon him;¹ and as a general rule he is not liable for the omission to take any step required in the progress of an action pending in his court, in the absence of a request on the part of the interested party to do so.² It is the duty of the court to see that the clerk performs his duties.³ The clerk is often prohibited from acting as attorney, counsel or agent for a litigant in his court.⁴

b. COURT ATTENDANTS.—(See SHERIFFS.)

7. Police Officers.—Police officers are officers of the State rather than of the municipality in which they exercise the duties of their office,⁵ and the office is a statutory creation, the officer having only such powers as are expressly conferred or necessarily inferred from the functions and duties of his office.⁶ Where all the powers of constables as conservators of the peace are conferred upon police officers, they are authorized, in a proper case, to arrest upon view without a warrant and detain the person arrested

has been lost, the clerk will not be compelled to prepare another without his fee. *Western Union Tel. Co. v. Ordway*, 8 Lea (Tenn.) 558.

1. See *M'Alister v. Scrice*, 7 Yerg. (Tenn.) 277; 27 Am. Dec. 504; *State v. Norwood*, 12 Md. 177; *Carey v. State*, 34 Ind. 105; *People v. Leaton*, 25 Ill. App. 45; *Waters v. Carroll*, 9 Yerg. (Tenn.) 102; *Bringolf v. Burt*, 44 Iowa 184.

Where a clerk of a court refused to issue more than one execution on a judgment, and the statute was silent as to the number of executions which might be issued, it was held that he was not liable for a breach of his official duty. *State v. Ruland*, 12 Mo. 264.

It is not a breach of the condition of the official bond of the clerk of the State circuit court that he transmitted to the appellate an appeal bond which omitted the name of one of the appellees. The clerk's duty, under the *Illinois* statute, is to approve the sufficiency of the security, but otherwise he has nothing to do with the sufficiency of the bond. *People v. Leaton*, 121 Ill. 666.

2. *Badham v. Jones*, 69 N. Car. 665; *Ford v. Brooks*, 35 La. Ann. 151.

3. *Alexander v. Marshall*, 3 Head (Tenn.) 475.

The county court may, on omission of the circuit court to do so, compel the clerk of the circuit court to render and adjust his official accounts; also may compel the county recorder to render and adjust his. *Lee Co. v. Abrahams*, 31 Ark. 571.

It is not a misdemeanor in office for

the clerk of a court to obey the directions of the justices thereof, sitting as a court, although their term of office has expired, and they are sitting on a day to which the court has not adjourned, and the clerk has knowledge that their successors have been commissioned. *State v. Hixon*, 41 Mo. 210.

4. *Kirkland v. Texas Express Co.*, 57 Miss. 316; *Carlisle v. Dodge*, 5 N. H. 386. See *Chase v. Ostrom*, 50 Wis. 640.

A statute which prohibited county recorders and other officers from practicing law, is constitutional. *McCracken v. State*, 27 Ind. 491.

5. *Farrell v. Bridgeport*, 45 Conn. 191; *Burch v. Hardwicke*, 30 Gratt. (Va.) 24; 32 Am. Rep. 640; and see *Sanner v. State*, 2 Tex. App. 458.

In *People v. Henry*, 62 Cal. 557, it was held that a police judge, though a judicial officer, is also a municipal officer.

6. *Com. v. Dugan*, 12 Met. (Mass.) 233; *Com. v. Hastings*, 9 Met. (Mass.) 259.

The power to appoint policemen is implied under authority to make rules necessary to good order and public peace. *State v. Sims*, 16 S. Car. 486.

A defendant, indicted for assaulting a police officer, and obstructing him in the discharge of the duties of his office, cannot defend by showing that he had never been sworn; the law not requiring police officers to be sworn. *Com. v. Dugan*, 12 Met. (Mass.) 233. And see *Buttrick v. Lowell*, 1 Allen (Mass.) 172; 79 Am. Dec. 721; *Mitchell v.*

until he can be brought before a magistrate;¹ but statutes conferring such power, being in derogation of personal liberty, are to be strictly construed, and their provisions accurately followed,² and such power can be exercised only when the offense was committed in the officer's view.³ A municipal council may authorize arrests on view without a warrant for violations of its by-laws, when not inconsistent with the general statutes or policy of the State.⁴

XIX. DURATION OF THE OFFICER'S AUTHORITY.—The word "term," when used with reference to the tenure of office, ordinarily refers to a fixed and definite time and does not apply to appointive offices held at the pleasure of the appointing power.⁵ If no definite time is fixed the term will be deemed to begin at the date of election or appointment⁶ and remain in force until revoca-

Rockland, 52 Me. 118; *People v. Board of Police*, 19 N. Y. 188.

1. *Mitchell v. Lemon*, 34 Md. 176; *Griffin v. Flock*, 11 Daly (N. Y.) 274; *Prell v. McDonald*, 7 Kan. 426; 12 Am. Rep. 423; *Com. v. Hastings*, 9 Met. (Mass.) 259; *Taylor v. Strong*, 3 Wend. (N. Y.) 384; and see *Dilcher v. Raah*, 73 Ill. 266. See also ARREST (CRIMINAL CASES), vol. 1, p. 730.

Under *Arkansas Acts* 1873, § 52, giving the chief of police of Little Rock like power with sheriffs, he may pursue a person charged with a crime in that city, and arrest him in another county within a few days. *Chrisman v. Carney*, 33 Ark. 316.

When it is shown that a policeman has been duly appointed by the proper authority of a city, whose charter confers on the common council the power to establish, organize, and maintain a city watch, and prescribe the duties thereof and to regulate the general police of the city, it will be presumed, in the absence of evidence as to the power given to such policeman by the city ordinances, that he possesses the ordinary powers of peace officers at common law. *Doering v. State*, 49 Ind. 56.

2. *Low v. Evans*, 16 Ind. 486; *Pow v. Becker*, 3 Ind. 475; *Vandever v. Mattocks*, 3 Ind. 479; *Ramsey v. Foy*, 10 Ind. 493; *State v. Dale*, 3 Wis. 795; 1 Bishop Crim. Proc. (3rd ed.) § 184.

In the absence of a statutory authority, a policeman is not authorized to arrest for a violation of a city ordinance not involving breach of the peace, merely because it occurs in his view. *Hennessey v. Connolly*, 13 Hun (N. Y.) 173.

3. *Main v. McCarty*, 15 Ill. 441; *Pow v. Beckner*, 3 Ind. 475; *Roddy v. Finnegan*, 43 Md. 490; *Com. v. Carey*, 12 Cush. (Mass.) 246; *Com. v. McLaughlin*, 12 Cush. (Mass.) 615; *Quinn v. Heisel*, 40 Mich. 576; *Roberts v. State*, 14 Mo. 138; *Stage Horse Cases*, 15 Abb. Pr., N. S. (N. Y.) 51; *White v. Kent*, 11 Ohio St. 550; *Fox v. Gaunt*, 3 B. & Ad. 798; 23 E. C. L. 187.

In an action for assault and battery and false imprisonment against a superintendent of police, who directed the imprisonment, the defendant cannot escape upon the ground that the officer who had charge of the plaintiff violated his duty in obeying the direction. In contemplation of law, the defendant did the act which the officer did who followed his direction. *Green v. Kennedy*, 46 Barb. (N. Y.) 16.

4. *Thomas v. Ashland*, 12 Ohio St. 127; *White v. Kent*, 11 Ohio St. 550; *Pesterfield v. Vickers*, 3 Coldw. (Tenn.) 205.

An act of assembly allowing a magistrate of police of an incorporated town to fine offenders for disorderly conduct not cognizable by the general law is not unconstitutional. *Com'rs v. Harris*, 7 Jones (N. Car.) 281.

5. *Speed v. Crawford*, 3 Metc. (Ky.) 207; *Gibbs v. Morgan*, 39 N. J. Eq. 126. See *People v. Leask*, 67 N. Y. 521.

The word "term," used in the provision of the *New York* city charter of 1873, fixing the terms of heads of departments, etc., means the consecutive period of six years succeeding the preceding term, and one appointed during a term goes out of office at the end of it. *People v. McClave*, 99 N. Y. 83.

6. *McGee v. Gill*, 79 Ky. 106; *Mar-*

tion or removal.¹ Where a constitutional or statutory provision is uncertain or doubtful in its construction as to the duration of the term of a public office, that interpretation will be adopted which limits the term to the shortest time.² An interpretation of the provisions fixing a term of office placed upon them by the incumbent is binding upon him, and he must vacate the office when the term expires as he has himself fixed it;³ and appointment made without designating the length of the term, under a statute providing for a periodical appointment, will be deemed to have been made for the statutory period.⁴ Where two persons

shall *v. Harwood*, 5 Md. 423; *Rice v. Ruddiman*, 10 Mich. 125; *Hughes v. Buckingham*, 5 Smed. & M. (Miss.) 632; *Attorney-Gen'l v. Love*, 39 N. J. L. 476; 23 Am. Rep. 234; *Haight v. Love*, 39 N. J. L. 14. And see generally *State v. Frizzell*, 31 Minn. 460; *People v. La Salle Co.*, 100 Ill. 495; *People v. Kingsbury*, 100 Ill. 509; *French v. Cowan*, 79 Me. 426; *Gilroy v. Smith* (Supreme Ct.), 5 N. Y. Supp. 784; *State v. Cook*, 20 Ohio St. 252; *People v. Barrett*, 55 Hun (N. Y.) 609.

Where no date of commencement is fixed and a commission is required to be issued to the officer, if the commission is issued within a reasonable time the term of office will date from the time it is issued. *Brodie v. Campbell*, 17 Cal. 11.

In *State v. Chapin*, 110 Ind. 272, it was held that the commission is simply evidence of the right to an office but does not fix the term.

When a law is passed providing for the creation of a new county out of parts of counties already in existence, which act provides for the election of county officers, and fixes the time when they shall enter upon their duties, the territory described does not become a county until its organization is perfected by the election of officers. *People v. McGuire*, 32 Cal. 140.

Where the term of office runs "from" a certain date, the day of that date is excluded from the computation. *Best v. Polk*, 18 Wall. (U. S.) 112; *Batesville Institute v. Kauffman*, 18 Wall. (U. S.) 151.

1. *Corbett v. Sullivan*, 54 Vt. 619. And see *People v. Hammond*, 66 Cal. 654; *State v. Alt*, 26 Mo. App. 673; *Dibble v. Morris*, 26 Conn. 416; *Ex parte Camden Co.*, T. U. P. Charlt. (Ga.) 191; *State v. White*, T. U. P. Charlt. (Ga.) 123.

Where the duration of the term is fixed illegally, the part of the statute

fixing the duration must be regarded as though stricken out, leaving the term of office at the pleasure of the appointing power. *People v. Perry*, 79 Cal. 105.

2. *Wright v. Adams*, 45 Tex. 134. And see *Com. v. Kilgore*, 82 Pa. St. 396; *Gilroy v. Smith* (Supreme Ct.), 5 N. Y. Supp. 784.

But where the term of a city clerk was two years, his election in 1883, for "the coming term," entitles him to serve till 1885, notwithstanding there was a custom in the council to elect for each year, and in 1884 he had himself solicited re-election. *State v. Brady*, 42 Ohio St. 504. And see *State v. Squire*, 39 Ohio St. 197.

The *Indiana Rev. Stat.*, § 5152, fixed the term of office of the State inspector of oils at two years. Acts 1889 (Elliott's Supp.), § 1868, abolishes this office, and creates that of inspector of mineral oils, and refers to the former act for his duties and emoluments. It makes no provision as to his term of office. Held, that the earlier provision still governs as to his term of office. *State v. Hyde*, 121 Ind. 20.

3. *Pursel v. State*, 11 Ind. 519; *Griebel v. State*, 111 Ind. 369.

A public officer, by consenting to be a candidate for re-election, surrenders all claim to hold the office "during good behavior." *Ex parte Gray*, 1 Bailey, Eq. (S. Car.) 77; *Hunt v. Elliot*, 1 Bailey, Eq. (S. Car.) 90.

4. *Buffalo v. Mackay*, 15 Hun (N. Y.) 204; *State v. Police Com'rs*, 14 Mo. App. 297. And see *Parcel v. State*, 110 Ind. 122; *Isbell v. Farris*, 5 Coldw. (Tenn.) 426; *State v. Coenzler*, 9 Iowa 433.

Where a statute declared that justices should hold office for six years, and their clerks for the same period as the justices, and a clerk was appointed by a justice when the latter had been two years in office, and so had only four

are appointed to fill two vacancies in the same body it will be presumed that the first named was intended to fill the place of the first class and the second named that of the second class.¹ Under a statute providing for an office and designating the duration of the term of its incumbent, subsequent terms are presumed to have been intended to be of the same length.² The legislature can neither extend nor abridge the term of office fixed by the constitution,³ but if the office is created by the legislature, or if no constitutional limitation intervenes, its term is within the entire control of the legislature,⁴ and it may change the length of the term of office even after the election or appointment of the in-

more to hold, it was held that the clerk's term was six years, not four. *People v. Leask*, 6 Daly (N. Y.) 517. And see *State v. Neibling*, 6 Ohio St. 40; *Shansbury v. Middleton*, 11 Md. 296.

1. *People v. Richmond Co.*, 20 N. Y. 252.

2. *State v. Percy*, 44 Mo. 159. And see *People v. Colton*, 6 Cal. 84; *State v. Stonestreet*, 99 Mo. 361.

The county officers first elected, hold till the first general election for county officers throughout the State, after the expiration of the term of two years fixed by the special act; and an election held before that time is void. *People v. Church*, 6 Cal. 76.

Where the superior court clerk becomes *ex officio* clerk of the inferior court, by reason of the justices of the county declining to elect a clerk of the latter court, and gives the bond required by law, he is entitled to the office for two years, notwithstanding the expiration of his term as superior-court clerk within that period. *Davis v. Moss*, 80 N. Car. 141.

3. *People v. Perry*, 79 Cal. 105; *Douglass v. State*, 31 Ind. 429; *Grieble v. State*, 111 Ind. 369; *Pursel v. State*, 111 Ind. 519; *Howard v. State*, 10 Ind. 99; *State v. Thoman*, 10 Kan. 191; *Lowe v. Com.*, 3 Metc. (Ky.) 237; *Faut v. Gibbs*, 54 Miss. 396; *State v. Brewster*, 44 Ohio St. 589; *David v. Portland Water Committee*, 14 Oregon 98; *Bauton v. Wilson*, 4 Tex. 400. And see *People v. Clifton* (Cal. 1889), 21 Pac. Rep. 426; *People v. Rosentstine* (Cal. 1889), 21 Pac. Rep. 426; *People v. McCarthy* (Cal. 1889), 21 Pac. Rep. 426; *Christy v. Sacramento Co.*, 39 Cal. 3.

Where a State constitution directs that certain officers shall be elected by the people, and empowers the legislature to fix the term of office and time and

manner of election, after the legislature has acted as prescribed, and the office has been filled, an act extending the term of the incumbent is unconstitutional. *People v. Bull*, 46 N. Y. 57; 70 Am. Rep. 392.

A statute relating to the term of office, which is unconstitutional, must be regarded as leaving the term of office at the pleasure of the governor, the appointing power. The court cannot hold it unconstitutional only as to the excess. *People v. Perry*, 79 Cal. 105.

The time and manner of election, however, may be changed. *People v. Bull*, 46 N. Y. 57; 7 Am. Rep. 302; *State v. McGovney*, 92 Mo. 428. And see *State v. Rauston*, 73 Mo. 89.

4. *State v. Bailey* (Minn. 1887), 33 N. W. Rep. 778; *In re Senate Resolution*, 12 Colo. 340; *State v. Howe*, 25 Ohio St. 588; 18 Am. Rep. 321; *Taft v. Adams*, 3 Gray (Mass.) 126; *Kilgore v. Magee*, 85 Pa. St. 401; *Long v. Mayor etc. of N. Y.*, 81 N. Y. 425; *State v. Neibling*, 6 Ohio St. 40. But see *Hoke v. Henderson*, 4 Dev. (N. Car.) 1; 25 Am. Dec. 677.

The power delegated to a board by the legislature, of creating an office necessarily implies the power to abolish it when, in the judgment of the board, it is no longer necessary, though the term for which the incumbent was appointed had not expired. *Ford v. Board of State Harbor Com'rs*, 81 Cal. 19.

The incumbent of an office at the time of an organic change of government, continuing to hold over after such change (in the absence of a provision of the new constitution, or of an act of the legislature of the new government giving them such authority), hold by sufferance only, and upon a principle of public necessity or convenience, not in virtue of any individ-

cumbent.¹ The governor cannot, by issuing a commission, enlarge a term of office fixed by law or confer extended powers upon its incumbent.² A person elected or appointed to fill a vacancy holds the office only for the remainder of the term,³ and in some of the States the rule is that he can hold only until the next election at which officers generally can be elected.⁴ The office of a subordinate or deputy ceases and is vacated by the abolishment of the superior office.⁵

ual or private right. They cannot set up any claim against the legislature, which has ample power to put an end to their official authority at any time, and appoint others to their places, subject only to any constitutional restrictions which may plainly appear to exist. *Richmond Maybralty Cases*, 19 Gratt. (Va.) 673.

1. *In re Bulger*, 45 Cal. 553; *In re Jordan*, 37 Minn. 174; *Wilcox v. Rodman*, 46 Mo. 322.

Where a statute creating an office, was limited to two years, and such officer, according to the State constitution, was to hold his office during good behavior, and the statute was afterwards continued in force by a repeal of the limiting clause, the officer is entitled to hold office so long as the statute continued in force. *Bruce v. Fox*, 1 Dana (Ky.) 447.

2. *Hench v. State*, 72 Ind. 297.

3. *Opinion of Justices*, 64 Me. 596; *Opinion of Justices*, 50 Me. 607; *Ruddock v. Mallory*, 14 La. Ann. 314; *State v. Dubuc*, 9 La. Ann. 237; *Parmaater v. State*, 102 Ind. 90; *State v. Harmon*, 1 Cheves (S. Car.) 265; *State v. Peelle*, 121 Ind. 495; *Advisory Opinion*, 25 Fla. 426; *People v. Wilson*, 72 N. Car. 155; *State v. McKee*, 65 N. Car. 257; *Rose v. Knox Co.*, 50 Me. 243; *People v. Mathews*, 47 Cal. 442; and see *People v. Dempsey*, 19 Hun (N. Y.) 322; *State v. Stonestreet*, 99 Mo. 361; *Powers v. Hurst*, 2 Humph. (Tenn.) 24; *State v. Bias*, 65 Miss. 510; *State v. Lyon*, 45 Wis. 246. But see *State v. Sohn*, 97 Ind. 101; *People v. Townsend*, 102 N. Y. 430; *People v. Comstock*, 78 N. Y. 356; *State v. Foster*, 36 Kan. 504; *Edison v. Almy*, 66 Mich. 329.

By the failure to elect a new board of supervisors prior to the expiration of a member's term, a vacancy is caused, which, under the statute, is to be filled by the qualifying anew of the member whose term expires; such member, however, is only entitled to hold the office

until it can be legally filled by election, which may be at the next succeeding general election. *Dyer v. Bagwell*, 54 Iowa 487.

When a new county is created by the division of a larger one, the county commissioners elected at an election ordered by the governor in such new county for the election of officers merely continue in office until the next general election for such officers, and until their successors are elected and qualified. *State v. Fields*, 26 Neb. 393.

Where the evidence shows the alleged election of the new officer to be illegal and void, the term of the old one does not expire. *People v. Harvey*, 58 Cal. 337.

4. See *State v. Foster*, 36 Kan. 504; *State v. Mechen*, 31 Kan. 435; *Dyer v. Bagwell*, 54 Iowa 487; *Advisory Opinion*, 25 Fla. 426; *State v. Johns*, 3 Oregon 533; *Stevens v. Wyatt*, 16 B. Mon. (Ky.) 542; *State v. Neibling*, 6 Ohio St. 40; *State v. Gamble*, 13 Fla. 9; *Jacobs v. Murray*, 15 Cal. 221.

In *Mississippi* all officers are elected for a term which expires at the general election for the respective offices. Thus where a judicial district was created after the general election, and a special election of judge had, it was held that his term of office expired at the general election next succeeding his election. *Smith v. Halfacre*, 6 How. (Miss.) 582.

5. *Banner v. McMurray*, 1 Dev. (N. Car.) 218; *U. S. v. Wood*, 2 Gall. (U. S.) 361; *State v. Board of Public Lands*, 7 Neb. 42; *Dillon on Mun. Corp.*, § 64; *People v. Fisher*, 24 Wend. (N. Y.) 215; *Richmond Mayoralty Case*, 19 Gratt. (Va.) 673. But see *Currier v. Boston etc. R. Co.*, 31 N. H. 209.

Where during the pendency of charges against him, the clerk of a court resigns his office, the appointment made of a clerk *pro tempore* terminates with the resignation. *Raddock v. Mallory*, 14 La. Ann. 314.

Where a board of officers has the

XX. TERMINATION OF THE OFFICER'S AUTHORITY—1. By the Expiration of His Term.—Although there is authority for the proposition that an officer's functions cease immediately upon the expiration of his term of office,¹ the doctrine supported by the preponderance of opinion is, that in the absence of any express or implied prohibition² an officer holds over after the expiration of his term until a successor is duly chosen and qualified.³ To this general

power of appointing certain officers to hold office during the pleasure of the board, the tenure of an appointee is unaffected by changes in the *personnel* of the board, the result of expiration, death, etc.; but if the board as a body is abolished, the tenure of office of the appointee is thereby determined. *State v. Board of Public Lands*, 7 Neb. 42.

Where a legislative act creates a public office, appoints the officer and appropriates money to pay his salary, a subsequent repeal of the act terminates both the office and the right of the appointee to any salary not already earned at the time of such repeal. *Hall v. State*, 39 Wis. 79.

1. *Rex v. Thornton*, 4 East 308; *Mayor of Durham's Case*, 1 Sid. 33; *Foot v. Prowse*, 1 Str. 625; 3 Bro. P. C. 169; *Rex v. Hearle*, 1 Str. 627; *Dighton's Case*, 1 Vent. 82; *Rex v. Atkins*, 3 Mod. 12; *Reg. v. Durham*, 10 Mod. 146; *Corporation of Banbury*, 10 Mod. 346; *Badger v. U. S.*, 93 U. S. 599; *Christian v. Gibbs*, 53 Miss. 314; *Beck v. Hanscom*, 29 N. H. 213; *People v. Tieman*, 30 Barb. (N. Y.) 193; 8 Abb. Pr. (N. Y.) 359. See also *Rex v. Pasmore*, 3 T. R. 199; *Saunders v. Grand Rapids*, 46 Mich. 467; *Philips v. Wickham*, 1 Paige (N. Y.) 595; *People v. Bull*, 46 N. Y. 65; 7 Am. Rep. 308.

An appointment to fill a vacancy in the office of county treasurer, made by the vote of a county commissioner whose term of office expired at midnight the night before, is invalid. *People v. Reid*, 11 Colq. 141.

The presumption of law that an officer is cognizant of proceedings affecting him officially, without special notice, does not apply to a delinquent clerk of a county court after expiration of his term of office. *Ray Co. v. Barr*, 57 Mo. 290.

2. *Compare Tuley v. State*, 1 Ind. 500; *Louisville v. Higdon*, 2 Metc. (Ky.) 527; *State v. Hopkins*, 10 Ohio St. 509.

3. *Foot v. Prowse*, 1 Stra. 625; 3 Bro. P. C. 169; *Anonymous*, 12 Mod.

256; *Rex v. Doncaster*, 2 Ld. Raym. 1564; *Stratton v. Oulton*, 28 Cal. 44; *People v. Stratton*, 28 Cal. 382; *Central v. Sears*, 2 Colo. 588; *Walker v. Ferrill*, 58 Ga. 512; *State v. Harrison*, 113 Ind. 440; 3 Am. St. Rep. 667; *Thomas v. Owens*, 4 Md. 188; *Robb v. Carter*, 65 Md. 329; *Overseers of Poor v. Sears*, 22 Pick. (Mass.) 130; *People v. Ferris*, 16 Hun (N.Y.) 219; *Cordell v. Frizell*, 1 Nev. 130; *State v. Wells*, 8 Nev. 105; *York Co. v. Small*, 1 W. & S. (Pa.) 315; *Lynch v. Lafand*, 4 Coldw. (Tenn.) 96; *Chandler v. Bradish*, 23 Vt. 416. *Compare Ritchie v. South Topeka*, 38 Kan. 368; *Moser v. Shamleffer*, 39 Kan. 635; *Kreidler v. State*, 24 Ohio St. 22; *Walsh v. Coin.*, 89 Pa. St. 419; 33 Am. Rep. 771.

And *compare* also the rule in the case of private corporations. *McCall v. Byram Mfg. Co.*, 6 Conn. 428; *Spencer v. Champion*, 9 Conn. 536; *Bethany v. Sperry*, 10 Conn. 200; *Wier v. Bush*, 4 Litt. (Ky.) 429; *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479; *Savings Bank v. Hunt*, 72 Mo. 597 (statutory provision); 37 Am. Rep. 449; *Slee v. Bloom*, 5 Johns. Ch. (N. Y.) 336; *Nashville Bank v. Petway*, 3 Humph. (Tenn.) 522; *Wheeling v. Black*, 25 W. Va. 266. See also **OFFICERS (Private Corporations)**, vol. 17, p. 49.

An officer holding over and continuing to discharge his official duties until his successor was qualified, was held to be entitled to compensation for the time without an express provision to that effect. *Robb v. Carter*, 65 Md. 321.

Appointments to Fill Vacancy.—Where a judge of probate, before one term expired, was elected for another term, but died before the new term, and the governor appointed a successor to fill the vacancy, and afterward, at the beginning of the period of the new term, on the supposition that this appointment had run out, appointed another to fill the supposed vacancy, it was held that the second appointment was void, for the direction of the

rule some of the authorities make an exception in the case of judicial officers,¹ and possibly also of members of the legislature and the executive.² In most of the States all doubt is removed by constitutional or statutory provisions, that, when an officer is elected or appointed for a fixed term, the office shall not, on the expiration of the term, become vacant, but the incumbent shall continue to hold until his successor is elected and qualified.³ In these jurisdictions, consequently, the governor cannot, on the expiration of a term of office, appoint a new officer, but the former incumbent is entitled to hold over until a duly qualified

constitution was unambiguous, that the probate judge elected to fill a vacancy should continue in office until a successor was elected and qualified; and that his term did not expire at the end of the regular term, unless some such elected and qualified person was ready to succeed him. *People v. Lord*, 9 Mich. 227.

New appointments are to be made constitutionally; otherwise the incumbents would continue in office. *State v. Dubuc*, 9 La. 237; and see *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; *Tillson v. Ford*, 53 Cal. 701.

Provision that officers shall hold over until their successors are qualified, are not designed to extend their terms for their own advantage. *State v. Duffield* (N. J., 1888), 13 Atl. Rep. 30.

1. See Throop's Pub. Off., §§ 323 *et seq.*; *Christian v. Gibbs*, 53 Miss. 314. Compare *Stratton v. Oulton*, 28 Cal. 56.

2. Compare *Stratton v. Oulton*, 28 Cal. 56; *People v. Bull*, 46 N. Y. 57; 7 Am. Rep. 302.

3. *People v. Whitman*, 10 Cal. 38, *overruling* *People v. Reid*, 6 Cal. 288; *People v. Tilton*, 37 Cal. 614; *Treadwell v. Yolo Co.*, 62 Cal. 565; *State v. Fagan*, 42 Conn. 32; *People v. Reid*, 11 Colo. 138; *Bonner v. State*, 7 Ga. 473; *People v. Fairbury*, 51 Ill. 149; *Forristal v. People*, 3 Ill. App. 470; *Tuley v. State*, 1 Ind. 500; *State v. Spears*, 1 Ind. 515; *Miller v. Burger*, 2 Ind. 337; *Stewart v. State*, 4 Ind. 396; *Swails v. State*, 4 Ind. 516; *Akers v. State*, 8 Ind. 484; *Butler v. State*, 20 Ind. 169; *Baker v. Kirk*, 33 Ind. 517; *Steinback v. State*, 38 Ind. 487; *State v. Berg*, 50 Ind. 496; *Elam v. State*, 75 Ind. 518; *Gosman v. State*, 106 Ind. 203; *State v. Harrison*, 113 Ind. 440; 3 Am. St. Rep. 667; *Wapello Co. v. Bigham*, 10 Iowa 39; 74 Am. Dec. 370; *Hubbard v. Crawford*, 19 Kan. 570; *Killion v. Herman*, 43 Kan. 37; *Marshall v. Harwood*,

5 Md. 423; *Third School Dist. v. Atherton*, 12 Met. (Mass.) 105; *Dow v. Bullock*, 13 Gray (Mass.) 136; *People v. Lord*, 9 Mich. 227; *State v. Lusk*, 18 Mo. 333, *overruled* by *State v. Thomas*, 102 Mo. 85; *State v. Thompson*, 38 Mo. 192; *State v. Seay*, 64 Mo. 89; 27 Am. Rep. 206; *State v. Ranson*, 73 Mo. 78; *State v. Smith*, 87 Mo. 158; *Tappan v. Gray*, 9 Paige (N. Y.) 507; *State v. Howe*, 25 Ohio St. 588; 18 Am. Rep. 321; *State v. Bryson*, 44 Ohio St. 467; *State v. Brewster*, 44 Ohio St. 589; *Com. v. Hanley*, 9 Pa. St. 513; *Macoy v. Curtis*, 14 S. Car. 367; *Jones v. Jefferson*, 66 Tex. 578; *Ex parte Lawhorne*, 18 Gratt. (Va.) 85; *Johnson v. Mann*, 77 Va. 265; *Vaughan v. Johnson*, 77 Va. 300; *Kilpatrick v. Smith*, 77 Va. 347; *State v. Washburn*, 17 Wis. 658. Compare *In re Corporation of Tregony*, 8 Mod. 127; *Rex v. Phillips*, 1 Str. 394; *Montgomery v. Hughes*, 65 Ala. 201; *Heys v. Walters*, 46 Ga. 387.

The same rule applies where an officer has tendered his resignation to the proper authority and it has been accepted; he is not released from the duties and responsibilities of the office, but continues to hold until his successor is chosen and qualified. *Badger v. U. S.*, 6 Biss. (U. S.) 308; 93 U. S. 599; *People v. Barnett Tp.*, 100 Ill. 332; *Jones v. Jefferson*, 66 Tex. 576. But see to the contrary *Olmstead v. Dennis*, 77 N. Y. 378.

It has been held that, although the officer of a city, upon whom process is to be served, may have resigned from an improper motive, and although the plaintiff may have been prejudiced by his action, yet the injury is one for which no damages can be recovered. *Amy v. Watertown*, 130 U. S. 301. Under a provision that certain officers shall continue to hold office beyond their term, until their successors be "elected and qualified," the term

successor presents himself.¹ However, upon the due election and qualification of a successor, the right to hold over ceases, and is not revived by the subsequent death of such successor, even though it be before the commencement of the term.² The right to hold over, when conferred upon any officer, applies as well to those elected by the legislature as to those elected by the people or appointed by the executive.³ But the rule in respect to holding over applies only to such officers as have held during the full term, and not to such as have been adjudged by competent authority to have forfeited their offices.⁴ Nor does the rule apply where a municipal corporation is legislated out of existence, for the rule enables officers only to hold until their successors are elected and qualified, and in this case no successors can be elected.⁵

By analogy with the expiration of an officer's term, it has been held that an office is vacated by the repeal of the law or ordinance by which it was created,⁶ and that where an office is created

"elected," entitles the incumbent to hold until his successor is selected or designated in the manner provided for by the constitution or law creating the office, and it applies equally to officers who are to be appointed by the general assembly as to those elected by the people. *State v. Harrison*, 113 Ind. 434.

The provision of the constitution that civil officers shall hold and exercise their duties during their terms or until they shall be superseded by lawful appointments, applies to future officers as well as those in office at the time of the adoption of the constitution. *Aycock v. Aven*, 25 Ga. 694.

Sureties on a bond conditioned for faithful performance "during incumbency," are liable when the officer holds over, though he only holds office *de facto*. *State v. Wells*, 8 Nev. 105; *State v. Kurtzeborn*, 78 Mo. 98.

1. *People v. Tilton*, 37 Cal. 614; *People v. Bissell*, 49 Cal. 407; *People v. Hammond*, 66 Cal. 654, 657; *Gosman v. State*, 106 Ind. 203; *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663. Compare *People v. Parker*, 37 Cal. 639. *Contra State v. Thomas*, 102 Mo. 85, *overruling State v. Lusk*, 18 Mo. 333.

2. *State v. Seay*, 64 Mo. 89; 27 Am. Rep. 206; *State v. Hopkins*, 10 Ohio St. 509. Compare *Com. v. Hanley*, 9 Pa. St. 513; in which it was held that the death of the successor before full qualification leaves the right of the incumbent to hold over unimpaired.

Under provisions permitting every

officer to hold his office until his successor is qualified, the direction to have officers of the court appointed by the judges at the first term, is not imperative, and a subsequent appointment thereto is not invalid. *In re Baldwin*, 7 Heisk. (Tenn.) 414.

3. *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663.

4. *Hyde v. State*; 52 Miss. 655.

Cannot Extend Constitutional Limitation.—Where a constitutional provision declares that no person shall be eligible to an office for more than the designated number of years, a legislative provision that an officer holding office for a given term, shall hold until the election and qualification of a successor, does not apply to enable an officer to hold an office for a longer time than that limited by the constitution. *Gosman v. State*, 106 Ind. 203.

5. *Beckwith v. Racine*, 7 Biss. (U. S.) 142. And see *State v. Bailey*, 37 Ohio St. 98.

Where a district was abrogated and two districts from the same territory were created, and the terms of office of the commissioners of the abrogated district had expired and no new ones had been elected to fill their places, it was held that the doctrine of corporate officers holding over, where an election of successors is postponed, cannot be applied where there is no provision of law authorizing a further election, and the corporate functions have been terminated. *Barkley v. Levee Comrs.*, 93 U. S. 258.

6. *Chandler v. Lawrence*, 128 Mass.

and an officer appointed for the performance of a single act, the office terminates and the officer's authority ceases upon the completion of that act.¹ So, the authority of an officer appointed under a law which does not prescribe the duration of the office, is terminable at the will of the appointing power, the right of removal being incident to the right of appointment.²

2. By Resignation.—Resignation is the act of an officer by which he declines his office and renounces the further right to use it.³ To constitute a complete and operative resignation, there

213; *State v. Harris* (N. Dak., 1890), 45 N. W. Rep. 1101; *Cambridge v. Fifield*, 126 Mass. 428; *State v. Covington*, 29 Ohio St. 102. And see *People v. Brown*, 83 Ill. 95; *People v. Breen*, 53 N. Y. Super. Ct. 167; *Kreider v. New Orleans*, 26 La. Ann. 342; *In re Senate Resolution*, 12 Colo. 340.

A regular clerk in a department of the city of New York, whose services are no longer needed, may be discharged without trial, hearing, or notice. The statute requiring hearings before discharge does not apply to such cases. *Langdon v. Mayor, etc.*, of N. Y., 92 N. Y. 427.

But where, after the organization of a Kansas city of the third class into a city of the second class, no election for mayor is had, the mayor of the city as it formerly existed will continue to act. *Moser v. Shamleffer*, 39 Kan. 635.

1. *Bergen v. Powell*, 94 N. Y. 592. And see *People v. Manistee Co.*, 40 Mich. 585.

Where commissioners are appointed to cause a work to be completed within a certain time, with authority to appoint a superintendent, to be allowed a fixed salary, the power of the commissioners and the office and salary of the superintendent cease with the expiration of the prescribed time. *Nichols v. Comptroller*, 4 Stew. & P. (Ala.) 154.

2. *Patton v. Vaughan*, 39 Ark. 211; *People v. Hill*, 7 Cal. 97; *Smith v. Brown*, 59 Cal. 672; *People v. Shear* (Cal., 1887), 15 Pac. Rep. 92; *State v. Doherty*, 25 La. Ann. 119; 13 Am. Rep. 131; *Com v. Reading Sav. Bank*, 129 Mass. 73; *State v. Alt*, 26 Mo. App. 673; *Keenan v. Perry*, 24 Tex. 253; *State v. Manlove*, 33 Tex. 798; *Collins v. Tracy*, 36 Tex. 546; *Honey v. Graham*, 39 Tex. 1, 12. Compare *Ex parte Hennen*, 13 Pet. (U. S.) 230; *Com. v. Slifer*, 25 Pa. St. 29; 64 Am. Dec. 680. But see *People v. Freese*, 76 Cal. 633; 83 Cal. 453.

An officer appointed for a term of defined length is entitled to hold his office until the expiration of that period, and another cannot be appointed in his place. *People v. Waite*, 9 Wend. (N. Y.) 58; *Collins v. Tracy*, 36 Tex. 546; *Upshaw v. Booth*, 37 Tex. 125; *Honey v. Graham*, 39 Tex. 1. Compare *Lowe v. Com.*, 3 Metc. (Ky.) 237; *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50; *Cummings v. Clark*, 15 Vt. 653.

The tenure of an office, which, held by executive appointment and having no term for its duration fixed, can be filled at the executive pleasure, is not enlarged by *Louisiana Const.* 1845, art. 96, which provides that "the duration of all offices, not fixed by this constitution, shall never exceed four years." That article was a restriction upon the legislature, and applied to offices held either during good behavior or for a longer term than four years. *State v. Crozat*, 8 La. Ann. 295.

Where statutes require a board of police commissioners, on appointing a chief of police, to fix his term of office, and provide that he can be removed only for cause, the board cannot evade the latter provision by neglecting or purposely omitting to determine the period for which he shall hold the office. *State v. Board of Police Commrs.*, 88 Mo. 144.

3. *Bouv. L. Dict.* (15th ed.), vol. 2, p. 583; *And. L. Dict.* 893.

A judge has no power to allow a motion for a new trial after a resignation of his office has taken effect, in a case tried before him while in office. *Griffing v. Danbury*, 41 Conn. 96.

Statutes with reference to the discharge of an officer from service, apply to a voluntary discharge and not to a case where an officer seeks to be relieved from his assumed obligations to the government, and anticipates his final discharge by offering his resignation. *Price's Case*, 4 Ct. of Cl. 164.

must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment.¹

At common law, an office being regarded as a burden which it was the duty of the appointee to bear for the public benefit,² it followed that a public officer could not resign his office without the consent of the appointing power, manifested either by an express acceptance of his resignation, or by the appointment of another in his place.³ In *America*, the above English rule, which, on principle, seems the better doctrine, has been followed in, perhaps, the majority of cases;⁴ but there is also authority for the opposite view, that a public officer may resign at pleasure without the assent of the appointing power, and that, in the absence of any statute to the contrary, an absolute and unconditional resignation vacates an office from the time the resignation reaches the proper authority, without any acceptance, express or implied, on the

1. *Biddle v. Willard*, 10 Ind. 62.

2. *Throop's Public Officers*, §§ 165, 409; *Vanacker's Case*, Carth. 480; 1 *Ld. Raym.* 496; *Rex v. Larwood*, 4 *Mod.* 270; *Reg. v. Hungerford*, 11 *Mod.* 142; *Edwards v. U. S.*, 103 *U. S.* 471; *State v. Ferguson*, 31 *N. J. L.* 120.

3. *Throop's Public Officers*, § 409; *Mechem's Public Officers*, §§ 409, 414; 1 *Dillon's Mun. Corp.* (4th ed.), § 224; *Rex v. Ripon*, 1 *Ld. Raym.* 563; *Reg. v. Lane*, 2 *Ld. Raym.* 1304; *Hazard's Case*, 2 *Rol.* 11; *Jenning's Case*, 12 *Mod.* 402; *Rex v. Patteson*, 1 *N. & M.* 612; 4 *B. & Ad.* 9; 24 *E. C. L.* 10; *Rex v. Bower*, 1 *B. & C.* 585; 8 *E. C. L.* 247; *Rex v. Burder*, 4 *T. R.* 778; *Rex v. Lone*, 2 *Str.* 920; *Rex v. Jones*, 2 *Str.* 1146; *Edwards v. U. S.*, 103 *U. S.* 471; *State v. Clayton*, 27 *Kan.* 442; 41 *Am. Rep.* 418; *State v. Ferguson*, 31 *N. J. L.* 120.

4. *Edwards v. U. S.*, 103 *U. S.* 471; *Thompson v. U. S.*, 103 *U. S.* 480; *Waycross v. Youmans*, 85 *Ga.* 708; *State v. Clayton*, 27 *Kan.* 442; *Hetherington v. Sterry*, 28 *Kan.* 429; 42 *Am. Rep.* 169; *Rogers v. Slonaker*, 32 *Kan.* 193; *State v. Ferguson*, 31 *N. J. L.* 120; *State v. Van Buskirk*, 40 *N. J. L.* 463; *State v. Good*, 41 *N. J. L.* 296; *Greene v. Hudson Co.*, 44 *N. J. L.* 388; *Hoke v. Henderson*, 4 *Dev. (N. Car.)* 1; 25 *Am. Dec.* 677. *Compare Oregon v. Jennings*, 119 *U. S.* 74; *State v. Newark*, 27 *N. J. L.* 198; *London v. Headen*, 76 *N. Car.* 72; *Jones v. Jefferson*, 66 *Tex.* 576.

In *Hoke v. Henderson*, 4 *Dev. (N. Car.)* 1, 25 *Am. Dec.* 677, the court by *Ruffin, C. J.*, said: "An officer may certainly resign; but without accept-

ance his resignation is nothing, and he remains in office. It is not true that an office is held at the will of either party. It is held at the will of both. Generally, resignations are accepted; and that has been so much a matter of course, with respect to lucrative offices, as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military. . . . Every man is obliged, upon a general principle, after entering upon office to discharge the duties of it while he continues in office, and he cannot lay it down until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left, and the officer discharged. The obligation is, therefore, strictly mutual, and neither party can forcibly violate it. . . . I cannot doubt that the legislature has the perfect power, if it choose arbitrarily to exercise it, of compelling, not indeed a particular man designated in a statute by name, but any citizen elected or appointed, as by law prescribed, to serve in office even against his will."

In *Edwards v. U. S.*, 103 *U. S.* 47, a mandamus was issued to compel the performance of official duty, although the officer had tendered his resignation, it not having been accepted. See also *Thompson v. U. S.*, 103 *U. S.* 480; but see *Olmstead v. Dennis*, 77 *N. Y.* 378.

A city treasurer cannot, by resigning his office take from the city any remedy for wrongs committed by him during

part of the latter.¹ One elected to an office cannot resign it until after he has qualified and entered into possession of it;² nor can one resign an office to which he is not entitled, and which he has no right to occupy.³ And so, where a person is legally ineligible, but receives a majority of the votes for Presidential Elector, he cannot, by declining the appointment, create a vacancy which the governor can fill under a general statute relating to filling vacancies; for he has not been lawfully chosen.⁴

In the absence of statutory or constitutional provisions, a resignation should be made to that officer or body which is by law authorized to act upon it by appointing or electing an officer to fill the vacancy.⁵ As regards the form of the resignation, if no especial mode be prescribed, neither the resignation nor the acceptance thereof need be in writing or in any particular form of words.⁶ The acceptance may be manifested by a formal declara-

his term of office. *Philadelphia v. Marcer*, 1 Leg. Gaz. (Pa.) 355.

1. *Throop's Public Officers*, § 410; *U. S. v. Wright*, 1 McLean (U. S.) 509; *State v. Fitts*, 49 Ala. 402; *People v. Porter*, 6 Cal. 26; *Gates v. Delaware Co.*, 12 Iowa 405; *State v. Mayor*, 4 Neb. 260; *State v. Clarke*, 3 Nev. 566; *Gilbert v. Luce*, 11 Barb. (N. Y.) 91; *Olmsted v. Dennis*, 77 N. Y. 378; *Bunting v. Willis*, 27 Gratt. (Va.) 144; 21 Am. Rep. 338. Compare *U. S. v. Justices*, 10 Fed. Rep. 460; *State v. Hauss*, 43 Ind. 105; 13 Am. Rep. 384.

Thus in *U. S. v. Wright*, 1 McLean (U. S.) 512, the court said: "There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not within the power of the executive to compel him to remain in office. It is only necessary that the resignation should be received, to take effect, and this does not depend upon the acceptance or rejection of the resignation by the President."

A letter to the court from their clerk declaring his intention to resign his office at the next term, and giving them notice to prepare to choose another at that time, as he shall not continue in office after that day, is such a resignation as authorizes the court to appoint a clerk, at that term, to execute his duties immediately after the term ends. *Smith v. Dyer*, 1 Call (Va.) 562.

Under provisions of a charter, which direct that an alderman or other officer may resign by giving written notice to the city clerk, and publishing a copy of such notice in the corporation papers, a simple com-

munication to the mayor and common council, tendering a resignation, is ineffectual. *Lewis v. Oliver*, 4 Abb. Pr. (N. Y.) 121.

2. *Miller v. Sacramento Co.*, 25 Cal. 93; *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538.

3. *Reg. v. Blizard*, L. R. 2 Q. B. 55; 36 L. J. Q. B. 18; *In re Corliss*, 11 R. I. 638.

4. *In re Corliss*, 11 R. I. 638.

5. *Edwards v. U. S.*, 103 U. S. 471; *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 247; *Succession of Boyd*, 12 La. Ann. 611.

Under section 9 of the Office Act, a county commissioner must resign to the board, not to the governor, and the board may fill the vacancy. *People v. Gillespie*, 1 Idaho N. S. 52.

6. *Rex v. Ripon*, 1 Ld. Raym. 563; 2 Salk. 433; *Reg. v. Lane*, 2 Ld. Raym. 1304; *Fortescue* 275; 11 Mod. 270; *Barbour v. U. S.*, 17 Ct. of Cl. 149; *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 248; *State v. Ancker*, 2 Rich. (S. Car.) 245. See also *Jennings' Case*, 12 Mod. 402; *Reg. v. Gloucester*, Holt 450; *Edwards v. U. S.*, 103 U. S. 471; *State v. Allen*, 21 Ind. 516; *People v. Albany Common Pleas*, 19 Wend. (N. Y.) 29; *People v. Board of Police*, 26 N. Y. 316, reversing 35 Barb. (N. Y.) 644; 14 Abb. Pr. (N. Y.) 151; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659. Thus, in *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 248, the court by Cowen, J., said: "Where no particular mode of resignation is prescribed by law, and where the appointment is not by deed, it may be by parol; as, by the incumbent declaring to the appointing power

tion, by the appointment or election of a successor, or by any unequivocal circumstance showing an intention to act upon the resignation.¹

A resignation which has been accepted, cannot be withdrawn,² nor can a resignation which is intended to take effect immediately, and which has been delivered for that purpose to the officers authorized to receive it.³ But a prospective resignation, as it amounts to a mere notice of intention to resign at a future date, may be recalled at any time before it is accepted.⁴

3. By Acceptance of an Incompatible Office—*a.* DOCTRINE AT COMMON LAW.—At common law the rule is well settled, that, where the occupant of one office accepts another incompatible with the first, he thereby vacates absolutely the first office, even though it be a superior one, and his title thereto is *ipso facto* terminated, without any further act on his part, and without any judicial or other proceedings.⁵ But to the above rule an excep-

tion, that he resigns his office, or will continue to serve no longer, and requesting an acceptance of his resignation. Nor need the acceptance be in writing. It is enough that the office be treated as vacant; for instance, by appointing a successor."

A resignation in writing is good without a seal, although the statute require the appointment to be under seal. *Gilbert v. Luce*, 11 Barb. (N. Y.) 91.

1. See *Edwards v. U. S.*, 103 U. S. 471; *Pace v. People*, 50 Ill. 432; *McGee v. State*, 103 Ind. 444; *Gates v. Delaware Co.*, 12 Iowa 405.

Acceptance of a resignation is presumed where the written resignation of the officer is received and filed in the proper office without objection. *Pace v. People*, 50 Ill. 432; *Gates v. Delaware Co.*, 12 Iowa 405.

Where an officer is ineligible to one office because of his holding another office, he continues so until his resignation of the first office is accepted. *Rogers v. Slonacker*, 32 Kan. 191. And see *Bunting v. Willis*, 27 Gratt. (Va.) 144; 21 Am. Rep. 338.

2. *State v. Fitts*, 49 Ala. 402; *Pace v. People*, 50 Ill. 432; *State v. Hauss*, 43 Ind. 105; 13 Am. Rep. 384; *Gates v. Delaware Co.*, 12 Iowa 405; *Bunting v. Willis*, 27 Gratt. (Va.) 144; 21 Am. Rep. 338. Compare *Reg. v. Wigan*, 14 Q. B. D. 908; 54 L. J. Q. B. 338; 38 Eng. Rep. 68; *Yonkey v. State*, 27 Ind. 236.

Where a statute definitely fixes the time when, and the means by which, an officer shall cease to belong to the army

by resignation, if he thus ceases to belong to it, he can only be restored by a new appointment. The President's revocation of the order accepting his resignation will not work his restoration. *Mimmack v. U. S.*, 10 Ct. of Cl. 584.

Resignation While Insane.—If a public officer resigns while insane, and the resignation is accepted by the proper authority in ignorance of the insanity, and a successor is duly appointed, the loss of the office will fall upon the officer who resigned it. *Blake v. U. S.*, 103 U. S. 227.

3. *Mechem's Public Officers*, § 417; *Reg. v. Wigan*, 14 Q. B. D. 908; 54 L. J. Q. B. 338; 38 Eng. Rep. 68; *State v. Hauss*, 43 Ind. 105; 13 Am. Rep. 384.

When an unconditional resignation is transmitted to the proper officer with the intention that it shall operate as such, it amounts to a complete resignation, taking effect from the date of the transmission. *State v. Clarke*, 3 Nev. 566; *State v. Fitts*, 49 Ala. 402.

4. *Biddle v. Willard*, 10 Ind. 66; *State v. Clayton*, 27 Kan. 442; 41 Am. Rep. 418; *Bunting v. Willis*, 27 Gratt. (Va.) 144; 21 Am. Rep. 338. See also *Leech v. State*, 78 Ind. 570; *Rogers v. Slonaker*, 32 Kan. 191; *State v. Boecker*, 56 Mo. 17; *State v. Clarke*, 3 Nev. 566.

5. *Com. Dig.*, tit. Officer, K, 5; *Mechem's Public Officers*, § 420; *Throop's Public Officers*, § 30; *In re Dyer*, Dy. 158, b; *Rex v. Trelawney*, 3 Burr. 1616; *Milward v. Thacher*, 2 T. R. 81; *Rex v. Pateman*, 2 T. R. 777; *Rex v. Hughes*, 5 B. & C. 886; 12 E. C. L. 399; *Rex v. Tizzard*, 9 B. & C. 418;

tion exists in cases where a party cannot divest himself of his office by his own act without the concurrence of another authority to his resignation or motion; in such instances the acceptance of an incompatible office does not operate as an absolute avoidance of a former office, unless the authority whose concurrence is necessary, be privy and consenting to the second appointment.¹ Where, however, the office is one that can be vacated without the consent of any other authority, the officer has the right, upon his appointment or election to the second office, to choose which he will retain; but his choice is deemed to be made when he qualifies for the second office.² And if an officer is appointed to a second office by the power authorized to accept his resignation of the

17 E. C. L. 411; *State v. Hutt*, 2 Ark. 282; *Magie v. Stoddard*, 25 Conn. 565; 68 Am. Dec. 375; *People v. Hanifan*, 96 Ill. 420; *Dailey v. State*, 8 Blackf. (Ind.) 329; *Lucas v. Shepherd*, 16 Ind. 368; *Mehringer v. State*, 20 Ind. 103; *Howard v. Shoemaker*, 35 Ind. 111; *Wilson v. King*, 3 Litt. (Ky.) 457; 14 Am. Dec. 84; *State v. Newhouse*, 29 La. Ann. 824; *State v. Arata*, 32 La. Ann. 193; *State v. Dellwood*, 33 La. Ann. 1229; *State v. West*, 33 La. Ann. 1261; *Stubbs v. Lee*, 64 Me. 195; 18 Am. Rep. 251; *Pooler v. Reed*, 73 Me. 129; *State v. Draper*, 45 Mo. 355; *State v. Lusk*, 48 Mo. 242; *Cotton v. Phillips*, 56 N. H. 220; *People v. Carrique*, 2 Hill (N. Y.) 93; *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 248; *People v. Nostrand*, 46 N. Y. 375; *Davenport v. Mayor, etc., of N. Y.*, 67 N. Y. 456; *State v. Brown*, 5 R. I. 1; *State v. Goff*, 15 R. I. 505; 2 Am. St. Rep. 921; *State v. Buttz*, 9 S. Car. 156; *Biencourt v. Parker*, 27 Tex. 558; *State v. Brinkerhoff*, 66 Tex. 45; *Ex parte Call*, 2 Tex. App. 497; *Shell v. Cousins*, 77 Va. 328. Compare *Rex v. Jones*, 1 B. & Ad. 677; 20 E. C. L. 467; *Rex v. Patteson*, 4 B. & Ad. 9; 24 E. C. L. 11; *Kenney v. Goergen*, 36 Minn. 190.

Hence, the first office being thus vacated *eo instanti* on the acceptance of the second, the acts thenceforth done by the person in his capacity as occupant of the first office are void. *State v. Newhouse*, 29 La. Ann. 824; *Biencourt v. Parker*, 27 Tex. 558. And he is entitled to no compensation therefor. *Davenport v. Mayor, etc., of N. Y.*, 67 N. Y. 456. And so a salaried officer against whom judgment of ouster has been pronounced for having accepted an inconsistent office, is not entitled to his salary from the time he accepted the inconsistent office until the judg-

ment was pronounced. *State v. Comptroller-Gen'l*, 9 S. Car. 259.

But acts done as holder of the second office are valid. *State v. Arata*, 32 La. Ann. 193; *State v. Dellwood*, 33 La. Ann. 1229; *State v. West*, 33 La. Ann. 1261.

Though an election to a second office is void, the first office is nevertheless forfeited, and the officer cannot then regain possession of the former office, if another person has been appointed or elected to it. *Rex v. Hughes*, 5 B. & C. 886.

1. *Rex v. Patteson*, 4 B. & Ad. 9; 24 E. C. L. 11; *Worth v. Newton*, 10 Exch. 247; 23 L. J. Exch. 338.

There is in *England* another exception, viz., where the holding of both offices has been legalized by custom. Thus, in one case, the court refused to oust a party from the first office, because it appeared that both had been held together for one hundred years. *Rex v. Trelawney*, 3 Burr. 1616.

This exception is not recognized by the courts in the *United States*, since with us no custom can have the force of a local law. *Throop's Public Officers*, §§ 30, 31; 1 *Minor's Insts.* (3d ed.) *34.

2. *Mechem's Public Officers*, § 426, citing *State v. Brinkerhoff*, 66 Tex. 45; *Stubbs v. Lee*, 64 Me. 195; 18 Am. Rep. 251.

In the latter case the defendant, being a trial justice, was subsequently appointed and sworn as a deputy sheriff. Said the court by Appleton, C. J.: "Where one has two incompatible offices, both cannot be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance, or to the uncertain and fluctuating whim of the officeholder to determine. The general rule,

first, such appointment will be deemed an acceptance of the resignation of the old office.¹

The incompatibility which will operate to vacate the first office, must be something more than the mere physical impossibility of the performance of the duties of the two offices by one person, and may be said to arise where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both.² Examples under this rule are given in the note below.³

therefore, that the acceptance of, and qualification for, an office, incompatible with one then held, is a resignation of the former, is one certain and reliable, as well as one indispensable, for the protection of the public. The defendant, having been appointed and sworn as a deputy sheriff, must be regarded as having accepted that office. By that acceptance he surrendered the office of trial justice, a judicial office incompatible with that of deputy sheriff."

1. *State v. Brinkerhoff*, 66 Tex. 45.

2. See *Dillon's Mun. Corp.* (4th ed.), vol. 1, § 227; *Preston v. U. S.*, 37 Fed. Rep. 417; *State v. Feibleman*, 28 Ark. 424; *Bryan v. Cattell*, 15 Iowa 538; *Stubbs v. Lee*, 64 Me. 195; 18 Am. Rep. 251; *People v. Green*, 5 Daly (N. Y.) 254; *People v. Green*, 58 N. Y. 295; *State v. Brown*, 5 R. I. 1; *State v. Goff*, 15 R. I. 505; 2 Am. St. Rep. 921; *State v. Buttz*, 9 S. Car. 156.

But in *Rex v. Tizzard*, 9 B. & C. 418, 17 E. C. L. 411, it was held that two offices are incompatible where the holder cannot in every instance discharge the duties of each.

In *People v. Green*, 58 N. Y. 295, it was held that where one office is not subordinate to the other, and the relation of the one to the other is not such as is inconsistent and repugnant, and where contrariety and antagonism would not result in the attempt by one person faithfully and impartially to discharge the duties of each, there is not that incompatibility from which the law declares that the acceptance of the one is a vacation of the other.

"Offices are said to be incompatible and inconsistent, so as to be executed by the same person, when, from the multiplicity of business in them, they cannot be executed with care and ability, or when their being subordinate and interfering with each other, it induces a presumption they cannot be executed with impartiality and honesty." *Bacon's Abr.*, tit. Offices and Officers,

(K) 2. And see *Dillon's Mun. Corp.* (4th ed.), vol. 1, § 227; *Throop's Public Officers*, § 33; *Mechem's Public Officers*, § 422.

3. In the following note are collected instances of offices which have been held compatible or incompatible. Where the decision depends upon statutory or constitutional provisions this fact is indicated.

Alderman.—The office of alderman is incompatible with that of Capital Burgess; *Rex v. Hughes*, 5 B. & C. 886; 12 E. C. L. 399; with that of Chamberlain of a Municipal Corporation; *Throop's Public Officers*, § 35, citing *In re Blissell*, note to Dougl. 398; and with that of Town Clerk; *Com. Dig.*, tit. Officer, B, 6; *Rex v. Tizzard*, 9 B. & C. 418; 17 E. C. L. 411. A person who is an Alderman and Justice of the Peace cannot be appointed County Treasurer. *Rex v. Patteson*, 4 B. & Ad. 9; 24 E. C. L. 11. The office of Alderman is compatible with that of Editor appointed to print the United States laws in his newspaper. *Com. v. Binns*, 17 S. & R. (Pa.) 219.

Aqueduct Commissioner.—The office of aqueduct Commissioner is compatible with that of a Retired Army Officer. *People v. Duane*, 121 N. Y. 367.

Army Officer.—An Army Officer of the United States on the retired list cannot, under the *Texas* Constitution, hold at the same time the office of Mayor of a city. *State v. De Gress*, 53 Tex. 387. But in *New York* he may be an Aqueduct Commissioner. *People v. Duane*, 121 N. Y. 367.

Auditor.—The office of Auditor of a County is, under the *Indiana* Constitution, incompatible with that of Major of Volunteers in the military service of the United States. *Mehring v. State*, 20 Ind. 103. The office of Auditor of a School District is incompatible with that of Prudential Committee. *Cotton v. Phillips*, 56 N. H.

220. The Auditor of a State cannot be also Treasurer of the State. *Bryan v. Cattell*, 15 Iowa 550.

Bailiff.—The office of Bailiff is compatible with that of Town Marshal. *Lewis v. Wall*, 70 Ga. 646.

Capital Burgess.—The office of Capital Burgess is incompatible with that of Alderman. *Rex v. Hughes*, 5 B. & C. 886; 12 E. C. L. 399.

Captain of Volunteers.—The office of Captain of Volunteers is compatible with that of District Attorney. *Bryan v. Cattell*, 15 Iowa 550.

Chamberlain of a Municipal Corporation.—The offices of Chamberlain of a Municipal Corporation and of Alderman are incompatible. *Throop's Public Officers*, § 35; citing *In re Blissell*, note to Dougl. 398.

Chief Baron of Exchequer.—The office of Chief Baron of the Exchequer is compatible with that of Justice of the Common Bench. *Com. Dig.*, tit. Officer, B, 6.

Chief Justice of the Common Bench.—The office of Chief Justice of the Common Bench is compatible with that of Keeper of the Great Seal, but incompatible with that of Prothonotary. *Com. Dig.*, tit. Officer, B, 6.

Chief Supervisor of Elections.—The offices of Chief Supervisor of Elections and of Counsel to the Health Department of the City of New York are incompatible. *Davenport v. Mayor*, etc., of N. Y., 67 N. Y. 456; *aff'd* 2 Thomp. & C. (N. Y.) 536.

City Clerk.—The office of City Clerk is compatible under the *Indiana* Constitution with that of Justice of the Peace. *Mohan v. Jackson*, 52 Ind. 599.

City Councilman.—The office of City Councilman is incompatible with that of City Marshal; *State v. Hoyt*, 2 Oregon 246; and, under the constitution of *Indiana*, with that of Director of the State Prison; *State v. Kirk*, 44 Ind. 401; 15 Am. Rep. 239.

City Marshal.—The offices of City Marshal and City Councilman are incompatible. *State v. Hoyt*, 2 Oregon 246.

Clerk of Circuit Court.—The office of Clerk of Circuit Court is compatible with that of Clerk of County Court. *State v. Lusk*, 48 Mo. 242.

Clerk of County Court.—The office of Clerk of County Court is incompatible with that of Paymaster in the army. *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 401. But it is compatible with that of

Clerk of the Circuit Court. *State v. Lusk*, 48 Mo. 242.

Clerk of District Court.—The offices of Clerk of District Court and Court Commissioner are compatible. *Kennedy v. Goergen*, 36 Minn. 190.

Clerk of School District.—The office of Clerk of School District is compatible with that of Collector of School District. *Howland v. Luce*, 16 Johns. (N. Y.) 135.

Collector of School District.—The offices of Collector of School District and Clerk of same are compatible. *Howland v. Luce*, 16 Johns. (N. Y.) 135.

Colonel.—The offices of Colonel and Major General are incompatible. *State v. Brown*, 5 R. I. 1. The office of Colonel of Volunteers in the Military Service of the United States is, by the *Indiana* Constitution, incompatible with the office of Reporter of the Supreme Court. *Kerr v. Jones*, 19 Ind. 351.

Commissioner.—The office of Commissioner of the United States Centennial Commission is, under the Constitution of the United States, incompatible with the office of Elector of President and Vice-President of the United States. *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538. The office of Commissioner to Lay Out and Construct a Public Road is incompatible with the office of Sheriff. *People v. Nostrand*, 46 N. Y. 375.

Common Councilman.—The offices of Common Councilman and Town Clerk are compatible. *Rex v. Jones*, 1 B. & Ad. 677; 20 E. C. L. 467.

Constable.—The office of Constable is incompatible with that of Justice of the Peace. *Magie v. Stoddard*, 25 Conn. 565; 68 Am. Dec. 375; *Pooler v. Reed*, 73 Me. 129. *Contra*, under the *Massachusetts* Constitution, *Com. v. Kirby*, 2 Cush. (Mass.) 577.

Comptroller.—The office of Comptroller of a State and the Federal office of Surveyor-General are, under the *California* Constitution, incompatible. *People v. Whitman*, 10 Cal. 38.

Coroner.—The office of Coroner is incompatible with that of Justice of the Peace. *Answer of Justices*, 3 Me. 486.

Counsel.—The offices of Counsel to the Health Department of the City of New York and Chief Supervisor of Elections, are incompatible. *Davenport v. Mayor*, etc., of N. Y., 67 N. Y. 456; *aff'd* 2 Thomp. & C. (N. Y.) 536.

County Clerk.—The offices of County Clerk and Notary Public are, under

the Constitution of *Texas*, incompatible. *Biencourt v. Parker*, 27 Tex. 558.

County Commissioner.—The offices of County Commissioner and County Recorder, are incompatible under the Constitution of *Indiana*. *Dailey v. State*, 8 Blackf. (Ind.) 329. Under the *Texas* Constitution, the office of County Commissioner is compatible with any other civil office. *Gaal v. Townsend*, 77 Tex. 464.

County Recorder.—The offices of County Recorder and County Commissioner are incompatible within the meaning of the *Indiana* Constitution. *Dailey v. State*, 8 Blackf. (Ind.) 329.

County Treasurer.—The office of County Treasurer is incompatible with that of a person who is an Alderman and Justice of the Peace. *Rex v. Patteson*, 4 B. & Ad. 9; 24 E. C. L. 11.

Court Commissioner.—The offices of Court Commissioner and Clerk of District Court are compatible. *Kennedy v. Goergen*, 36 Minn. 190.

Crier.—The office of Crier of the United States Circuit or District Court is compatible with that of Messenger of same. *Preston v. U. S.*, 37 Fed. Rep. 417.

Deputy Clerk of Circuit Court.—The offices of Deputy Clerk of Circuit Court and Supervisor are, under the *Arkansas* Constitution, compatible. *State v. Feibleman*, 28 Ark. 424.

Deputy Clerk.—The office of Deputy Clerk of a Municipal Court is compatible with the office of Legislator. *People v. Green*, 58 N. Y. 295; *reversing* 5 Daly (N. Y.) 254; 46 How. Pr. (N. Y.) 169; *People v. Murray*, 73 N. Y. 535; *reversing* 8 Daly (N. Y.) 347. The offices of Deputy Clerk of County Court and of Justice of the Peace, are incompatible. *Amory v. Justices*, 2 Va. Cas. 523.

Deputy Sheriff.—The office of Deputy Sheriff is incompatible with that of Justice of District Court. *State v. Goff*, 15 R. I. 505; 2 Am. St. Rep. 901. The offices of Deputy Sheriff and Justice of the Peace are incompatible. *Wilson v. King*, 3 Litt. (Ky.) 457; 14 Am. Dec. 84; *Answer of Justices*, 3 Me. 486. So under the Constitution of *Arkansas*. *State Bank v. Curran*, 10 Ark. 142. The office of Deputy Sheriff is also incompatible with that of Trial Justice. *Stubbs v. Lee*, 64 Me. 195; 18 Am. Rep. 251.

Director of State Prison.—Under the *Indiana* Constitution the office of Director of the State Prison is incompati-

ble with that of Mayor of a City; *Howard v. Shoemaker*, 35 Ind. 111; and with that of City Councilman. *State v. Kirk*, 44 Ind. 401; 15 Am. Rep. 239.

District Attorney.—The office of District Attorney is compatible with that of Captain of Volunteers. *Bryan v. Cattell*, 15 Iowa 550.

Editor.—An Editor appointed to print the United States laws in his newspaper may be an Alderman. *Com. v. Binns*, 17 S. & R. (Pa.) 219.

Elector.—The office of Elector of President and Vice-President of the United States is, under the United States Constitution, incompatible with the office of Commissioner of the United States Centennial Commission. *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538.

Inspector of Elections.—An Inspector of Elections may be an Interpreter of a Municipal Court. *Goettman v. Mayor*, etc., of N. Y., 6 Hun (N. Y.) 132.

Interpreter.—The office of Interpreter of a Municipal Court is compatible with that of Inspector of Elections. *Goettman v. Mayor*, 6 Hun (N. Y.) 132.

Judge.—The office of Judge is incompatible with that of Legislator. *Woodside v. Wagg*, 71 Me. 207. A Judge of a County Court cannot be a Postmaster. *Hoglan v. Carpenter*, 4 Bush (Ky.) 89. The office of Judge of a District Court is incompatible with that of Judge of the Supreme Court. *Bryan v. Cattell*, 15 Iowa 550.

Judge of Elections.—The office of Judge of Elections is compatible with that of School Director. *In re District Attorney*, 11 Phila. (Pa.) 645.

Jury Commissioner.—A Jury Commissioner cannot, under the *Louisiana* Constitution, be a Police Commissioner. *State v. Newhouse*, 29 La. Ann. 824.

Justice of the Common Bench.—The office of Justice of the Common Bench is compatible with that of Chief Baron of the Exchequer, but is incompatible with the office of Justice of the King's Bench. *Com. Dig.*, tit. Officer, B, 6.

Justice of King's Bench.—The office of Justice of the King's Bench is incompatible with that of Justice of the Common Bench. *Com. Dig.*, tit. Officer, B, 6.

Justice of District Court.—The offices of Justice of District Court and of Deputy Sheriff are incompatible. *State v. Goff*, 15 R. I. 505; 2 Am. St. Rep. 901.

Justice of the Peace.—The office of

Justice of the Peace is incompatible with that of Constable. *Magie v. Stoddard*, 25 Conn. 565; 68 Am. Dec. 375; *Pooler v. Reed*, 73 Me. 129. *Contra*, under the *Massachusetts* Constitution. *Com. v. Kirby*, 2 Cush. (Mass.) 577. It is incompatible with that of Coroner; Answer of Justices, 3 Me. 486; with that of Deputy Clerk of County Court; *Amory v. Justices*, 2 Va. Cas. 523; with that of Deputy Sheriff; *Wilson v. King*, 3 Litt. (Ky.) 457; 14 Am. Dec. 84; Answer of Justices, 3 Me. 486; so under the *Arkansas* Constitution; *State Bank v. Curran*, 10 Ark. 142; with that of Sheriff; Answer of Justices, 3 Me. 486; so under the *Arkansas* Constitution; *State Bank v. Curran*, 10 Ark. 142; with that of Treasurer of the State (by the Constitution of *Arkansas*); *State v. Hutt*, 2 Ark. 282. The office of Justice of the Peace is compatible with that of City Clerk (under the Constitution of *Indiana*); *Mohan v. Jackson*, 52 Ind. 599; with that of Register of Deeds; Opinions of Justices, 68 Me. 594. Under the *Texas* Constitution the office of Justice of the Peace is compatible with any other civil office. *Gaal v. Townsend*, 77 Tex. 464. The office of a person who is a Justice of the Peace and an Alderman, is incompatible with that of County Treasurer. *Rex v. Patteson*, 4 B. & Ad. 9; 24 E. C. L. 11.

Keeper of the Great Seal.—The Keeper of the Great Seal may be Chief Justice of the Common Bench. *Com. Dig.*, tit. Officer, B, 6.

Legislator.—The office of Legislator is incompatible with that of Judge. *Woodside v. Wagg*, 71 Me. 207. But it is compatible with that of Deputy Clerk of a Municipal Court. *People v. Green*, 58 N. Y. 295, *reversing* 5 Daly (N. Y.) 254; 46 How. Pr. (N. Y.) 169; *People v. Murray*, 73 N. Y. 535, *reversing* 8 Daly (N. Y.) 347.

Major General.—The office of Major General is incompatible with that of Colonel. *State v. Brown*, 5 R. I. 1.

Major of Volunteers.—The office of Major of Volunteers in the military service of the United States is incompatible, under the *Indiana* Constitution, with the office of Auditor of a County. *Mehringer v. State*, 20 Ind. 103.

Marshal of a City.—The office of Marshal of a City is incompatible with that of City Councilman. *State v. Hoyt*, 2 Oregon 246.

Mayor.—The office of Mayor is in-

compatible with that of Town Clerk. *Com. Dig.*, tit. Officer, B, 6. And, so under the *Indiana* Constitution, with that of Director of the State Prison. *Howard v. Shoemaker*, 35 Ind. 111. The office of Mayor of a City cannot, under the *Texas* Constitution, be legally held by one who at the same time continues a United States Army Officer on the retired list. *State v. De Gress*, 53 Tex. 387.

Member of Assembly.—The office of Member of Assembly is compatible with that of Deputy Clerk of a Municipal Court. *People v. Green*, 58 N. Y. 295, *reversing* 5 Daly (N. Y.) 254; 46 How. Pr. (N. Y.) 169; *People v. Murray*, 73 N. Y. 535, *reversing* 8 Daly (N. Y.) 347.

Member of Congress.—A Member of Congress cannot be a State Solicitor. *State v. Buttz*, 9 S. Car. 156.

Member of Legislature.—A Member of the Legislature cannot be a Judge. *Woodside v. Wagg*, 71 Me. 207. But he may be a Deputy Clerk of a Municipal Court. *People v. Green*, 58 N. Y. 295, *reversing* 5 Daly (N. Y.) 254; 46 How. Pr. (N. Y.) 169; *People v. Murray*, 73 N. Y. 535, *reversing* 8 Daly (N. Y.) 347.

Messenger of Court.—The Messenger of a United States Circuit or District Court may be the Crier of the same. *Preston v. U. S.*, 37 Fed. Rep. 417.

Notary Public.—The offices of Notary Public and County Clerk were formerly under the *Texas* Constitution incompatible. *Biencourt v. Parker*, 27 Tex. 558. But by the present Constitution the office of Notary Public is compatible with any other civil office. *Gaal v. Townsend*, 77 Tex. 464.

Office Holder.—An office in an Executive Department may be held by a Retired Army Officer. *Collins v. U. S.*, 15 Ct. of Cl. 22. Compare *People v. Duane*, 121 N. Y. 367.

Paymaster in the Army.—The offices of Paymaster in the Army and Clerk of the County Court are incompatible. *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 401.

Police Commissioner.—The office of Police Commissioner is incompatible, under the *Louisiana* constitution, with that of Jury Commissioner. *State v. Newhouse*, 29 La. Ann. 824.

Postmaster.—The office of Postmaster is incompatible with that of Judge of the County Court; *Hoglan v. Carpenter*, 4 Bush (Ky.) 89; and so, under the *Indiana* constitution, the office of

Postmaster is incompatible with that of Township Trustee. *Foltz v. Kerlin*, 105 Ind. 221. In *Texas*, by constitution, the office of Postmaster is compatible with any other civil office. *Gaal v. Townsend*, 77 Tex. 464.

Presidential Elector.—Under the *United States* Constitution the office of Presidential Elector is incompatible with the office of Commissioner of the United States Centennial Commission. *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538.

Prothonotary.—The office of Prothonotary is incompatible with that of Chief Justice of the Common Bench. Com. Dig., tit. Officer, B. 6.

Prudential Committee.—The office of Prudential Committee is incompatible with that of Auditor of a School District. *Cotton v. Phillips*, 56 N. H. 220.

Register of Deeds.—The office of Register of Deeds is compatible with that of Trial Justice or Justice of the Peace and Quorum. *Opinions of Justices*, 68 Me. 594.

Reporter of Supreme Court.—The office of Reporter of the Supreme Court and the office of Colonel of Volunteers in the military service of the United States, are incompatible under the *Indiana* constitution. *Kerr v. Jones*, 19 Ind. 351.

Retired Army Officer.—A Retired Army Officer may be an official in an Executive Department. *Collins v. U. S.*, 15 Ct. of Cl. 22. See also *People v. Duane*, 121 N. Y. 367, in which it was held that a Retired Army Officer could be an Aqueduct Commissioner.

Sampler of Tobacco.—Under the *Virginia* constitution the office of Sampler of Tobacco and the office of Sheriff are incompatible. *Shell v. Cousins*, 77 Va. 328.

School Director.—A School Director may be a Judge of Elections. *In re District Attorney*, 11 Phila. (Pa.) 645.

Secretary of State.—Under the constitution of *Arkansas* a Secretary of State may also be a State Senator. *State v. Clendenin*, 24 Ark. 78.

Sheriff.—The office of Sheriff is incompatible with that of Commissioner to lay out and construct a public road; *People v. Nostrand*, 46 N. Y. 375; with that of Justice of the Peace; *Answer of Justices*, 3 Me. 486; so, under the *Arkansas* constitution; *State Bank v. Curran*, 10 Ark. 142; with that of Sampler of Tobacco (under the *Virginia* constitution). *Shell v. Cousins*, 77 Va. 328.

State Auditor.—The office of State Auditor is incompatible with that of State Treasurer. *Bryan v. Cattell*, 15 Iowa 550.

State Senator.—Under the constitution of *Arkansas* the office of State Senator is compatible with that of Secretary of State. *State v. Clendenin*, 24 Ark. 78.

State Solicitor.—The offices of State Solicitor and of Member of Congress are incompatible. *State v. Buttz*, 9 S. Car. 156.

State Treasurer.—The office of State Treasurer is incompatible with that of State Auditor; *Bryan v. Cattell*, 15 Iowa 550; and, under the constitution of *Arkansas*, with that of Justice of the Peace. *State v. Hutt*, 2 Ark. 282.

Supervisor.—By the constitution of *Arkansas* the offices of Supervisor and of Deputy Clerk of Circuit Court are compatible. *State v. Feibleman*, 28 Ark. 424. Under the *Indiana* constitution the offices of Supervisor and Township Trustee are incompatible. *Creighton v. Piper*, 14 Ind. 182.

Supervisor of Elections.—The offices of Chief Supervisor of Elections and of Counsel to the Health Department of the City of New York are incompatible. *Davenport v. Mayor*, etc., of N. Y., 67 N. Y. 456; *affirming 2 Thomp. & C. (N. Y.) 536*.

Surveyor General.—The office of Surveyor General (a Federal office) is, under the *California* constitution, incompatible with the office of Comptroller of the State. *People v. Whitman*, 10 Cal. 38.

Town Clerk.—The office of Town Clerk is incompatible with that of Alderman; Com. Dig., tit. Officer, B. 6; *Rex v. Tizzard*, 9 B. & C. 418; 17 E. C. L. 411; and with that of Mayor; Com. Dig., tit. Officer, B. 6. The office of Town Clerk is compatible with that of Common Councilman; *Rex v. Jones*, 1 B. & Ad. 677; 20 E. C. L. 467; and with that of Bailiff. *Lewis v. Wall*, 70 Ga. 646.

Township Trustee.—Under the *Indiana* constitution the office of Township Trustee is incompatible with the Federal office of Postmaster; *Foltz v. Kerlin*, 105 Ind. 221; 55 Am. Rep. 197; and with that of Supervisor. *Creighton v. Piper*, 14 Ind. 182.

Treasurer of State.—The office of Treasurer of a State is incompatible with that of Auditor of the State; *Bryan v. Cattell*, 15 Iowa 550; and with that of Justice of the Peace (under the

b. DOCTRINE UNDER STATUTES.—In many of the *United States* there are statutory or constitutional provisions forbidding the holding of more than one office by the same person,¹ whether that office be State or Federal,² or forbidding the holding of offices in different departments of the government, such as the judicial and executive departments.³ Where in this manner two offices of a designated character are forbidden to be held by the same person at the same time, the acceptance of a second office of the kind prohibited absolutely vacates the first,⁴ no shadow of title being left and no judicial determination being necessary to declare the vacancy.⁵ This rule, however, applies only to two offices held under the same sovereignty. The national law neither creates nor governs a State office, and the State law exerts no dominion over a Federal office; the acceptance of an office existing under a State law, therefore, does not vacate an office existing under a national law.⁶ But if the incumbent elects to hold the latter, he must surrender the former,⁷ and the State courts will declare a State office vacated on the acceptance by the incumbent of a Federal office of the prohibited class.⁸ If the prohibition refers to eligibility as distinguished from the

Arkansas constitution). *State v. Hutt*, 2 Ark. 282.

Trial Justice.—The offices of Trial Justice and Deputy Sheriff are incompatible; *Stubbs v. Lee*, 64 Me. 195; 18 Am. Rep. 251. But the office of Trial Justice is compatible with that of Register of Deeds. *Opinions of Justices*, 68 Me. 594.

1. See *Dailey v. State*, 8 Blackf. (Ind.) 329; *Creighton v. Piper*, 14 Ind. 182; *Kerr v. Jones*, 19 Ind. 351; *Mehringer v. State*, 20 Ind. 103; *State v. Kirk*, 44 Ind. 401; 15 Am. Rep. 239; *Biencourt v. Parker*, 27 Tex. 558; *State v. De Gress*, 53 Tex. 387; *State v. Brinkerhoff*, 66 Tex. 45.

2. See *People v. Whitman*, 10 Cal. 38; *Foltz v. Kerlin*, 105 Ind. 221; 55 Am. Rep. 197; *Davenport v. Mayor*, etc., of N. Y., 67 N. Y. 456.

3. See *State v. Hutt*, 2 Ark. 282; *State Bank v. Curran*, 10 Ark. 142.

4. *State v. Hutt*, 2 Ark. 282; *Dickson v. People*, 17 Ill. 191; *People v. Hanifan*, 96 Ill. 420; *Dailey v. State*, 8 Blackf. (Ind.) 329; *Creighton v. Piper*, 14 Ind. 182; *Lucas v. Shepherd*, 16 Ind. 368; *Howard v. Shoemaker*, 35 Ind. 111; *State v. Kirk*, 44 Ind. 401; 15 Am. Rep. 239; *Foltz v. Kerlin*, 105 Ind. 221; 55 Am. Rep. 197; *State v. Arata*, 32 La. Ann. 193; *State v. Dellwood*, 33 La. Ann. 1239; *State v. West*, 33 La. Ann. 1261; *State v. Newhouse*, 29 La. Ann. 824; *Stubbs v. Lee*, 64 Me. 195;

18 Am. Rep. 251; *State v. Draper*, 45 Mo. 355; *Cotton v. Philips*, 56 N. H. 220; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659; *Davenport v. Mayor*, etc., of N. Y., 67 N. Y. 456; *Shell v. Cousins*, 77 Va. 328.

New York Laws 1882, ch. 410, declare that no clerk in the employ of New York City shall become interested in the performance of any contract work, or business the price of which is payable by the city. *Held*, that a clerk could not become a lecturer in an evening school under an appointment from the board of education. *McAdam v. Mayor*, etc., of N. Y., 36 Hun (N. Y.) 340.

5. *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659; *People v. Green*, 58 N. Y. 304; *People v. Nostrand*, 46 N. Y. 381; *People v. Carrique*, 2 Hill (N. Y.) 93.

6. *Foltz v. Kerlin*, 105 Ind. 222; 55 Am. Rep. 197.

One holding a Federal office does not create a vacancy therein by accepting a State office which, under the Constitution, is incompatible therewith, as the State cannot declare vacant a Federal office. *De Turk v. Com.*, 129 Pa. St. 151.

7. *Foltz v. Kerlin*, 105 Ind. 222; 55 Am. Rep. 197. And see *People v. Leonard*, 73 Cal. 230.

8. See *Dickson v. People*, 17 Ill. 191; *People v. Brooklyn*, 77 N. Y. 103; 33

right to hold the office, an election to the second office is void, and the vacation of that and not of the first will be enforced by the courts.¹

4. By Abandonment.—A public office may be vacated and the authority of its incumbent terminated by abandonment.² Thus if the incumbent of an office is required to reside in, or be a resident of, the district which he represents, his permanent removal from it is an abandonment which will vacate the office;³ but not so of a mere temporary removal without intent to abandon the office or to discontinue the performance of its duties.⁴ An officer whose abandonment has taken effect so as to create a vacancy cannot legally resume the occupancy of the office, either by accidental, voluntary, or forcible means;⁵ and a public officer who refuses or neglects to perform the duties of his office for such a period as to warrant the presumption that he did not intend to perform them, whether the neglect was willful or due to a mistaken supposition that he had no right to the office, will be held to have abandoned it.⁶ A mere temporary accidental

Am. Rep. 659; *State v. Buttz*, 9 S. Car. 156; *State v. De Gress*, 53 Tex. 387.

1. *Crawford v. Dunbar*, 52 Cal. 36; *Vogel v. State*, 107 Ind. 374; *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538.

In *People v. Leonard*, 73 Cal. 230, under a constitutional provision that no person holding any lucrative office under the *United States* or any other power, shall be eligible to any civil office of profit in that State, it was held to refer to eligibility to hold office as well as to be elected to it, and that it disqualified a person from continuing to hold an office under the State after he had received and entered upon a lucrative office under the *United States*.

2. *State v. Allen*, 21 Ind. 516; 83 Am. Dec. 367; *Wildes v. Russell*, L. R. 1 C. P. 722; *Willc. Mun. Cor.* 238; *Dillon Mun. Corp.*, § 228. And see *People v. Hamipin*, 96 Ill. 420.

3. *Yonkey v. State*, 27 Ind. 236; *State v. Allen*, 21 Ind. 516; 83 Am. Dec. 367; *Jones v. Collier*, 65 Ga. 553; *Curry v. Stewart*, 8 Bush (Ky.) 560; *Prather v. Hart*, 17 Neb. 598. But see *Smith v. State*, 24 Ind. 101.

To constitute an abandonment, it must have been such an absence from the official district as will effect injuriously the public interest. *State v. Graham*, 26 La. Ann. 568; 21 Am. Rep. 551.

The absence of the governor from the State is to be ascertained on some proof accessible to the public, from which they may with certainty derive

the knowledge as to who is authorized to act in his place. There being no provision of law for the mode in which the governor is to manifest to the public his absence from the State, it is necessarily left to his discretion, subject to his responsibility to the people. *State v. Hunt*, 54 N. H. 431.

4. *Yonkey v. State*, 27 Ind. 236; *Curry v. Stewart*, 8 Bush (Ky.) 562; *McGregor v. Allen*, 33 La. Ann. 870; *State v. Graham*, 26 La. Ann. 568; 21 Am. Rep. 551; *People v. Parker*, 3 Neb. 409; 19 Am. Rep. 634.

When a public officer of the State absent from his duties, has not legally vacated his office, he is entitled to his salary during such absence, the statutes of *Iowa* making no deduction therefor. *Bryan v. Cattell*, 15 Iowa 538.

By the apportionment law of 1866, the boundaries of an assembly district were so changed that a person previously elected in the district as a resident of the board of county supervisors, ceased to be a resident thereof. It was held that he did not in consequence lose his office. *State v. Milwaukee Co.*, 21 Wis. 433.

5. *State v. Allen*, 21 Ind. 516; 83 Am. Dec. 367; *Yonkey v. State*, 27 Ind. 236; and see *State v. Jones*, 19 Ind. 356; *Hedley v. Franklin Co.*, 4 Blackf. (Ind.) 116; *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *Rex v. Harris*, 1 B. & Ad. 936; 20 E. C. L. 509.

6. *People v. Hartwell*, 67 Cal. 11; *State v. Allen*, 21 Ind. 516; 83 Am.

or excusable failure to exercise the functions of the office for a short period or in a single instance, however, is not a sufficient ground upon which to declare an abandonment,¹ nor will a discontinuance of the exercise of official functions in obedience to a statute which is afterward declared unconstitutional during the continuance of the term, effect an abandonment or an estoppel to claim the office.² In any event, a judicial determination is necessary, refusal to serve not being in itself a forfeiture but merely a cause of forfeiture.³

While an absolute refusal to qualify or to enter upon the discharge of the duties of the office would undoubtedly effect a forfeiture of the office, mere delay in qualifying cannot be deemed an abandonment;⁴ though in several of the States quali-

Dec. 367; *People v. Kingston, etc.*, R. Co., 23 Wend. (N. Y.) 193; 35 Am. Dec. 511; *Williams v. Somers*, 1 Dev. & B. (N. Car.) 61; *Dickens v. Justices*, 1 Dev. & B. (N. Car.) 406; *Barbour v. U. S.*, 17 Ct. of Cl. 149; *Rex v. Wells*, 4 Burr. 2004; *Reg. v. Bailiffs*, 2 Ld. Raym. 1237; *King v. Rook*, Cro. Car. 291; and see *Hunter v. Rutledge*, 6 Jones (N. Car.) 216.

Where one who had been elected alderman failed for five months to attend the meetings of the city council, or perform the duties of his office, he will be considered as having impliedly resigned his position, so as to authorize an election to fill his place. *People v. Hanifan*, 6 Ill. App. 158.

1. See *State v. Allen*, 21 Ind. 516; 83 Am. Dec. 367; *State v. Baird*, 47 Mo. 301.

The mere fact that a county officer has been prevented, by sickness, for a period of fifty days, from attending to his official duties, does not create a vacancy in his office nor authorize the county court to appoint his successor. *State v. Baird*, 47 Mo. 301.

2. *Turnipseed v. Hudson*, 50 Miss. 429; 19 Am. Rep. 15.

But where an officer, after being informed that the president intends to vacate the office is suspended under U. S. Rev. Stat., and does not, until the adjournment of the Senate seek to recover the office, or tender service, nor demand salary, his conduct evinces an intention to abandon the office and is equivalent to a resignation. *Barbour v. U. S.*, 17 Ct. of Cl. 149.

3. *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 243; *Cronin v. Grundy*, 16 Hun (N. Y.) 520; *Cronin v. Stoddard*, 97 N. Y. 371.

"Every proceeding to remove an of-

ficer for official misconduct or neglect, is essentially and thoroughly a judicial proceeding and has, consequently, and with the utmost propriety, been confided to that branch of the State government." *State v. Pritchard*, 36 N. J. L. 117; and see *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *Curry v. Steward*, 8 Bush (Ky.) 560; *Hyde v. State*, 52 Miss. 665; *State v. Pritchard*, 36 N. J. L. 101; *Honey v. Graham*, 39 Tex. 1.

Under *California* Pol. Code, § 996, a local office becomes vacant when the incumbent ceases to be an inhabitant of the district for which he was elected, or within which the duties of the office are discharged; and a successor may be appointed without an adjudication that the office is vacant. *People v. Brite*, 55 Cal. 79.

4. *State v. Peck*, 30 La. Ann. 280; *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182; *State v. Porter*, 7 Ind. 204; *Ross v. Williamson*, 44 Ga. 501; *People v. Benfield*, 80 Mich. 265; *State v. Churchill*, 41 Nev. 41; *Cronin v. Stoddard*, 97 N. Y. 271; *People v. Hooley*, 12 Wend. (N. Y.) 481; *Cronin v. Grundy*, 16 Hun (N. Y.) 520; *State v. Colvig*, 15 Oregon 57; *State v. Toomer*, 7 Rich. (S. Car.) 216; *Buckman v. Beaufort Co.*, 80 N. Car. 121. See also *Payne v. San Francisco*, 3 Cal. 122; *Jones v. Jones*, 80 N. Car. 127.

The general rule is that statutes requiring officers to qualify within a certain time after their election or appointment, or that they should be deemed to have refused the office, and that the same should be filled by appointment, are merely directory as to the same, and that the failure of an officer-elect to file his bond and take the oath of office does not *ipso facto* work a forfeit-

fication within the required time is regarded as a condition precedent to the incumbency of the office, a failure to thus qualify effecting a forfeiture and creating a vacancy without the interposition of a judicial determination.¹ Engaging in a rebellion against a government in itself effects a forfeiture of an office held under it, without the necessity of a judicial declaration;² and while the death of the incumbent vacates an office required to be filled by one person only,³ where power is conferred upon two or more officers, the death of one of them does not vacate

ure of his office. *Ross v. Williamson*, 44 Ga. 501; *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182; *State v. Porter*, 7 Ind. 204; *State v. Churchill*, 41 Mo. 41; *State v. Texas Co. Ct.*, 44 Mo. 230; *Kearney v. Andrews*, 10 N. J. Eq. 70; *People v. Holly*, 12 Wend. (N. Y.) 481; *Cronin v. Grundy*, 16 Hun (N. Y.) 520; *State v. Toomer*, 7 Rich. (S. Car.) 216.

If the failure of a person appointed to an office to file his official bond within the time prescribed was due to no neglect or default on his part (as where the officer required to approve such bond withheld his approval on the ground that the appointment was invalid) such appointee may, after judgment in his favor in an action to oust a usurper from the office, file his bond, and do any other act necessary to entitle him to discharge the duties of the office. *State v. Ackerman*, 65 Wis. 510. The statute only applies to the person declared elected by the board of canvassers, and not to one to whom the board had refused a certificate. *People v. Mayworth*, 5 Mich. 146; *State v. Kraft*, 18 Oregon 550.

The county judge only, and not the supervisors, has authority to approve official bonds, and consequently to declare an office vacant for want of a bond. *People v. Marion Co.*, 10 Cal. 344; and see *Wren v. Fargo*, 2 Oregon 19; *Ruckles v. State*, 1 Oregon 347.

1. *Thompson v. Holt*, 52 Ala. 491; *State v. Tucker*, 54 Ala. 205; *People v. Taylor*, 57 Cal. 620; *In re Attorney Genl.*, 14 Fla. 277; *State v. Matheny*, 7 Kan. 327; *State v. Laughton*, 19 Nev. 202; *Branham v. Long*, 78 Va. 352; *Johnson v. Mann*, 77 Va. 265; *Howell v. Com.*, 97 Pa. St. 332. And see *State v. Beard*, 34 La. Ann. 273; *State v. McCarty*, 5 Wis. 163.

Where two candidates for an office receive the same number of votes, it is not necessary that either should qual-

ify before the result of the election has been determined. *State v. Kraft*, 18 Oregon 550.

In *Kansas*, the statute has been changed so as to provide that if the officer-elect "shall refuse or neglect, without sufficient cause," to qualify within a certain time, the office should become vacant. And it was decided under the statute so amended, that he had a right to show that he had sufficient cause for failing to qualify within the time prescribed by law. *Carpenter v. Titus*, 33 Kan. 7.

In *Georgia*, it is held that it must appear that the failure of the officer to qualify within the prescribed time was due to his own default, in order to work a forfeiture of his office. *Ross v. Williamson*, 44 Ga. 501.

2. *Chisholm v. Coleman*, 43 Ala. 204; 94 Am. Dec. 678.

3. See *People v. Cowles*, 13 N. Y. 350.

The right to the office of chancellor is perfected by the election; and the fact that he dies without being commissioned does not render him the less a chancellor while he lived. His death creates a vacancy in the office, which may be filled *pro tempore* by the governor. *Gold v. Fite*, 11 Heisk. (Tenn.) 237.

When a person dies after he has been chosen a county officer, though before the votes are counted, the supreme court has authority to declare the office vacant and to fill the vacancy. *State v. Hunt*, 54 N. H. 431.

The statute of *Indiana* authorizing the board of commissioners of any county, in which the office of recorder shall become vacant by death, etc., to appoint some person to supply the vacancy until the next general election, does not conflict with the provision of the constitution that the recorder shall be elected. *Hedley v. Franklin Co.*, 4 Blackf. (Ind.) 116.

the whole office unless the joint action of all is expressly required.¹

5. Removal of Subordinate Officers.—In the absence of constitutional provisions or statutory regulations, where the tenure is not fixed by law and where the office is held at the pleasure of the appointing power, the power of removal is incident to the power of appointment,² and it is well settled in such case that an

1. See *Downing v. Rugar*, 21 Wend. (N. Y.) 178; 34 Am. Dec. 223; *People v. Palmer*, 52 N. Y. 84; *People v. Mayor, etc., of Syracuse*, 63 N. Y. 291; *In re Merriam*, 84 N. Y. 596; *Colman v. Shattuck*, 62 N. Y. 348; *Gildersleeve v. Board of Education*, 17 Abb. Pr. (N. Y.) 206.

By death or disqualification of a portion of a board of officers, the number of its members is reduced, and all do meet when all who are living and qualified to act come together. *People v. Palmer*, 52 N. Y. 83.

There is no doubt of the authority of two to act where a third neglects to do so. In New York it is provided by statute that in case of the neglect of any assessor from any cause to perform his duties, the other assessors are authorized to do so, and they are required to certify with the assessment roll the name of the delinquent. *Colman v. Shaddock*, 62 N. Y. 348.

2. *Patton v. Vaughan*, 39 Ark. 211; *People v. Hill*, 7 Cal. 97; *Ford v. Board of State Harbor Comrs.*, 81 Cal. 19; *Smith v. Brown*, 59 Cal. 672; *People v. Shear* (Cal. 1887), 15 Pac. Rep. 92; *People v. Higgins*, 15 Ill. 110; *State v. Barrow*, 29 La. Ann. 243; *Avery v. Tyringham*, 3 Mass. 177; 3 Am. Dec. 105; *Newsome v. Cocke*, 44 Miss. 352; 7 Am. Rep. 686; *People v. Durston* (Supreme Ct.), 3 N. Y. Supp. 522; *People v. Mayor, etc., of N. Y.*, 16 Hun (N. Y.) 309; *People v. Fire Comrs.*, 73 N. Y. 437; *People v. Mayor, etc., of N. Y.*, 82 N. Y. 491; *People v. Mayor, etc., of N. Y.*, 5 Barb. (N. Y.) 43; *Cincinnati, etc., R. Co. v. Sloan*, 31 Ohio St. 1; *Houseman v. Com.*, 100 Pa. St. 222; *Com. v. Sutherland*, 3 S. & R. (Pa.) 145; *Williams v. Boughner*, 6 Coldw. (Tenn.) 486; *In re Eaves*, 30 Fed. Rep. 21; *Ex parte Hennen*, 13 Pet. (U. S.) 230. *Ford v. Board of State Harbor Comrs.*, 81 Cal. 19; *Williams v. Gloucester*, 148 Mass. 256; *Madison v. Korbly*, 32 Ind. 74; *Madison v. Kelso*, 32 Ind. 79; *Evans v. Justices, etc.*, 3 Hayw. (Tenn.) 26; *Hardin Co. Ct. v. Hardin*, Peck (Tenn.)

291; *Sevier v. Washington Co.*, Peck (Tenn.) 334; *State v. Dougherty*, 25 La. Ann. 119; *State v. Alt*, 26 Mo. App. 673; *State v. Police Comrs.*, 88 Mo. 144; *People v. Comptroller*, 20 Wend. (N. Y.) 595; *People v. Whitlock*, 92 N. Y. 191; *People v. Robb*, 126 N. Y. 180; *Bergen v. Powell*, 94 N. Y. 591; *People v. Purroy*, 10 N. Y. Supp. 181; *Gaimbeer v. Mayor, etc., of New York*, 4 Sandf. (N. Y.) 109; *People v. Thompson*, 94 N. Y. 451; *People v. Hayden*, 10 N. Y. Supp. 794; *Avery v. Tyringham*, 3 Mass. 177; *Blake v. U. S.*, 103 U. S. 227.

Whenever the people directly or through the legislature clothe any department of the government, or of its boards or officers, with power at discretion to create an office, they clothe it with a like power to abolish the same office. *Ford v. Harbor Commissioners*, 81 Cal. 19.

Such a power of removal may be exercised at pleasure. The officer upon whom it is conferred is the sole and exclusive judge as to the propriety of its exercise. The discretion is not to be construed as a judicial discretion to be regulated according to known rules of law. *People v. Mayor, etc., of New York*, 82 N. Y. 491.

In *State v. Board of Public Lands*, 7 Neb. 42, it was held that the tenure of an office filled by appointment is not affected by changes in membership of the appointing board, but that if the board is abolished by law, tenure of the office is thereby terminated. See also *Nichols v. Comptroller*, 4 Stew. & P. (Ala.) 154. But in *People v. Hammond*, 66 Cal. 454, in which police commissioners were appointed by the district judges, no term of office being fixed, and afterwards the district courts were abolished, and a new judicial system established, making no specific provision for the exercise of the functions of the judges, it was held that police commissioners appointed by the governor, were not entitled to the office. See also *Currier v. Boston, etc., Railroad*, 31 N. H. 209.

officer may be removed without notice or hearing.¹ This doctrine applies, however, where the office is held at the pleasure of the appointing power only; where the tenure of the office is fixed by law;² or where the concurrence or consent of a different body or officer is required to the removal;³ or where the right to removal can be exercised only for specified cause or for cause generally;⁴ the appointing power cannot arbitrarily remove the officer; and where the removal is to be had for cause, the power cannot be exercised until the officer has been duly notified and opportunity given him to be heard in his own defense.⁵ It is within the

Where the officer is appointed to hold his office during the pleasure of some other officer or board than that appointing him, however, the appointing power cannot arbitrarily remove him. *Carr v. State*, 111 Ind. 101.

A law which provides that such an officer may be removed in a certain way or for a certain cause does not restrain or limit the power of removal to the cause or manner indicated. The only way in which the power of removal can be limited is by first fixing the duration or term of office and then providing the mode by which a removal may be made during the term. *Smith v. Brown*, 59 Cal. 672; *People v. Hill*, 7 Cal. 97. But see *Clark v. Cape May*, 50 N. J. L. 558. An officer holding office at the pleasure of the appointing power cannot be removed by any other officer. *Carr v. State*, 111 Ind. 101.

1. *State v. St. Louis*, 90 Mo. 19; *State v. Stevens*, 46 N. J. L. 344; *Field v. Com.*, 32 Pa. St. 478; *State v. McGarry*, 21 Wis. 496; *Ex parte Hennen*, 13 Pet. (U. S.) 230.

A police officer of the city of Sacramento, appointed by the board of police commissioners, may be removed by them without written charges, trial, or conviction. *Smith v. Brown*, 59 Cal. 672.

2. *People v. Hill*, 7 Cal. 79; *People v. Jewett*, 6 Cal. 291; *State v. Chatburn*, 63 Iowa 659; 56 Am. Rep. 760; *People v. Flynn*, 62 N. Y. 375; *Keenan v. Perry*, 24 Tex. 253; *Collins v. Tracy*, 36 Tex. 546.

The power of the executive of *Mississippi* to remove from office is limited to cases in which he has the power to fill the vacancy created by such removal. *Payton v. Cabaniss*, 44 Miss. 808.

3. See *People v. Freese*, 76 Cal. 633; *People v. Bulger* (Cal. 1890), 23 Pac. Rep. 379; *People v. Weber*, 86 Ill. 283; *Carr v. State*, 111 Ind. 101; *Murphy v.*

Webster, 131 Mass. 482; *State v. Draper*, 48 Mo. 213; *Charles v. Mayor etc. of Hoboken*, 27 N. J. L. 203; *State v. Heinmiller*, 38 Ohio St. 101.

Where the authority of removal is vested in the appointing power and the appointing power is vested in the governor, by and with the advice and consent of the senate, the consent of the latter body is necessary to the removal. *People v. Freese*, 76 Cal. 733.

In *Louisiana*, a public officer, such as secretary of state, who has been suspended from his functions by the governor, is entitled to resume his office immediately after the adjournment of the next general assembly, provided no action has been taken on the suspension during the session, and his exclusion thereafter is an arbitrary violation of his legal and constitutional rights as such. *State v. Herron*, 24 La. Ann. 594.

4. *Lowe v. Com.*, 3 Metc. (Ky.) 237; *Dubuc v. Voss*, 19 La. Ann. 210; 92 Am. Dec. 526; *Com. v. Shaver*, 3 W. & S. (Pa.) 338.

Where the cause for which an officer may be removed is prescribed by constitution, defining it in terms having a well understood legal meaning, the legislature cannot add other offenses which do not fall within the meaning of the constitutional provision. *Com. v. Williams*, 79 Ky. 42; 42 Am. Rep. 204.

5. *Page v. Hardin*, 8 B. Mon. (Ky.) 672; *Dullam v. Willson*, 53 Mich. 392; 51 Am. Rep. 128; *State v. St. Louis*, 90 Mo. 19; *State v. Bryce*, 7 Ohio, pt. 1, 282; *Field v. Com.*, 32 Pa. St. 478; *Willard's Appeal*, 4 R. I. 601; *Foster v. Kansas*, 112 U. S. 201; *Kennard v. Louisiana*, 92 U. S. 480; *Baggs' Case*, 11 Coke 99; *King v. Gaskin*, 8 T. R. 209; *Ramshay's Case*, 18 A. & E., N. S. 100; *Williams v. Bagot*, 3 B. & C. 772; *Reg. v. Archbishop of Canterbury*, 1 E. & E. 545; 102 E. C. L. 544.

Where the superintendent of repairs

power of the legislature, however, when conferring the power of removal upon an officer or body, to make him or it the sole judge of the sufficiency of the cause.¹ A removal may be either express, that is, by a notification that the officer is removed,² or implied by the appointment of another person to the same office;³ but in

and supplies in the department of public works of New York city was served with a communication from the commissioner, charging him with conduct affording a sufficient cause for removal, and notifying him of a time and place where he would be heard in explanation, it was held that it was immaterial that the charges were not drawn with the formal exactness of pleadings. *People v. Thompson*, 94 N. Y. 451.

Under that clause of the *Nevada* constitution which relates to the removal of judicial officers, etc., from their offices for certain reasons, an office already filled cannot become vacant without a removal, voluntary or involuntary. When voluntary, no judicial determination resulting in vacation is necessary; when involuntary, such determination is essential. *State v. McClinton*, 5 Nev. 329.

The dismissal of an application for the removal of a public officer is not a bar to its renewal where the ground of dismissal is shown to have been unfounded in fact. *People v. Eddy*, 3 Lans. (N. Y.) 80.

1. See *People v. Whitlock*, 92 N. Y. 191; *State v. Register*, 59 Md. 283; *State v. Stevens*, 46 N. J. L. 344; *People v. Board of Fire Com'rs*, 73 N. Y. 437; *State v. Board of Fire Com'rs*, 26 Ohio St. 24; *State v. McGarry*, 21 Wis. 496.

Where an officer is removable at the pleasure of the governor for certain specified causes and deficiencies, the governor need not specify the causes of his removal, and his decision is final. *Keenan v. Perry*, 24 Tex. 253.

In *Louisiana*, the grant of power to the executive to remove an officer for a certain cause, implies authority to judge of the existence of that cause. The power, vested exclusively in executive discretion, cannot be controlled in its exercise by any other branch of the government. *State v. Doherty*, 25 La. Ann. 119; 13 Am. Rep. 131. See also *Patton v. Vaughan*, 39 Ark. 211; *Wilcox v. People*, 90 Ill. 186.

Where no particular cause is specified in the provision authorizing the re-

moval, it must rest in the sound discretion of the officer to whom the power of removal is given to determine what cause shall be sufficient. See *Patton v. Vaughn*, 39 Ark. 211; *State v. Doherty*, 25 La. Ann. 119; 13 Am. Rep. 131.

2. *Com. v. Slifer*, 25 Pa. St. 23; 64 Am. Dec. 680; with other cases.

An order of dismissal issued by the Secretary of the Navy, although not expressed as the act of the President, is his dismissal; and so of an appointment of a successor. *McElrath v. U. S.*, 12 Ct. of Cl. 201.

3. *Com. v. Slifer*, 25 Pa. St. 23; 64 Am. Dec. 680; *State v. Abbott*, 41 La. Ann. 1096; *Stadler v. Detroit*, 13 Mich. 346; *Keenan v. Perry*, 24 Tex. 253; *People v. Carrigue*, 2 Hill (N. Y.) 93; *Bowerbank v. Morris*, Wall. (C. C.) 119; *Ex parte Hennen*, 13 Pet. (U. S.) 260; and see *Atkins v. Clare*, 1 Vent. 400; *Boucher v. Wiseman*, Cro. Eliz. 440; *Newland v. Shephard*, 2 P. Wms. 194; *Smyth v. Latham*, 9 Bing. 692; 23 E. C. L. 424.

Where there were two persons, each holding a commission as sheriff, but the date of the commissions is different, in the entire absence of anything showing that there had been a removal from office of the party first appointed, or that the office had, from any cause, become vacant before the date of the last commission, the presumption is that the last commission was issued in error. *State v. Bankston*, 23 La. Ann. 375.

Appointing an officer the second time upon the erroneous supposition that his first term had expired, cannot be deemed to be an implied removal as to the first term, even though the council had the power of removal at pleasure, there being no intent to remove. *Stadler v. Detroit*, 13 Mich. 436; and see *People v. Lord*, 9 Mich. 227.

Where A was appointed an assistant engineer of the New York fire department, and, after serving for a time, he was ordered to duty as a machinist at a lower rate of pay, by performing the duties of machinist without protest, he precluded himself from claiming pay as

any event the officer has authority to act until notice of revocation.¹ An officer not arbitrarily removable by the appointing power, cannot be indirectly removed by the rescission or revocation of his appointment after its completion and acceptance;² though a commission issued to an officer under the mistaken supposition that he was duly elected, may be revoked upon discovery of the mistake, and reissued to the officer legally entitled to it.³

The power to remove for cause, when conferred upon an officer or board, must be strictly construed and confined within the limits prescribed for it,⁴ the power to remove not necessarily

an assistant-engineer. *Reilly v. New York*, 48 N. Y. Super. Ct. 274.

1. *Com. v. Slifer*, 25 Pa. St. 23; 64 Am. Dec. 680.

Where a member of the New York city police force, for the purpose of evading trial and punishment on charges about to be preferred, filed his application to be retired on a pension for twenty years' service, it was held that the board of police still had power to try him and dismiss him from the force. *People v. French*, 108 N. Y. 105.

2. *People v. Reid*, 11 Colo. 138; *Attorney-Gen'l v. Love*, 39 N. J. L. 476; 23 Am. Rep. 234; *Ewing v. Thompson*, 43 Pa. St. 372; *Marbury v. Madison*, 1 Cranch (U. S.) 137; and see *Page v. Hardin*, 8 B. Mon. (Ky.) 648.

Revocation of an order of dismissal, and acceptance of resignation, after appointment of a successor, does not operate to displace the successor. *McElrath v. U. S.*, 12 Ct. of Cl. 201.

An officer who was appointed without fixing the duration of his term, under a provision authorizing his appointment for such time as the board shall determine, holds for the statutory period fixed for the office, and the board having authority to remove for cause only, cannot remove him at pleasure. *State v. Police Com'rs*, 88 Mo. 144; 14 Mo. App. 297.

3. *Gulick v. New*, 14 Ind. 93; 77 Am. Dec. 49; *State v. Capers*, 37 La. Ann. 747.

But where a town officer has been declared elected by the election board, and has qualified by taking the necessary oath of office, the board of appointment has no power to fill the office by appointment, as in case of a vacancy; nor has it authority to hear evidence and decide that the election was irregularly conducted, or that the election was fraudulent, and thus declare a

vacancy. *People v. Callaghan*, 83 Ill. 128.

4. See *Mead v. Treasurer*, 36 Mich. 416; *Leeman v. Hinton*, 1 Duv. (Ky.) 37; *Com. v. Slifer*, 25 Pa. St. 23; 64 Am. Dec. 680; *Crawford v. Township Board*, 24 Mich. 248; *McGregor v. Gladwine Co.*, 37 Mich. 388; *State v. Lingo*, 26 Mo. 496; *People v. Albany Medical College*, 62 How. Pr. (N. Y.) 220; *Prowell v. Fowlkes*, 5 Baxt. (Tenn.) 649; *People v. Burnside*, 3 Lans. (N. Y.) 74; *State v. Bryce*, 7 Ohio, pt. 2, 82; *Hawkins v. Kercheval*, 10 Lea (Tenn.) 535; *State v. Chamber of Commerce*, 20 Wis. 63; *Reg. v. Sutton*, 10 Mod. 76.

Removals can only be made for the causes prescribed by law. *Dubuc v. Voss*, 19 La. Ann. 210; 92 Am. Dec. 526.

Power to remove an officer for causes named, or for other causes means other like causes. *State v. McGarry*, 21 Wis. 496.

Under a constitutional provision that persons appointed to fill vacancies in office shall hold until the next general election and the qualification of their successors, a board of supervisors may not remove at pleasure one whom they had appointed to fill a vacancy in the office of sheriff. *State v. Chatburn*, 63 Iowa 659; 50 Am. Rep. 760.

A power conferred on police commissioners to remove subordinates for the purpose of reducing the force, cannot be exercised to create a vacancy for the appointment of another person. *State v. Schumaker*, 27 La. Ann. 332.

A naked power given by law to an officer or other person must be strictly followed, especially if it involves forfeiture; and it devolves on him claiming a right under the exercise of such power to show that it was pursued in all re-

including the power to suspend.¹ But when no other or different results would be effected by a suspension, so that it can be properly designated as the lesser power, it is clearly included in the power to remove.² Proceedings for the removal of an officer for cause are judicial in their nature and must be had before tribunals clothed with judicial powers,³ and while such powers may be and often are conferred upon superior officers and heads of departments, they must be exercised within the same limitations and subjected to the same precautions as other judicial proceedings,⁴ the regularity of proceedings for removal being at

spects accurately. *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Yancey v. Hopkins*, 1 Munf. (Va.) 419.

A power of removal conferred by a city charter is not repealed by a general act conferring power to remove for another cause. *Manker v. Faulbarber*, 94 Mo. 430.

1. *State v. Jersey City*, 25 N. J. L. 536; *Gregory v. Mayor etc. of N. Y.*, 113 N. Y. 416; and see *State v. Heron*, 24 La. Ann. 594.

The power vested in the city council to expel its members does not warrant their suspension because that would leave a portion of the people unrepresented in the body and without a remedy. *State v. Jersey City*, 25 N. J. L. 536.

Where, as in *Nebraska*, the statute clearly makes a distinction between the mode of filling the places of officers removed and those suspended the terms "removed" and "suspended" cannot be deemed synonymous. *State v. Meeker*, 19 Neb. 444.

2. *Shannon v. Portsmouth*, 54 N. H. 183; *Gregory v. Mayor etc. of N. Y.*, 113 N. Y. 416; *State v. Lingo*, 26 Mo. 496; *Weatberg v. Kansas City*, 64 Mo. 493; *State v. Police Com'rs*, 16 Mo. App. 48.

A board of police commissioners is not guilty of an arbitrary and unwarrantable exercise of authority in suspending an officer pending a trial before the board on charges, which if true would involve his dismissal. *State v. Police Com'rs*, 16 Mo. App. 48.

3. *Page v. Hardin*, 8 B. Mon. (Ky.) 672; *Andrews v. King*, 77 Me. 224; *Dullam v. Willson*, 53 Mich. 392; 51 Am. Rep. 128; *Charles v. Mayor etc. of Hoboken*, 27 N. J. L. 203; *State v. Pritchard*, 36 N. J. L. 101; *In re Cleveland*, 51 N. J. L. 311; *In re Nichols*, 6 Abb. N. Cas. (N. Y.) 474; 57 How. Pr. (N. Y.) 395; *State v. Prince*, 45 Wis. 610.

No special mode of procedure having been prescribed by statute, an application to have a commissioner removed may be heard upon a rule to show cause, founded upon affidavits of citizens making charges of misconduct, and granted upon the motion of the United States district attorney, giving the commissioner notice and an opportunity to present affidavits and other documentary evidence. *In re Caves*, 30 Fed. Rep. 21.

The charges against a clerk, prosecuted for breach of good behavior, must be supported by affidavit before they can be filed; and the summons against him should recite the charges at length. *Com. v. Rodes*, 1 Dana (Ky.) 595.

A statute giving the governor power to remove a State officer is void if the constitution lodges all judicial power elsewhere. *Dullam v. Willson*, 53 Mich. 392; 51 Am. Rep. 128.

4. See *Stockwell v. Township Board*, 22 Mich. 341; *Dullam v. Willson*, 53 Mich. 392; 51 Am. Rep. 128.

The legislature may authorize the governor to remove incumbents of offices created by the legislature; and the exercise of this power of removal will be presumed to have been for good cause. *Evans v. Populus*, 22 La. Ann. 121; *State v. Graham*, 25 La. Ann. 73; *Com. v. Slifer*, 25 Pa. St. 23; 64 Am. Dec. 640.

The power of removal should not be exercised capriciously or arbitrarily, but the court should proceed with great caution, and every presumption of innocence allowed in a criminal case should be indulged in favor of the officer. *In re Eaves*, 30 Fed. Rep. 21.

A petition addressed to the governor by virtue of the power of removal vested in him by the constitution in the investigation of charges against the sheriff and for his removal is absolutely privileged. *Randall v. State*,

all times subject to review in the courts.¹ The power to remove public officers, however, has been held by a number of cases to be administrative, and not judicial.² In ascertaining what is a sufficient cause for a removal, it is necessary to separate the character of the man from the character of the officer, the misconduct which will warrant a removal being ordinarily such as affects the performance of his duties as an officer,³ and not such as affect his private character as an individual only, unless it is in itself of so infamous a nature as to render the offender unfit to execute any public franchise,⁴ and even such as are only against

16 Wis. 340; *Larkin v. Noonan*, 19 Wis. 82.

1. *Page v. Hardin*, 8 B. Mon. (Ky.) 672; *Dullan v. Willson*, 53 Mich. 392; 51 Am. Rep. 128; *State v. St. Louis*, 90 Mo. 19; *In re Nichols*, 6 Abb. N. Cas. (N. Y.) 474; 57 How. Pr. (N. Y.) 395; *People v. Board of Police*, 3 Abb. App. Dec. (N. Y.) 488; *Mooers v. Smedley*, 6 Johns. Ch. (N. Y.) 28; *State v. Bryce*, 7 Ohio, pt. 1, 282; *Field v. Com.*, 32 Pa. St. 478; *Willard's Appeal*, 4 R. I. 601; *Foster v. Kansas*, 112 U. S. 201; *Kennard v. Louisiana*, 92 U. S. 480; *Bagg's Case*, 11 Coke 99; *King v. Gaskin*, 8 T. R. 209; *Ramsay's Case*, 18 A. & E., N. S. 190; *Williams v. Bagot*, 3 B. & C. 722; *Reg. v. Archbishop of Canterbury*, 1 E. & E. 545; 102 E. C. L. 544.

In *People v. Stout*, 11 Abb. Pr. (N. Y.) 17; 19 How. Pr. (N. Y.) 171, however, it was held that the power to remove an officer for cause is of a discretionary or judicial nature, and unless otherwise specially provided by law, is not the subject of examination or review by any other tribunal than the one in which the power is vested, either in respect to the cause, or in respect to its sufficiency, or existence, or in any respect whatever. See also *People v. French*, 110 N. Y. 494.

2. *State v. Frazier*, 48 Ga. 137; *Patton v. Vaughan*, 39 Ark. 211; *State v. Doherty*, 25 La. Ann. 119; 13 Am. Rep. 131; *State v. Ramos*, 10 La. Ann. 420; *Keenan v. Perry*, 24 Tex. 253; *State v. McGarry*, 21 Wis. 496; *Attorney Gen'l v. Brown*, 1 Wis. 513; and see *State v. Hawkins*, 44 Ohio St. 98; *Ex parte Hennen*, 13 Pet. (U. S.) 230; *Conner v. Mayor etc. of N. Y.*, 5 N. Y. 285.

In *Donahue v. Will Co.*, 100 Ill. 94, it was held that a statute which authorizes a county board to remove a county treasurer for nonfeasance or mal-

feasance, does not contravene a constitutional provision vesting all judicial powers in the courts, and is valid.

3. *Com. v. Barry*, Hard. (Ky.) 229; *Com. v. Williams*, 79 Ky. 42; 42 Am. Rep. 204; *Com. v. Chambers*, 1 J. J. Marsh. (Ky.) 160.

Where a public officer is charged with conspiracy or fraud in the discharge of his duties, the presumption of law in favor of his innocence will prevail against circumstances of suspicion, but it may be overcome by proof of delinquencies of a similar nature. *Bottomly v. U. S.*, 1 Story (U. S.) 135.

Under the *Indiana* constitution providing for the removal of public officers for crime, negligence or incapacity, a statute providing for their removal for voluntary intoxication in business hours, is valid. *McComas v. Krug*, 81 Ind. 327; 42 Am. Rep. 135. The rule is the same under the laws of *Alabama*. *State v. Savage*, 89 Ala. 1; but intoxication is not misfeasance within the constitution of *Kentucky*. *Com. v. Williams*, 79 Ky. 42; 42 Am. Rep. 204.

4. *Rex v. Richardson*, 1 Burr. 517; *Rex v. Liverpool*, 2 Burr. 723; and see *Com. v. St. Patrick's Soc.*, 2 Binn. (Pa.) 441; 4 Am. Dec. 453; *Com. v. Guardians of the Poor*, 6 S. & R. (Pa.) 469; *Society v. Com.*, 52 Pa. St. 125; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *People v. Board of Fire Com'rs*, 72 N. Y. 445.

Bribing a voter previous to election is not misconduct in office, *Com. v. Shaver*, 3 W. & S. (Pa.) 338; but receiving bribes while in office is an official misconduct. *State v. Jersey City*, 25 N. J. L. 536.

Under provisions that all convictions of any county officer for any misdemeanor involving official misconduct shall work an immediate removal from office, etc., and that no officer shall be removed for any act committed prior to his election to office, an officer who

the duties of his office must amount to a breach of the tacit conditions annexed to it,¹ though the official commission of a wrongful act, or the official omission to perform a duty, is a sufficient misconduct, even in the absence of corrupt or malicious motives.² In case of misconduct which consists of a breach of official duty only the offense is triable by the officer in whom the power of removal is vested.³ When it is not only a breach of duty, but also a criminal matter for which the offender may be indicted, the weight of authority upholds the same mode of trial;⁴ but if the act be criminal only and not a breach of official duty,

is his own successor, and committed the unlawful act after re-election, and while performing the functions of office, but before he had qualified, should be removed. *Brackenridge v. State*, 27 Tex. App. 513.

Upon a suit by a public officer for his salary after removal, the city are not confined in their defense to the misbehavior specified in the order of removal. *Macon v. Hays*, 25 Ga. 590.

If the incumbent of an office uses the office as a means of wrong-doing, this is a good cause of removal, though the acts in question are not of an official nature. *People v. Cooper*, 57 How. Pr. (N. Y.) 416.

1. *Rex v. Richardson*, 1 Burr. 517; and see *Com. v. Barry*, Hard. (Ky.) 229; *Com. v. Chambers*, 1 J. J. Marsh. (Ky.) 160; *Minkler v. State*, 14 Neb. 181.

Demanding and receiving illegal fees is an official misconduct justifying the removal of the officer perpetrating the act. *Brackenridge v. State*, 27 Tex. App. 513.

Superintendents of the poor who draw orders on the county treasurer in favor of persons without whose knowledge they draw the money, and then compel the payees to take goods instead of the money at exorbitant prices are guilty of misconduct in office, authorizing their removal. *Gager v. Chippewa Co.*, 47 Mich. 167.

A false certificate over his official signature by a registrar of deeds that he had examined a title and found it unincumbered, is such a misconduct in office as will justify his removal. *State v. Leach*, 60 Me. 58; 11 Am. Rep. 172.

2. *Minkler v. State*, 14 Neb. 181; *Com. v. Barry*, Hard. (Ky.) 229; *Com. v. Chambers*, 1 J. J. Marsh. (Ky.) 160; *State v. Leach*, 60 Me. 58; 11 Am. Rep. 172.

The willful and persistent refusal

upon the part of a county attorney to prosecute violations of the liquor law is a misconduct in office, though the refusal was made in the belief that the sentiment of the community was opposed to the prosecution. *State v. Foster*, 32 Kan. 14. See also *State v. Allen*, 5 Kan. 213.

The misconduct of a deputy is not a ground for the removal of his superior unless he has directly ratified or participated in it. *State v. Budd*, 39 La. Ann. 232.

3. *Rex v. Richardson*, 1 Burr. 517; *Com. v. St. Patrick's etc. Soc.*, 2 Binn. (Pa.) 441; 4 Am. Dec. 453.

4. *Haddock's Case*, Ld. Raym. 439; *Rex v. Chalke*, 6 Comb. 397; *Willc. on Mun. Corp.* 249; and see *Donahue v. Will Co.*, 100 Ill. 94; *People v. French*, 32 Hun (N. Y.) 112; 60 How. Pr. (N. Y.) 377.

A report of a grand jury, which states that an officer should be removed "for and on account of his habitual drunkenness while in such office prior to and down to the making of this report," sufficiently complies with the *Alabama Code*, § 4839, requiring a grand jury, if it finds that an officer should be removed, to report to the court, "setting forth the facts." *State v. Savage*, 89 Ala. 1.

Under the *Texas* constitution providing that every officer, before assuming the duties of his office, shall take an oath that he has not given or offered any inducement to procure votes at his election, and that every person shall be disqualified from holding office upon conviction for such offense, merely holding out a promise, in case of his election, to serve for less compensation than the lawful fees, does not disqualify one from holding office, unless he had been actually convicted for such offense. *State v. Humphreys*, 74 Tex. 466.

while there is a conflict of authority, the better theory would seem to be that the presumption of innocence would apply in favor of the officer, and that therefore he could not be deprived of his right to hold the office until after conviction in a regular trial for the offense in a court of competent jurisdiction.¹ Statutes authorizing the removal of public officers for cause usually declare what cause shall be deemed sufficient.² Misconduct or malfeasance as a ground for removal has reference to the conduct of the officer as such and signifies an abuse of the duties of his office,³

1. *Rex v. Richardson*, 1 Burr. 517; *Com. v. Jones*, 10 Bush (Ky.) 725; *State v. Humphries*, 74 Tex. 466; and see *Cummings v. Missouri*, 4 Wall. (U. S.) 277; *In re Dorsey*, 7 Port. (Ala.) 293; *Coit v. State*, 28 Ark. 417; *Barker v. People*, 3 Cow. (N. Y.) 686; *Mayor etc. of Macon v. Shaw*, 16 Ga. 172; *Com. v. Barry, Hard.* (Ky.) 238; *Com. v. Chambers*, 1 J. J. Marsh. (Ky.) 160; *Ex parte Lehman*, 60 Miss. 967; *People v. Board of Police*, 9 Hun (N. Y.) 222; *People v. Police Com'rs*, 20 Hun (N. Y.) 333. But see to the contrary, *Oliver v. City Council*, 69 Ga. 165; *People v. Board of Police*, 11 Hun (N. Y.) 403; *People v. French*, 32 Hun (N. Y.) 112; 60 How. Pr. (N. Y.) 377.

At common law the king could not take into his own hands by virtue of his own judgment an office on the ground that the incumbent of it has been convicted of a crime. *Reynolds' Case*, 9 Rep. 95; and see *State v. Pritchard*, 36 N. J. L. 101.

Under power to remove for illegal, corrupt or otherwise improper conduct a charge of using obscene and abusive language which does not show that such language was used while in the discharge of official duty, is not good. *People v. Doolittle*, 44 Hun (N. Y.) 293.

If an officer is indicted for a personal offense and pending trial is imprisoned and an appointment is made to the office, the accused cannot on being subsequently acquitted recover from the public the salary provided for the office for the portion of the term subsequent to his removal. *Brunswick v. Fahm*, 60 Ga. 109.

In Kansas.—In the absence of any judgment against a county treasurer on his official bond, the board of county commissioners cannot remove such county treasurer from office and fill his place by the appointment of some other person. *Graham v. Cowgill*, 13 Kan. 114.

Intoxication of the clerk of the court

when discharging the functions of his office, is a gross neglect of duty; but evidence of intoxication at other times, or of habit, cannot be admitted in proof of a specific charge. *Ledbetter v. State*, 10 Ala. 241.

Providing for the suspension from office, by a designated court however, of any county or township officer, against whom a presentment or an indictment is lodged, until the charge is tried, does not violate the constitutional right of an officer to hold and exercise his office. *Allen v. State*, 32 Ark. 241.

2. *Mechem's Pub. Off.* § 457.

It is frequently provided that the power of removal shall not be exercised for political reason only. See *State v. Board of Public Works*, 51 N. J. L. 240.

The constitutional right of the appointing power to remove at pleasure, is not abridged by an act providing for removal in a certain way, or for a certain cause. *People v. Hill*, 7 Cal. 97; and see *Smith v. Brown*, 59 Cal. 672; *Lutz' Case*, 8 Pa. Co. Ct. Rep. 153.

3. See *Mayor etc. of Macon v. Shaw*, 16 Ga. 172; *Randolph v. Pope Co.*, 19 Ill. App. 100; *State v. Jersey City*, 25 N. J. L. 536; *Minkler v. State*, 14 Neb. 181; *State v. Teasdale*, 21 Fla. 652; *People v. New York Fire Com'rs*, 49 N. Y. Super. Ct. 369; *Bracy v. Smith*, 64 Miss. 17; *State v. Hawkins*, 44 Ohio St. 98; *State v. Bowen*, 41 Mo. 217; *State v. Hixon*, 41 Mo. 210; *People v. Jourdan*, 90 N. Y. 53; *People v. Mays*, 117 Ill. 257; *Runnels v. State*, Walk. (Miss.) 146; *Woods v. Varnum*, 83 Cal. 46; *People v. Police Com'rs*, 41 Hun (N. Y.) 389; *McPherson v. State*, 3 W. Va. 564; *Phares v. State*, 3 W. Va. 567; 100 Am. Dec. 777. But see *Queen v. Atlanta*, 59 Ga. 318; *Com. v. Barry, Hard.* (Ky.) 229.

An officer who with corrupt motives does an act beyond his lawful authority, assuming to act officially and under his official designation in such manner as

and voluntary misconduct is contemplated and not circumstances or conditions resulting from accident or misfortune.¹ So incapacity does not mean a lack of general capacity, but a defect of capacity for the office held.²

The trial body, in case of removal for cause, must consist of all the officers in whom the power of removal is vested,³ and the

is likely to deceive and mislead others, is guilty of misbehavior or malfeasance in office. *State v. Wedge*, 24 Minn. 150.

It is malfeasance for a policeman to commit a battery upon a citizen with his billet while off duty as a redress for his private wrongs. *Oliver v. City Council*, 69 Ga. 165; *People v. Carroll*, 42 Hun (N. Y.) 438.

The demand of illegal fees by the county judge is an "official misconduct," and subjects him to removal from office. *Brackenridge v. State*, 27 Tex. App. 513.

But a removal cannot be made for the violation of a void ordinance. *Milliken v. City Council*, 54 Tex. 388; 38 Am. Rep. 629. And an officer cannot be removed because he was ineligible at the time of his appointment. *People v. Board of Police*, 72 N. Y. 415; *Ellison v. Raleigh*, 89 N. Car. 125.

In *Coit v. Lynes*, 33 Conn. 109, the court by Butler, J., held that a misfeasance is a default in not doing a lawful act in a proper manner, or omitting to do it as it should be done; while a malfeasance is the doing of an act wholly wrong and unlawful; and nonfeasance is omission to perform the required duty at all, or a total neglect of duty.

1. *People v. French*, 52 Hun (N. Y.) 90; and see *State v. Alcorn*, 78 Tex. 387; *State v. Hixon*, 41 Mo. 210.

Failure to execute a bond required by law is not a misconduct in office. *Hyde v. State*, 52 Miss. 665; *Com. v. Silfer*, 25 Pa. St. 23; 64 Am. Dec. 680.

That some other person is more congenial to the appointing power is not a cause which the incumbent can explain in the sense in which that term is used, and hence, is not a ground of removal. *People v. Board of Fire Com'rs*, 72 N. Y. 445; *People v. Grant*, 12 Daly (N. Y.) 294.

A mayor cannot be removed for disorderly behavior or malconduct in office for appointing as a temporary policeman one who had several times been arrested for breaches of the peace though the mayor knew of such

arrest, though such appointee was under arrest for a criminal offense at the time of his appointment, it not appearing that this fact was known to the mayor. *State v. Teasdale*, 21 Fla. 652.

It is not a failure to properly discharge the duties of his office for a policeman to bring, in good faith, a suit against the city of which he is an officer, for the assertion of a supposed right. *Hawkins v. Kerscheal*, 10 Lea (Tenn.) 535.

The mere want of qualification to be appointed, or to hold the office of clerk, is not a ground of prosecution "for a breach of good behavior." *Com. v. Lancaster*, 5 Litt. (Ky.) 161.

2. *People v. Board of Police*, 69 N. Y. 408; *People v. Board of Fire Com'rs*, 43 Hun (N. Y.) 554. And see *Andrews v. King*, 77 Me. 224; *State v. Board of Police Com'rs*, 49 N. J. L. 170.

The opinion of the board that the duties of the persons removed can be more efficiently performed by other persons is not "cause" such as the law requires. *People v. Fire Com'rs*, 12 Hun (N. Y.) 500.

If a person who has been regularly appointed to an office, assumes the duties of another office with the consent of the proper authorities, he may be held responsible for the rightful performance of the latter office, and may be removed from the office to which he was regularly appointed for incapacity or inefficiency in the assumed office. *People v. Campbell*, 82 N. Y. 247.

3. *Andrews v. King*, 77 Me. 224; *Charles v. Mayor etc. of Hoboken*, 27 N. J. L. 203; *Jacksonville v. Allen*, 25 Ill. App. 54. But see *People v. Mays*, 117 Ill. 257; *People v. Board of Police Com'rs*, 93 N. Y. 97; *People v. Police Com'rs*, 31 Hun (N. Y.) 209.

Though the mayor is one of the body charged with the duty of investigating an offense alleged to have been committed by an officer, he may, nevertheless, formally bring charges against him, but he must not prejudice

proceeding must be based upon specific charges sufficient in their nature, if established, to justify a removal.¹ The officer may be represented by counsel, call witnesses and cross-examine the witnesses against him,² the substance of the rules governing judicial procedure being required to be observed;³ and before a

the cause, nor act as prosecutor at the hearing. *Andrews v. King*, 77 Me. 224.

It is not a ground of objection to the trial body that the officers who composed it, directed that the charges which alleged physical incapacity, and were based upon the report of their examining physician, be put into proper form for investigation. *State v. Board of Police Com'rs*, 49 N. J. L. 170.

A change in the constitution of the board of police commissioners pending the trial of an officer, does not invalidate a removal made by the new board. *People v. New York Police Com'rs*, 23 Hun (N. Y.) 351.

1. *People v. French*, 102 N. Y. 583; *People v. Nichols*, 79 N. Y. 582; *People v. Starks*, 33 Hun (N. Y.) 384; *People v. Carroll*, 42 Hun (N. Y.) 438; *Sevier v. Justices etc.*, Peck (Tenn.) 334; *People v. Therrien*, 80 Mich. 187; *In re Nichols*, 6 Abb. N. Cas. (N. Y.) 474; 57 How. Pr. (N. Y.) 395; and see *Woods v. Varnum*, 85 Cal. 639; *People v. Mayor etc. of N. Y.*, 19 Hun (N. Y.) 441; *Coit v. State*, 28 Ark. 417; *Callahan v. State*, 2 Stew. & P. (Ala.) 379; *Street v. Gallatin Co.*, 1 Ill. 50; *Ex parte Thatcher*, 7 Ill. 167.

Due opportunity for explanation is not given to an officer by proceeding in his absence, caused by sickness, of which the trial body had notice. *People v. Starks*, 33 Hun (N. Y.) 334.

The charges and notice must be such as shall enable the accused to prepare for trial. *People v. N. Y. Fire Com'rs*, 77 N. Y. 153.

Where the charge exhibited to the governor, and the copy served on the officer, is not specific, the error cannot be cured by subsequently serving the officer with a bill of particulars setting forth the particular acts. *People v. Therrien*, 80 Mich. 187.

Notice of the cause of the proposed removal need not be given in writing. *People v. Campbell*, 50 N. Y. Super. Ct. 82.

2. *People v. Nichols*, 79 N. Y. 582; *Leadbetter v. State*, 10 Ala. 241; *In re Nichols*, 6 Abb. N. Cas. (N. Y.) 474; 57

How. Pr. (N. Y.) 395; *In re Emmet*, 65 How. Pr. (N. Y.) 266.

A right to have counsel upon the hearing before the New York City board of police commissioners rests in the discretion of that body. The constitutional provision giving such right does not apply. *People v. Police Com'rs*, 31 Hun (N. Y.) 209; *People v. Campbell*, 50 N. Y. Super. Ct. 82.

Under an authority to remove after notice of the cause, and an opportunity for explanation, if an explanation is not satisfactorily given, a removal may be ordered, without calling witnesses to prove the charges or allowing accused to give testimony. *People v. Thompson*, 94 N. Y. 451; *People v. Campbell*, 50 N. Y. Super. Ct. 82.

It is only where an officer has been lawfully appointed that he is entitled to the protection prescribed by law as to his removal. Where, for example, the city charter authorizes ordinances for the appointment and no ordinance is passed, an appointment does not protect. *State v. Gloucester City*, 49 N. J. L. 177.

3. See *People v. Starks*, 33 Hun (N. Y.) 384; *People v. Doolittle*, 44 Hun (N. Y.) 293; *People v. Therrien*, 80 Mich. 187; *In re Nichols*, 6 Abb. N. Cas. (N. Y.) 474; 57 How. Pr. (N. Y.) 395; but see *People v. Police Com'rs*, 98 N. Y. 332.

But proceedings are not required to be conducted with the strictness of common law pleading or practice. *People v. Carroll*, 42 Hun (N. Y.) 438; and see *People v. Thompson*, 26 Hun (N. Y.) 28.

If notice is given of the charges, and of the time of hearing, and the officer appears with counsel, making no objections to the notice, and the charges and specifications are read to him, and the witnesses are examined and cross-examined by both parties, the proceedings will be deemed to be regular. *State v. Board of Police Com'rs*, 49 N. J. L. 170; *State v. Mayor of Camden*, 48 N. J. L. 433.

It is sufficient if the directions of the statute are substantially observed. *State v. Mayor of Camden*, 48 N. J. L. 433.

removal can be made the truth of the charges must be passed upon.¹ Courts of general jurisdiction have power, as a general rule, to examine into removals and determine whether they have been made in compliance with the statute.²

6. Removal by Legislative Action.—Where the term of an office is fixed by the constitution, the legislature has no authority to remove the officer, either directly or by abolishing the office, unless the power is expressly given by the constitution.³ Where an officer has been elected by the legislature, however, it may lawfully reduce his territorial jurisdiction to the

Under the *California* Penal Code, § 772, providing that when an accusation "in writing, verified by the oath of any person," is presented against any officer, the court shall cite him to appear, and then "hear, in a summary manner, the accusation," the proceedings may be on a written charge by a private person, and need not be by indictment or information in the name of the people. *Woods v. Varnum*, 85 Cal. 639.

In view of the evident intent of the statute that actions to try title to offices shall be speedily tried, it is not an abuse of discretion to advance such a cause on the docket where there is no application to postpone it, and an application for continuance, based on the absence of witnesses, is not such as the law requires. *Hunnicut v. State*, 75 Tex. 233.

1. *Andrews v. King*, 77 Me. 224; and see *People v. Nichols*, 58 How. Pr. (N. Y.) 200; *People v. Cooper*, 58 How. Pr. (N. Y.) 358; *Callahan v. State*, 2 Stew. & P. (Ala.) 379; *Com. v. Arnold*, 3 Litt. (Ky.) 309; *Ledbetter v. State*, 10 Ala. 241.

If the person accused, denies that his authority extended to the matter upon which the allegations of his neglect is based, his answer will be regarded as a demurrer, and an admission of the facts charged. *People v. Thompson*, 94 N. Y. 451.

Police commissioners have no authority to remove a member of the force, where the evidence has been wholly taken by one commissioner who has since left the board. *People v. New York Police Com'rs*, 27 Hun (N. Y.) 462.

Under the *California* Penal Code no right to trial by jury exists. *Woods v. Varnum*, 85 Cal. 639; *contra* in *Tennessee*. *Sevier v. Washington Co.*, Peck (Tenn.) 334.

2. *People v. Therrien* 80 Mich. 187;

In re Nichols, 6 Abb. N. Cas. (N. Y.) 474; 57 How. Pr. (N. Y.) 395; and see generally as to appeals from determinations in proceedings for removal, *Woods v. Varnum*, 83 Cal. 46; *Mayor etc. of Savannah v. Brown*, 64 Ga. 229; *People v. French*, 60 How. Pr. (N. Y.) 377; *Sevier v. Washington Co.*, Peck (Tenn.) 334.

The finding of the board should not be interfered with if supported by evidence to such an extent as would justify the court in refusing to set aside a verdict of a jury as against the weight of evidence. *People v. Board of Com'rs*, 93 N. Y. 97.

If there is evidence of incapacity on the part of a subordinate, in proceedings under the charter of New York city, by the head of a department, to remove him, the court of appeals will not reverse the decision; where, however, there is no evidence, the removal is not "for cause," and may be reversed. *People v. Campbell*, 82 N. Y. 247.

3. *People v. Dubois*, 23 Ill. 547; *Howard v. State*, 10 Ind. 99; *Lowe v. Com.*, 3 Metc. (Ky.) 237; *King v. Hunter*, 65 N. Car. 603; 6 Am. Rep. 754; *State v. Choate*, 11 Ohio 511; *Com. v. Gamble*, 62 Pa. St. 343; 1 Am. Rep. 422; *Com. v. Mann*, 5 W. & S. (Pa.) 403; *State v. Messmore*, 14 Wis. 170; *State v. Douglas*, 26 Wis. 428; 7 Am. Rep. 87; *Foster v. Jones*, 79 Va. 642; 52 Am. Rep. 637; and see *Fraser v. Alexander*, 75 Cal. 147; *Hastings v. Young* (Cal. 1888), 17 Pac. Rep. 530; *Riggs v. Poston* (Cal. 1888), 17 Pac. Rep. 530.

Wherever the constitution has created an office and fixed its term, and declared upon what grounds and in what mode an incumbent may be removed, it is beyond the power of the legislature to remove or suspend him from office for any other reason or in any other mode than the constitution

minimum extent as fixed by the constitution;¹ or may diminish the aggregate amount of the duties of the officer by division of his district or otherwise, but must leave the authority and jurisdiction pertaining to the office intact;² but as a public office cannot be regarded as the property of the incumbent,³ and as an office is not a contract, either expressed or implied between the public officer and the government whose agent he is, but a mere creation of law,⁴ an office created by statute is wholly within the control of the legislature, and it may be declared vacant;⁵

itself has furnished. *Brown v. Grover*, 6 Bush (Ky.) 1; *Low v. Com.*, 3 Metc. (Ky.) 237; *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *State v. Draper*, 50 Mo. 353; *State v. Thoman*, 10 Kan. 191; *State v. McNeely*, 24 La. Ann. 19, and see *State v. Wiltz*, 11 La. Ann. 439.

The legislature cannot prescribe to the council of appointment of the State the manner in which they shall execute their powers, nor prevent their removing an incumbent from office, and appointing a successor, whenever they please so to do. *People v. Foot*, 19 Johns. (N. Y.) 58.

1. *Foster v. Jones*, 79 Va. 642; 52 Am. Rep. 637.

A constitutional office may be abolished at any time by a new constitution or by the amendment of the existing one. *French v. Com.*, 78 Pa. St. 339.

The fact that an office is mentioned incidentally in the constitution does not make it a constitutional office so as to place it beyond legislative control. *State v. Hermann*, 11 Mo. App. 43. And see *Ex parte Wiley*, 54 Ala. 226; *State v. Wright*, 7 Ohio St. 334.

A constitutional provision that all officers shall hold office during their official terms and until their successors shall be duly elected or appointed and qualified, does not bar the legislature of the power to vacate a statutory office, the purpose of the provision being that an officer shall hold his office and act until his successor is qualified. *State v. Hermann*, 11 Mo. App. 43; *State v. Harris* (N. Dak. 1890), 45 N. W. Rep. 1101.

2. *Com. v. Gamble*, 62 Pa. St. 334; 1 Am. Rep. 422.

The State legislature cannot establish arbitrary exclusions from office, or any general regulations requiring qualifications which the constitution has not required; but it can inflict disqualification to hold office as a punish-

ment for crime. *Barker v. People*, 3 Cow. (N. Y.) 686.

3. See *Prince v. Skillin*, 71 Me. 361; 36 Am. Rep. 328; *Hyde v. State*, 52 Miss. 665; *State v. Davis*, 44 Mo. 129; *Conner v. Mayor etc. of N. Y.*, 5 N. Y. 285; *State v. Douglas*, 26 Wis. 428; 7 Am. Rep. 87.

But see the contrary in *North Carolina*, *Vann v. Pipkin*, 77 N. Car. 408; *Brown v. Turner*, 70 N. Car. 93; *King v. Hunter*, 65 N. Car. 603; 6 Am. Rep. 754. And see *supra*, this title, *Definition*.

4. See *Hyde v. State*, 52 Miss. 665; *Conner v. Mayor etc. of N. Y.*, 2 Sandf. (N. Y.) 355; 5 N. Y. 285; *People v. Cortland Co.*, 58 Barb. (N. Y.) 139; 40 How. Pr. (N. Y.) 53; *Com. v. Bacon*, 6 S. & R. (Pa.) 322; *Com. v. Mann*, 5 W. & S. (Pa.) 418; *Koontz v. Franklin Co.*, 76 Pa. St. 154; *Butler v. Pennsylvania*, 10 How. (U. S.) 402.

To the contrary in *North Carolina*, *Hoke v. Henderson*, 4 Dev. (N. Car.) 1; 25 Am. Dec. 677; *King v. Hunter*, 65 N. Car. 603; 6 Am. Rep. 754; and see *supra*, this title, *Compensation*.

5. *People v. Van Gaskin*, 5 Mont. 352; *State v. Davis*, 44 Mo. 129; *Denver v. Hobart*, 10 Nev. 28; and see *Barker v. Pittsburgh*, 4 Pa. St. 49; *Ex parte Wiley*, 54 Ala. 226; *People v. Rochester*, 11 Hun (N. Y.) 241.

But where the public by its legislature or other accredited agent has contracted with an officer and agreed to pay him a stipulated salary for his services during a limited period, the contract is as fully protected as a like contract would be between two citizens. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518. And see *Hall v. Wisconsin*, 103 U. S. 5.

An ordinance "providing for the vacating of certain civil offices in the State," passed at a convention called by the legislature for the purpose of amending the State constitution, was within the powers of that convention,

its duties may be transferred to another officer;¹ it may be entirely abolished;² its term may be increased or diminished;³ its duties may be increased or diminished;⁴ the manner of filling it may be changed,⁵ or its compensation may be altered,⁶ at the will of the power by which it was created. So municipal offices may be abolished, extended, altered or vacated by the municipal authority by which they were created,⁷ or by the legislature by which the corporation itself was created,⁸ and where the legislature has conferred upon a municipal body the authority to create offices, it may abolish offices so created by it even though the term of the incumbent has not expired.⁹

7. Removal by Judicial Action.—Acts or omissions upon the part of an incumbent which forfeit the right to an office, do not render it forthwith vacant, and it becomes so only by the judgment

and is constitutional. *State v. Bernoudy*, 40 Mo. 192.

1. *People v. Squires*, 14 Cal. 13.

2. *State v. Douglas*, 26 Wis. 428; 7 Am. Rep. 87; *In re Bulger*, 45 Cal. 553; *Bryan v. Cattell*, 15 Iowa, 538; *Prince v. Skillen*, 71 Me. 361; 36 Am. Rep. 328; *Wilcox v. Rodman*, 46 Mo. 322.

Congress, by discontinuing an office, abolishes it. *Beaman v. U. S.*, 19 Ct. of Cl. 5.

Provisions that no officer be removed until he has been informed of the cause, etc., does not apply where one is discharged because the office is abolished, or no funds are provided for his payment. *Phillips v. Mayor etc. of N. Y.*, 88 N. Y. 245.

3. *People v. Haskell*, 5 Cal. 357; *People v. Banvard*, 27 Cal. 470; *People v. Auditor*, 2 Ill. 537; *Walker v. Peele*, 18 Ind. 264; *Taft v. Adams*, 3 Gray (Mass.) 126; *Prince v. Skillin*, 71 Me. 361; 36 Am. Rep. 328; *Territory v. Pyle*, 1 Oregon 149; *Bulter v. Pennsylvania*, 10 How. (U. S.) 402.

4. *People v. Squires*, 14 Cal. 13; *Bryan v. Cattell*, 15 Iowa 538; *Wilcox v. Rodman*, 46 Mo. 322; *Rhodes v. Hampton*, 101 N. Car. 629; *State v. Gales*, 77 N. Car. 283; *Hoke v. Henderson*, 4 Dev. (N. Car.) 1; 25 Am. Dec. 677.

In *North Carolina*, however, the legislature, whilst it continues an office, cannot oust an incumbent during the term for which he is chosen. *Cotten v. Ellis*, 7 Jones, (N. Car.) 545.

5. *Prince v. Skillin*, 71 Me. 362; 36 Am. Rep. 325; *State v. Davis*, 44 Mo. 129.

6. *Farwell v. Rockland*, 62 Me. 298; *Prince v. Skillin*, 71 Me. 361; 36 Am.

Rep. 325; *Taft v. Adams*, 3 Gray (Mass.) 126; *Hyde v. State*, 52 Miss. 665; *Conner v. Mayor etc. of N. Y.*, 5 N. Y. 291; *People v. Devlin*, 33 N. Y. 269; 88 Am. Dec. 377; *Warner v. People*, 2 Den. (N. Y.) 272; 43 Am. Dec. 740; *Com. v. Bacon*, 6 S. & R. (Pa.) 322; *Com. v. Mann*, 5 W. & S. (Pa.) 418; *Barker v. Pittsburgh*, 4 Pa. St. 51; *Butler v. Pennsylvania*, 10 How. (U. S.) 402.

Where a State legislature abolished the office of State printer, but added a *proviso* that the then incumbent should do the State printing for a certain time at a price twenty per cent. less than was previously allowed, it was held that, for work done after this enactment, he could only claim compensation subject to the deduction. *Wilcox v. Rodman*, 46 Mo. 322.

7. *Augusta v. Sweeney*, 44 Ga. 463; 9 Am. Rep. 172. And see *Dillon Mun. Corp.*, § 231.

But if a charter requires a two-thirds' vote to remove an officer, an abolition of the office, without such vote, in effect removing the incumbent, is invalid. *People v. Albany Medical College*, 10 Abb. N. Cas. (N. Y.) 122; 62 How. Pr. (N. Y.) 220.

8. See *People v. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 108; *People v. Detroit*, 28 Mich. 228; 15 Am. Rep. 202.

Where a statute provides for an office with a salary attached to be fixed by the board of supervisors, however, the latter cannot virtually abolish the office by reducing the salary to a nominal sum. *De Sota Co. v. Westbrook*, 64 Miss. 312.

9. *Ford v. Board of State Harbor Com'rs*, 81 Cal. 19.

of a court of competent jurisdiction in a proceeding instituted for the purpose of the removal of the officer;¹ nor can the authority of one holding a public office under color of legal title, be disputed in any collateral proceeding,² and proceedings against a public officer for his removal must be brought within the county or district of which he is an officer and within which the cause of action arose.³

a. IMPEACHMENT.—(See IMPEACHMENT.)⁴

b. QUO WARRANTO.—(See QUO WARRANTO.)

XXI. REMEDIES AS AGAINST PUBLIC OFFICERS—1. Injunctions.—(See INJUNCTIONS.)⁵

2. *Mandamus*.—(See *MANDAMUS*.)⁶

3. *Certiorari*.—(See *CERTIORARI*.)⁷

4. *Writ of Prohibition*.—(See *PROHIBITION, WRIT OF*.)

XXII. PROCEDURE IN ORDINARY ACTIONS BY AND AGAINST PUBLIC OFFICERS.—Actions against public officers in their individual capacities cannot be maintained if it appears that the acts complained of were done in an official capacity;⁸ and, on the other

1. *Graham v. Cowgill*, 13 Kan. 114; *People v. Head*, 25 Ill. 325; *Leach v. Cassidy*, 23 Ind. 449; *Groome v. Gwinn*, 43 Md. 572; *Palmer v. Toley*, 36 N. Y. Super. Ct. 14. And see *State v. Peck*, 30 La. Ann. 280.

But where a party has been so removed and another put in his place, under the power to fill vacancies, the latter is the *de facto* officer, and the former can only be reinstated by *quo warranto*. *Ellison v. Raleigh*, 89 N. Car. 125.

Equity will not restrain the incumbent of an office from exercising its duties pending an action involving his title thereto. *Breslin v. Quinn* (Supreme Ct.), 2 N. Y. Supp. 577.

Upon the rendition of a regular judgment of ouster against the officer and in favor of the claimant, the officer becomes ousted, and the party declared to be entitled, upon taking the official oath and filing bonds when required, becomes *eo instanti* invested with the office. *Welch v. Cook*, 7 How. Pr. (N. Y.) 282; *People v. Conover*, 6 Abb. Pr. (N. Y.) 220.

Where, on *quo warranto*, there is judgment that the relator is entitled to the office, a *supersedeas* bond filed on appeal will not delay the relator's right to take possession of the office. *Iowa Code*, § 3353, providing that if judgment be rendered in his favor, he shall proceed to exercise the functions of the office. *Jayne v. Drorbaugh*, 63

Iowa 711. And see *Allen v. Robinson*, 17 Minn. 113.

Nor will an action lie on the *supersedeas* bond to recover the emoluments of the office pending the appeal. *Jayne v. Drorbaugh*, 63 *Iowa* 711.

2. *Mayor etc. of N. Y. v. Tucker*, 1 *Daly* (N. Y.) 107; *Hamlin v. Kassaf*, 15 *Oregon* 456; 3 *Am. St. Rep.* 176; *State v. Camden Co.*, 47 *N. J. L.* 454; *People v. Board of Trustees etc.* (Supreme Ct.) 7 *N. Y. Supp.* 806; *Kissimmee City v. Cannon* (Fla. 1890), 7 *So. Rep.* 523; *Prince v. Boston*, 148 *Mass.* 285; *Schwartz v. Flatboats*, 14 *La. Ann.* 243; *McVeaney v. Mayor etc. of N. Y.*, 3 *Thomp. & C.* (N. Y.) 131; 1 *Hun* (N. Y.) 35; *Burt v. Wisona etc. R. Co.*, 31 *Minn.* 472. But see *Wenner v. Smith*, 4 *Utah* 238.

3. *Hays v. Thompson*, 21 *La. Ann.* 655; *State v. Delassiz*, 21 *La. Ann.* 655; *Hallgrene v. Campbell*, 81 *Mich.* 255; *People v. Fowler*, 8 *Hun* (N. Y.) 233.

This is an absolute right of the officer, as such, and not a matter of judicial discretion; and he cannot be deprived of it by joining other parties as defendants. *People v. Fowler*, 8 *Hun* (N. Y.) 233.

4. *Vol.* 9, p. 951.

5. *Vol.* 10, p. 777

6. *Vol.* 14, p. 88.

7. *Vol.* 3, p. 60.

8. *Smith v. Stephan*, 66 *Md.* 381.

The allegation in a complaint, that

hand, in actions against officers as such, the declaration must show an official act creating their liability duly performed in their official capacity,¹ the same procedure being applicable when the liability was incurred by the act of a predecessor as by the act of the officer proceeded against, it being unnecessary to aver an engagement or a liability on the part of the officer himself.² The

the defendant, being a canal commissioner, was bound to repair the banks of the Erie canal, at a certain place, in a division placed under his particular supervision, is sufficient to show that the action is brought against him in his private character; and it was not necessary to allege that he had in his hands funds sufficient to make the repairs, for not making which the action was brought against him. *Griffith v. Follett*, 20 Barb. (N. Y.) 620.

An assumption will not be applied to charge county commissioners in their private capacities for debts contracted by the county before they were in office, and when they are not in office at the trial of the case. *Lyon v. Adams*, 4 S. & R. (Pa.) 443.

1. *Archer v. Allen Co.*, 3 Blackf. (Ind.) 501. And see *Peters v. Land*, 5 Blackf. (Ind.) 12; *Butler v. State*, 17 Ind. 450; *Buyce v. Buyce*, 48 Hun (N. Y.) 433; *State v. Clarke*, 73 N. Car. 255; *Wake Co. v. Maginn*, 78 N. Car. 181; *Posey Co. v. Saunders*, 17 Ind. 437; *Parker v. State*, 8 Blackf. (Ind.) 292; *State v. Brown*, 5 Blackf. (Ind.) 494.

In an action on an order of a board of commissioners, payable out of the three-per cent. fund "as fast as the same accrues to the county," it must be alleged and proved that the county had received money from such fund with which it might have paid the order, or some part of it, or that the order was fraudulently drawn on a fund in which the county had no assets, and an averment that the county had not received any such fund, is fatal on demurrer. *Union Co. v. Mason*, 9 Ind. 97.

In an action against an assessor and collector by his deputy, to recover compensation received for a census taken by the plaintiff but reported by the defendant, the petition is fatally defective unless it sets forth the contract between them as to compensation, and avers a complete performance of the duty as prescribed by law, as to the report to the treasurer within the time, etc. *Reeves v. Miller*, 28 Tex. 578.

A complaint which alleges that the

plaintiff, as a justice of the peace, performed services at the request of the district attorney of the county, in cases wherein the people of the State were plaintiffs, to the amount of \$3,200, and that the defendant thereby became, and is, liable to pay said sum, does not state facts sufficient to constitute a cause of action against said county. *Miner v. Solano Co.*, 26 Cal. 115.

Where the statute in giving the right to sue or to be sued, expressly requires that the allegation of official capacity shall be in a prescribed form, that form must be strictly followed. *Plumtree v. Dratt*, 41 Barb. (N. Y.) 333.

In actions by a public officer in his own name simply naming himself in the title of the complaint with the title of his office annexed, it is insufficient to show that the action is brought by him in his official capacity; the complaint must contain an averment that the plaintiff is a public officer and that he sues as such. *Fowler v. Westervelt*, 17 Abb. Pr. (N. Y.) 59; 40 Barb. (N. Y.) 374; *Gould v. Glass*, 19 Barb. (N. Y.) 179; but no particular form of alleging these facts need be followed provided it can be clearly gathered from the instrument that the plaintiff is an officer and sues as such. *Smith v. Levinus*, 8 N. Y. 472; and see *Burnham v. Milwaukee*, 69 Wis. 379.

It is not necessary that he should set forth in his complaint the time, manner and circumstances of his election or appointment, or the detail or the regularity of the proceedings by which he was inducted into office. *Kelly v. Breusing*, 33 Barb. (N. Y.) 123; and see *Hulbert v. Young*, 13 How. Pr. (N. Y.) 413.

In actions by a board all members then living, and the personal representatives of those deceased, must be made parties. *Cornell v. Mayor etc.* of N. Y., 9 Hun (N. Y.) 285.

2. *Morse v. Earl*, 13 Vt. 273; *Silver v. Cummings*, 7 Wend. (N. Y.) 181; *Potter v. Davis*, Hill & D. Supp. (N. Y.) 394; *Gillis v. Space*, 63 Barb. (N. Y.) 177.

Where a public officer admits the

action is usually brought against the officer individually, specifying in the pleadings and proceedings his name of office.¹

One not an officer *de jure*, although invested with the forms of office, and although his acts would be deemed binding and valid as to third persons, cannot, when put upon his own defense, justify under his office,² and where one justifies under his office, his right to it and the legality of his election or appointment may be contested.³ A debt due to an officer in his private capacity is not a proper set-off to a claim against him for money received by him in his official capacity,⁴ and when the public alleges a set-off

loss of public moneys intrusted to him, but insists that he has a good defense, the State need not wait till the expiration of his term of office before suing on his bond. *State v. Nevin*, 19 Nev. 162; 3 Am. St. Rep. 873.

A proceeding by the county against the executrix of a deceased treasurer to enforce a claim due the county must be instituted in the name of the deceased county treasurer's successor in office, who alone has authority to receive, keep, and disburse the moneys of the county. *Cole Co. v. Schmidt* (Mo. 1889), 10 S. W. Rep. 888.

1. *Hathaway v. Homer*, 5 Lans. (N. Y.) 267; *Galway v. Stimson*, 4 Hill (N. Y.) 136; *Com'rs of Highways v. Peck*, 5 Hill (N. Y.) 215; *Duanesburgh v. Jenkins*, 46 Barb. (N. Y.) 294; *Wild v. Columbia Co.*, 9 How. Pr. (N. Y.) 315; and see *Agent etc. v. Rikeman*, 1 Den. (N. Y.) 279; *Lyon v. Adams*, 4 S. & R. (Pa.) 443.

In a suit against a public officer, to recover balances found due on three separate accounts, the whole must be treated with reference to its effect on an execution in the suit, as having accrued at the date of the last account stated. *Gorham v. Wing*, 10 Mich. 486.

In an action by a private person for a breach of the conditions of the official bond of a county officer, the county is not a necessary party, even where a reformation of the bond is part of the relief sought. *Stewart v. Carter*, 4 Neb. 524; and in an action in the name of the State, on the official bond of a justice of the peace, it is not necessary that it should appear from the declaration that the relator is beneficially interested in the suit. *State v. Herding*, 5 Blackf. (Ind.) 504; and see *Hagadorn v. Raux*, 72 N. Y. 583.

Foreign Officers.—Where property is vested in an officer for the time being of a foreign government, and he is au-

thorized to maintain an action therefor in his own name by the country he represents, he may maintain such action in this State. *Peel v. Elliot*, 28 Barb. 200; 7 Abb. Pr. (N. Y.) 433; 16 How. Pr. (N. Y.) 481.

Assumpsit does not lie by a contractor against the public superintendent for work done for the State. *West v. Jones*, 9 Watts (Pa.) 27.

2. *Pearce v. Hawkins*, 2 Swan (Tenn.) 87; *Schlencker v. Risley*, 4 Ill. 483; 38 Am. Dec. 100; *Blake v. Sturtevant*, 12 N. H. 567; *Short v. Symmes*, 150 Mass. 298.

A record that he was duly sworn is insufficient. *Blake v. Sturtevant*, 12 N. H. 567; *Schlencker v. Risley*, 4 Ill. 483; 38 Am. Dec. 100.

A public officer will not be allowed to set up as a defense his right to hold the office until his successor is appointed and qualified, if he unlawfully detains the certificate and commission of his successor, and in this way prevents him from qualifying. *State v. Steers*, 44 Mo. 223.

In a *qui tam* action against one as auctioneer, however, to recover the penalty prescribed by *Massachusetts Stat.* 1795, ch. 8, for selling his own goods after sunset, he may show that he was not a regularly licensed auctioneer, and thus avoid the forfeiture. *Clark v. Cushman*, 5 Mass. 505.

3. *Shepherd v. Staten*, 5 Heisk. (Tenn.) 79. See *McVeane v. Mayor etc. of N. Y.*, 3 Thomp. & C. (N. Y.) 131; 1 Hun (N. Y.) 85; *Demarest v. Mayor etc. of N. Y.*, 11 Hun (N. Y.) 19.

One claiming a salary as due him under an appointment for a time when he in fact rendered no service, must allege and prove his right to recover, irrespective of the fact that he rendered no service during the time. *Brant v. New York*, 48 N. Y. Super. Ct. 293.

4. *Prewett v. Marsh*, 1 Stew. & P.

against an officer, the burden rests with the public to establish it.¹ Irregular or improper conduct on the part of a public officer cannot be made out by inference, but must be directly alleged and proved,² the facts constituting the misconduct being required to be set forth.³ The official character of a public officer may be established by general reputation as to his acts as such, even though there is record evidence of his appointment or election.⁴ Judgments recovered against officers in their name of office are

(Ala.) 17; 21 Am. Dec. 645; *Harper v. Howard*, 3 Ala. 284; *Com. v. Rodes*, T. B. Mon. (Ky.) 318; and see *Com'rs of Yancey v. Piercy*, 72 N. Car. 181; *U. S. v. Prentice*, 6 McLean (U. S.) 65.

But where the official bond given to a town by a collector of taxes and his sureties is several as well as joint, and the collector brings an action against the town on a demand which is itself the subject of set-off, the defendants may set off their claim on such bond for money which the plaintiff has received on tax bills committed to him for collection, and which he has not accounted for nor paid over. *Donelson v. Colerain*, 4 Met. (Mass.) 430.

In a suit between the United States and individuals, the latter cannot claim to be allowed a credit, unless such claim has been presented to the accounting officers of the treasury department, and been disallowed, and proof of such presentation must be made by the individual. *U. S. v. Martin*, 2 Paine (U. S.) 68.

1. *Jones v. U. S.*, 39 Fed. Rep. 410.

Where it was alleged that the clerk retiring from office had forfeited his fees by failing to file an explicit fee bill within the term prescribed by statute, it was held that the allegation, although of a negative character, must be proved. *Barrow v. Robicheaux*, 14 La. Ann. 203.

2. *Windham v. Litchfield*, 22 Conn. 226; and see *Mayor etc. v. Davis*, 18 N. J. L. 21; *Perkins v. Adams*, 5 Met. (Mass.) 44; *U. S. v. Girault*, 11 How. (U. S.) 22.

In order to charge an officer for breach of duty, a valid writ is necessary. *Putnam v. Traeger*, 66 Ill. 89.

A petition in a suit against a judge of an election for wrongfully refusing the plaintiff's vote, is bad on demurrer when it does not aver the particular facts on which the plaintiff's right to vote depends. *Curry v. Cabliss*, 37 Mo. 330.

In a complaint against a county treasurer for neglecting and refusing to pay over moneys to his successor, an averment that, being elected for three years, and until a successor should be elected, he continued in office until a certain period beyond three years, it was held equivalent to an averment that no successor was elected until after that period. *State v. Spears*, 1 Ind. 515.

3. See *Kilgore v. Ferguson*, 77 Ill. 213; *Holden v. Eaton*, 7 Pick. (Mass.) 15; *Ryan v. State Bank*, 10 Neb. 524. See also *Beard v. Holland*, 59 Miss. 164.

In an action against a justice of the peace for a false return to a *certiorari*, the declaration after stating the falsity of the return, averred that "by pretext whereof, the plaintiff was not only prevented from obtaining any redress or reversal of the judgment and proceedings aforesaid, but was also compelled to suffer imprisonment, and endure great pain both of body and mind, and to pay and expend divers large sums of money," etc. *Held*, that this was a sufficient averment, after verdict, of the affirmance of the judgment, and the loss or damage consequent thereon. *Pangburn v. Ramsay*, 11 Johns. (N. Y.) 141.

4. *Dean v. Gridley*, 10 Wend. (N. Y.) 254; *Potter v. Luther*, 3 Johns. (N. Y.) 431; *State v. Row* (Iowa) 46 N. W. Rep. 872; *Lawrence v. Sherman*, 2 McLean (U. S.) 488; *Gourley v. Hankins*, 2 Iowa 75.

If a person give bond for the faithful discharge of the duties of an office, it is an admission of his appointment to that office so far as to make him liable for official misconduct or neglect of duty. *Barada v. Carondelet*, 8 Mo. 644.

In Action for Salary.—In an action by the clerk of the board of assessors to recover salary during absence, plaintiff is entitled to show that letters which he had written asking for leave of absence without pay were under compul-

usually made a public charge, and when levied and collected must be paid to the person to whom it has been adjudged,¹ though in some instances judgments have been permitted to be collected from the officers personally and the amount paid allowed to them in their official accounts.²

PUBLIC PEACE—(See also **BREACH OF THE PEACE**, vol. 2, p. 515.)—Public peace is public tranquillity, that quiet order, and freedom from agitation or disturbance which is guaranteed by the law.³

PUBLIC PLACE.—The term “public place” is a relative one. What is a “public place” for one purpose is not for another. A “public place” within the meaning of a statute, prescribing the time and place for posting notices of tax sales, may not be a “public place” within the common law definition of an affray; and so a place which is public in one community is not necessarily

sion; that if he had not so written he would have been removed. *Alker v. Mayor etc. of N. Y.*, 27 Hun (N. Y.) 413.

1. See *People v. Delaware*, 12 How Pr. (N. Y.) 50.

In order to recover against public officers having the control and distribution of public money, for non-payment of a debt liquidated by a judgment against the corporation, to force which a *mandamus* was granted, and which was placed on the budget of expenditures, it is necessary to prove that the fund required to pay was raised, that it was diverted, and that the creditor has sustained loss and injury. *Jones v. Currie*, 34 La. Ann. 1093.

In *Virginia*, one inspector of tobacco is entitled, in equity, to contribution from his co-inspector for the amount of a judgment recovered against the former, and discharged by him, for failing to deliver tobacco, when legally demanded, if such failure were not *ex maleficio* or from actual fraud, or voluntary wrong. *Thweatt v. Jones*, 1 Rand. (Va.) 328; 10 Am. Dec. 538.

2. See *Van Alstyne v. Friday*, 41 N. Y. 174; *Allen v. Clark*, 65 Barb. (N. Y.) 563; *Silver v. Cummings*, 7 Wend. (N. Y.) 181; *Paddock v. Symonds*, 11 Barb. (N. Y.) 117; *People v. Supervisors*, 12 How. Pr. (N. Y.) 50.

Where a judgment is recovered against a board of supervisors or a county superintendent of the poor, or any town or the supervisor or the overseers of the poor thereof, rendered for the costs of a suit commenced by any of such officers in their individual

names, such costs may be collected of the plaintiffs individually, and the amount thereof allowed to them in their accounts of official expenditures, if such suits appear to have been necessarily commenced in good faith. *Avery v. Slack*, 19 Wend. (N. Y.) 50; *Boyce v. Cayuga Co.*, 20 Barb. (N. Y.) 294; *People v. Delaware*, 9 Abb. Pr. N. S. (N. Y.) 458; 12 How. Pr. (N. Y.) 50.

Summary proceedings may in some cases and under some circumstances be maintained against public officers, the circumstances under which they may be maintained and the rules of procedure being governed by statute. See generally *O'Leary v. Harrison*, 6 Jones (N. Car.) 338; *Bellaufont v. Coleman*, 7 Heisk. (Tenn.) 559; *Kinzer v. Helm*, 7 Heisk. (Tenn.) 672; *Com. v. Jackson*, 10 Bush (Ky.) 424; *Ex parte Randolph*, 2 Brock (U. S.) 447.

3. *Neuendorff v. Duryea*, 6 Daly (N. Y.) 280. In that case it was held that an act prohibiting theatrical and other exhibitions and entertainments on Sunday in the city of New York, which was entitled “An Act to Preserve the Public Peace,” fulfilled the requirement of the *New York* constitution, § 16, art. 3, which provides that the subject of any private or local bill shall be expressed in the title.

In *State v. Benedict*, 11 Vt. 236, the court by Redfield, J., said: “What is the public peace? Almost every one has some more or less certain notion of the public peace, and still it may not be very easy to define it in words. It is, so to speak, that invisible sense of security which every man feels so

so in another.¹ In the notes will be found interpretations of the term as used in various connections.²

necessary to his comfort, and for which all governments are instituted."

1. *Cummins v. Little*, 16 N. J. Eq. 48; *Russell v. Dyer*, 40 N. H. 173; 43 N. H. 397; *Territory v. Lannon*, 9 Mont. 1; *Hilgers v. Quinney*, 51 Wis. 71; *Ramsay v. Hommel*, 68 Wis. 14. "The term public place, as used in the statute, is relative. What might be a public place in a crowded and populous city, and what would be a public place in a small town sparsely inhabited, are entirely different questions. *Cahoon v. Coe*, 57 N. H. 572.

A "public place" does not mean a place devoted solely to the uses of the public, but it means a place, which is in point of fact, public, as distinguished from private, a place that is visited by many persons, and usually accessible to the neighboring public. *Parker v. State*, 26 Tex. 207.

2. **Public Place as Used in Gaming Laws.**—See *GAMING*, vol. 8, p. 1045.

Within the Meaning of the Law of Indecent Exposure.—See *EXPOSURE OF PERSON*, vol. 7, p. 534.

Within the Meaning of the Law of Affray.—See *AFFRAY*, vol. 1, pp. 315, 318.

Within the Meaning of Statutes Requiring Notices to be Posted in Public Places.—See *ELECTIONS*, vol. 6, p. 301; *NOTICE*, vol. 16, p. 820.

In *Tidd v. Smith*, 3 N. H. 178, the court, after enumerating the various statutes requiring in certain contingencies notice to be posted in a public place, said: "In all these instances the words 'public place' were intended, we imagine, to express the same thing; and they must have been very generally understood by everybody in the same sense. The general understanding of the community on a question of this nature is entitled to much respect; and it is believed this understanding has viewed as public places, houses of public worship, inns, and, perhaps, in some places, shops where goods are retailed. We are not aware that a mechanic's shop has ever been considered as a public place anywhere." And it was held accordingly that a shoemaker's shop was not a "public place."

In *Scammon v. Scammon*, 28 N. H. 428, it was held that houses of public worship are ordinarily and *prima*

facie to be regarded as public places within the meaning of such statutes.

In *Russell v. Dyer*, 40 N. H. 187, the court by Bell, C. J., said: "The words 'public place' must be construed to mean such places, as, in comparison with other places in the same town, are the places where the inhabitants and others most frequently meet, or resort, or have occasion to be." And so in a sparsely settled town, where there is no post-office, tavern, or house of public worship, a school house, mill or mechanic's shop may be the most public place. See also *Wilson v. Bucknam*, 71 Me. 547, where a school house was held to be a "public place." In *Cahoon v. Coe*, 57 N. H. 572, it was held, that in the absence of any place more public, a dwelling house must be regarded as a "public place" for the purpose of posting the notice of a sale of land for taxes.

Montana Comp. St., § 1089 provides that notice of the presentation of a petition for laying out a county road shall be posted in four "public places" in the vicinity of the proposed road. It was held that posting at a railroad depot about six or seven hundred feet from the proposed road was a sufficient compliance with the statute. *Territory v. Lannon*, 9 Mont. 1.

A *Wisconsin* delinquent tax law requires notice of a sale under the law to be posted "in at least four public places" in the county. *Held*, that the affidavit of a county treasurer, affirming that a notice had been posted at four "public places" in the village of C was insufficient, as the places might be public so far as the village was concerned, and yet, as regards the county, might not be "public places." *Hilgers v. Quinney*, 51 Wis. 71; *Ramsay v. Hommel*, 68 Wis. 14.

A *Vermont* statute (G. S., p. 310, § 4; G. S., p. 362, § 4) provides that notice of a sale of property, held under attachment or execution, shall be posted in a "public place," and that the property shall be sold where the advertisement is posted. In *Austin v. Soule*, 36 Vt. 645, the court by Kellogg, J., said: "The object to be attained by putting up an advertisement is to attract attention to it, so that it may be seen and read; and, if the advertisement is set up in a

PUBLIC POLICY.—That principle of the law, which holds that no one can lawfully do that which has a tendency to be injurious to the public, or against the public good, may be termed the policy of the law, or public policy in relation to the administration of the law.¹ If a contract binds the maker to do something

place where it would be likely to attract general attention, so that its contents might reasonably be expected to become a matter of notoriety in the vicinity, such a place should be considered a 'public place' within the meaning of the statute. A private dwelling, a barn, a shed, or other out-building, or even a rock, tree, or fountain, if answering this condition, might be a 'public place.' And in *Goss v. Cardell*, 53 Vt. 447, it was held that the posting on a fence near a driveway leading to the premises which were farm premises, long occupied as such, on a public road leading through the town, was a sufficient compliance with the law. See also *Alger v. Curry*, 40 Vt. 448; *Fairbanks v. Benjamin*, 50 Vt. 99.

"A public place is a relative term. What is a public place for one purpose is not for another. That is a public and proper place for setting up notices, which is likely to give information to those interested and who may probably become bidders at the sale." *Cummins v. Little*, 16 N. J. Eq. 48.

"*Most Public Place.*"—See *Most*, vol. 15, p. 886.

Within the Meaning of Statutes Prohibiting Intoxication in a Public Place.—*Indiana Acts 1875, Spec. Sess.*, p. 57, provide that "any person of sound mind found in any public place in a state of intoxication shall be deemed guilty of a misdemeanor."

In *State v. Sowers*, 52 Ind. 311, the court by Pettit, J., said: "A public place is one where all persons have a right to go, while a social party given by a gentleman is a place where only those invited have the right to go or be present." And, accordingly, it was held that a person found in a state of intoxication at a social party was not liable to prosecution under the statute.

In *State v. Waggoner*, 52 Ind. 481, an indictment charged that the defendant was found "in a public street, highway, and sidewalk," in a state of intoxication. The indictment was quashed in the court below on the ground that it did not sufficiently describe a "public place." It was held that the

description of a public place in defining an affray applies equally to a public place as used in this statute, and that the words "public street and highway" sufficiently allege that the offense was committed in a "public place."

In *State v. Moriarty*, 74 Ind. 103, it was held that a public highway is a "public place." Overruling *Williams v. State*, 64 Ind. 553. See also *State v. Welch*, 88 Ind. 308.

A corresponding *New Hampshire* statute is as follows: "If any person shall be found drunk in any street, alley, or other public place, he shall be punished etc." In *State v. Stevens*, 36 N. H. 59, it was held that the use of the words "street" and "alley," excluding the more general term "highway," indicates that public roads throughout the country were not intended to be embraced within the term "public place." See also *State v. Hall*, 22 N. H. 384.

A grand jury room, while the grand jury is in session, has been held to be a public place within the meaning of the *Texas* statute. *Murchison v. State*, 24 Tex. App. 8.

As Used in a City Ordinance, Providing for the Impounding of Cattle Running at Large Upon Public Places.—The ordinance in question provided that it should be the duty of the police to take up any cattle running at large upon any "public street, alley, park or places." Cattle were taken on a parcel of land, known as the "Methodist Camp Ground," which was within the city limits, and open to the public, and unoccupied. It was held, though the camp ground was private property, that as it was open to the common, it was in a certain sense a "public place," and it was therefore competent for the officer finding the cattle loose and at large upon the common, immediately after having been at large in public streets, to seize them. *O'Mally v. McGinn*, 53 Wis. 353.

1. *Egerton v. Brownlow*, 8 H. L. Cas. 1.

In *Davies v. Davies*, L. R., 36 Ch. D. 364, where the question was whether a

opposed to the public policy of the state or nation, it is void, however solemnly made. For instances of such contracts, and for references to other doctrines, arising from the principle of public policy, see note.¹

PUBLIC PROSECUTOR.—See DISTRICT ATTORNEY, vol. 5, p. 713; PUBLIC OFFICERS, vol. 19, p. 378.

PUBLIC RECORDS.—See RECORDS.

covenant was "in restraint of trade," Kekewich, J., said: "All authorities, from first to last, concur in one thing—viz., that the doctrine on this subject is founded on 'public policy'; and I cannot but regard the jarring opinions as exemplifying the well-known dictum of Mr. Justice Burrough in *Richardson v. Mellish*, 2 Bing. 229, 9 E. C. L. 391, 252, that public policy 'is a very unruly horse, and when once you get astride it you never know where it will carry you.' Public policy does not admit of definition and is not easily explained. If that statement requires authority, turn to *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1, and consult the arguments of counsel and opinions of judges covering the whole subject including, in some passages to which I will presently call attention, that part of it which concerns restraint of trade. One thing I take to be clear, and it is this—that public policy is a variable quantity; that it must vary and does vary with the habits, capacities, and opportunities of the public; that it cannot have been the same when Chief Justice Tindal decided *Horner v. Graves*, 7 Bing. 735, 20 E. C. L. 310, in 1831, as it was when Chief Justice Parker decided *Mitchel v. Reynolds*, 1 P. Wms. 181, in 1711; that it must have changed, and did change, between 1831 and 1869 when Vice-Chancellor James decided *Leather Cloth Co. v. Lorsche*, L. R., 9 Eq. 345; and if there had not been further change before Lord Justice Fry decided *Rousillon v. Rousillon*, 14 Ch. D. 351, in 1880, it must have occurred ere now."

1. In General.—See CONTRACTS, vol. 3, p. 875, *et seq.*; ILLEGAL CONTRACTS vol. 9, p. 879; ILLEGAL SALES, vol. 9, pp. 923, 926, *et seq.* These titles treat concisely the whole subject of contracts which are illegal as being against public policy, and should be consulted in every instance, although another and more specific reference may be found.

Contracts in Restraint of Marriage.—

See MARRIAGE, vol. 14, p. 473, *et seq.*; BROKER, vol. 2, p. 598.

Waiver of the Equity of Redemption.—See MORTGAGES, vol. 15, p. 827.

Agreements to Waive the Statute of Limitations.—See LIMITATIONS OF ACTIONS, vol. 13, p. 717.

Contracts Limiting the Liability of Common Carriers.—See CARRIERS OF GOODS, vol. 2, p. 811, *et seq.*; CARRIERS OF LIVE STOCK, vol. 3, p. 10 *et seq.*

Sunday Contracts.—See SUNDAY.

Contracts Affecting Rights Acquired Under the Pre-emption, Homestead, etc. Laws.—See PUBLIC LANDS, vol. 19, p. 305.

Gambling Contracts.—See GAMBLING CONTRACTS, vol. 8, p. 992.

Insurable Interest.—Insurance by an Alien Enemy.—See INSURANCE, vol. 11, p. 312; MARINE INSURANCE, vol. 14, p. 323.

As Affecting Aliens.—See ALIENS, vol. 1, p. 456.

Champerly and Maintenance.—See CHAMPERTY AND MAINTENANCE, vol. 3, p. 68.

Assignment of Choses in Action.—Salaries of Officers.—See ASSIGNMENT, vol. 1, pp. 826, 829.

Contract Made in Consideration of Compounding Offenses.—See COMPOUNDING OFFENSES, vol. 3, p. 402.

Contracts not to Resort to a Judicial Forum.—See JURISDICTION, vol. 12, p. 305.

Contracts for Services Rendered in Obstruction of Justice.—See MASTER AND SERVANT, vol. 14, p. 783.

Illegal Contracts for Services.—See MASTER AND SERVANT, vol. 14, p. 783, 785, *et seq.*

Restraints on Alienation.—See RESTRAINTS ON ALIENATION.

Discriminating Contracts.—See FREIGHTS, vol. 8, p. 941; CARRIERS OF GOODS, vol. 2, p. 788; TICKETS AND FARES.

Combinations and Pools.—See RAILROAD POOLS; TRUST (CORPORATE).

Bills, Notes and Bonds Given for a Consideration Against Public Policy.—

PUBLICATION—PUBLISH—(See also ARBITRATION, vol. 1, p. 704; COPYRIGHT, vol. 4, p. 147; LIBEL AND SLANDER, vol. 13, pp. 370-472; LITERARY PROPERTY, vol. 13, pp. 916-920; NEWS-PAPERS, vol. 16, p. 490; NOTICE, vol. 16, p. 808, *et seq.*; PATENTS, vol. 18, p. 57; SERVICE OF PROCESS).—To publish is to proclaim, to make known generally.¹ Publication is the act by which a thing is made public.² A publication is a something—as a book or print—which has been published—made public or known to the world.³

See BILLS AND NOTES, vol. 2, p. 365; BONDS, vol. 2, pp. 454, 455.

1. Watts v. Greenlee, 2 Dev. (N. Car.) 87.

Sec. 18 of the schedule to the *Illinois* constitution of 1870 provides: "All laws of the State of *Illinois*, and all official writings and executive, legislative and judicial proceedings shall be conducted, preserved and published in no other than the English language." In *Chicago v. McCoy* (Ill. 1891), 26 N. E. Rep. 365 the court by Baker, J., said: "It is insisted that the word 'published,' as used in said section of the constitution, is restricted in its application to publications in book or pamphlet form. The word 'published' is broad enough to include and, in its ordinary and usual acceptation, does include publications in newspapers. . . . The constitutional provision in question contemplates publications in newspapers as well as in books and pamphlets."

In an action upon an agreement to pay the plaintiff "fifty dollars for inserting a business card on two hundred copies of his advertising chart, to be paid when the chart is published," the court by Wells, J., said: "When applied to such an article as this, the word 'published' can have no fixed signification which the court can apply to the contract. What was a sufficient publication within the sense and intent of the contract must be ascertained and determined by the jury, in the light of all the facts of the case." *Stoops v. Smith*, 100 Mass. 63; 97 Am. Dec. 76. See also *Palmer v. Clock*, 106 Mass. 387.

Published and Printed Not Equivalent.

—See NOTICE, vol. 16, p. 822.

2. *Grigsby v. Brekenridge*, 2 Bush (Ky.) 480; 92 Am. Dec. 509.

3. *U. S. v. Loftis*, 12 Fed. Rep. 671.

A *United States* statute required that before one should be entitled to a copyright upon any work, he must

deposit, before "publication," a printed copy of the title of the book in the clerk's office of the United States district court of his district. A State reporter delivered to the State several hundred copies of a volume of reports before filing the above required certificate. *Held*, that this was not a "publication" within the meaning of the statute. The court, by Drummond, C. J., said: "The mere printing of a book is not necessarily publication, and I am inclined to think it was incumbent upon the defendants to show something more than a mere delivery of the copies to the State." *Myers v. Callaghan*, 5 Fed. Rep. 729. See generally COPYRIGHT, vol. 4, p. 147.

United States Rev. Stat., § 3893, declares "every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character" to be non-mailable matter. Upon the construction of this statute, in *U. S. v. Williams*, 3 Fed. Rep. 486, the court by Allen, Comm., defined publication and "publish" thus: "A 'publication' is defined in the dictionaries as a book or writing published, especially one offered for sale or to public notice; and to publish is defined to issue, to make known what was before private, to put into circulation. Writings are either printed matter or manuscript. The idea of publicity, of circulation, of intended distribution, seems to be inseparable from the term 'publication.'" See generally OBSCENITY, vol. 17, p. 7.

A sealed letter is a "writing," but it is not a "publication," within the statute aforesaid. *U. S. v. Loftis*, 12 Fed. Rep. 671.

Publication of a Statute—Published and Circulated Used Synonymously.

Within the meaning of an *Indiana* constitutional provision, declaring that no law should take effect till it had

PUBLISHER.—One who by himself or his agent makes a thing publicly known; one engaged in the circulation of books, pamphlets, and other papers.¹

PUEBLO.—(See also SPANISH LAND GRANTS; TOWN).—"Pueblo," in its original signification, means people or population, but is used in the sense of the English word "town." It has the indefiniteness of that term, and, like it, is sometimes applied to a mere collection of individuals residing at a particular place, a settlement or village, as well as to a regularly organized municipality.²

Ownership of the lands in the pueblos could not in strictness be affirmed. It amounted to little more than a restrictive and qualified right to alienate portions to its inhabitants, for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. This right of disposition and use was, in all particulars, subject to the control of the government of the country.³

PUFFER.—AUCTIONS AND AUCTIONEERS, vol. 1, p. 988; FRAUDULENT SALES, vol. 8, p. 813.

PUNCTUATION.—See INTERPRETATION, vol. 11, p. 521; STATUTES; WILLS.

PUNISHABLE.—Liable to punishment.⁴ If an offense may be punished by a certain penalty, it is "punishable" by such penalty, although at the discretion of the court, or under different circumstances, other penalties may be imposed. Its meaning is not restricted to such an offense as must be so punished.⁵

been "published" and "circulated" in the several counties of the State, it was held that the words "published" and "circulated" were used as meaning the same thing. *Jones v. Cavins*, 4 Ind. 305. For provisions regulating the publication of statutes see generally, STATUTES.

Publication of an Ordinance.—See ORDINANCES, vol. 17, pp. 261, 268.

Publication of a Will.—Publication is the act of declaring or making known to the witnesses, that the testator understands and intends the instrument subscribed by him to be his last will and testament. *Lewis v. Lewis*, 13 Barb. (N. Y.) 23. See also WILLS.

What Is the Publication of a Label.—See LABEL, vol. 12, p. 531.

1. Bouv. Law Dict., followed in *Leroy v. Jamison*, 3 Sawy. (U. S.) 377.

As to Whether a Publisher Is a Manufacturer.—See MANUFACTURER, vol. 14, p. 265.

2. *Trenouth v. San Francisco*, 100 U. S. 251.

3. *Townsend v. Greely*, 5 Wall. (U. S.) 326.

4. *Com. v. Pemberton*, 118 Mass. 36.

5. *Com. v. Pemberton*, 118 Mass. 36; *McLaughlin's Case*, 107 Mass. 225. See also *Dull v. People*, 4 Den. (N. Y.) 91.

A Connecticut statute provides that a person arraigned for any offense "punishable by imprisonment for life," may peremptorily challenge ten jurors. In *State v. Neuner*, 49 Conn. 232, it was held that a crime which might in the discretion of the court be punished by imprisonment for life or for a term less than life, was to be regarded as "punishable by imprisonment for life," and that a person arraigned for such a crime was entitled to challenge ten jurors. The court by Loomis, J., said: "The meaning of the word 'punishable' is not 'must be punished,' but 'liable to be punished.' As was held in *Miller v. State*, 58 Ga. 200, 'punishable' includes an offense which may under some circumstances be punished in the manner designated, although under others it may not be."

In *U. S. v. Watkins*, 7 Sawy. (U. S.) 85; 6 Fed. Rep. 152, the defendant

PUNISHMENT—(See also CRIMINAL LAW, vol. 4, p. 721; IMPRISONMENT, vol. 10, p. 197; LIABILITY, vol. 13, p. 289; PENALTIES, vol. 18, p. 269; SENTENCE).—Punishments are evils or inconveniences consequent upon crimes and misdemeanors, and inflicted by human laws, in consequence of disobedience or misbehavior in those to regulate whose conduct such laws were made.¹ It is obvious that a treatment of punishments under this head would involve needless repetition, as the punishment for each offense is treated specifically under the various criminal law titles in this work, such as FORGERY, HOMICIDE, etc.

was indicted for voting illegally. He had previously been indicted for an assault with a dangerous weapon, which is punishable under the *Oregon* Criminal Code by a fine or imprisonment in jail or in the penitentiary, in the discretion of the court, to which indictment he had pleaded guilty, and had been sentenced to pay a fine. The *Oregon* constitution, art. 2, § 3, declares that the "privilege of an elector shall be forfeited by conviction of any crime which is punishable by imprisonment in the penitentiary." It was held, that a crime "is punishable by imprisonment in the penitentiary," when by law it may be so punished, and that the fact that it also may be or is otherwise punished, does not change its grade or character in this respect. The court, by Deady, D. J., said: "A crime is punished by the punishment actually imposed, but it is punishable by any punishment that the law authorizes the court to impose. The phrase 'is punishable' cannot be construed to mean, more or less, than 'may be punished,' or 'liable to be punished.'"

The act of Congress, establishing a *United States* district court in the Indian Territory, provides "that the court hereby established shall have exclusive original jurisdiction over all offenses, not punishable by death or imprisonment at hard labor." *In re Mills*, 135 U. S. 266, it was held that the words "punishable . . . by imprisonment at hard labor," as used in the act, embrace offenses which, although not imperatively required by statute to be so punished, may, in the discretion of the court, be punished by imprisonment in the penitentiary.

1. 4 Bl. Com. 7. "The penalty for transgressing the law," Wharton's Law Dict. followed in *State v. Smith*, 7 Conn. 428.

Punishment in the legal sense is

some pain or penalty warranted by law inflicted on a person for the commission of a crime or misdemeanor, whether declared by the court or superinduced as a legal result on conviction. *State v. Lawrence*, 45 Mo. 494.

Disqualification from office or from the pursuits of a lawful avocation, is a "punishment" as the word is used in the definition of a bill of attainder; viz., "a bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri*, 4 Wall. (U. S.) 277. See also *EX POST FACTO LAWS*, vol. 7, p. 527; *CONSTITUTIONAL LAW*, vol. 3, p. 736.

Synonymous with "penalty," "forfeiture," etc.—In *Beggs v. State*, 122 Ind. 54, it was held that a verdict that, "We, the jury, find the defendant guilty, and assess her punishment at the sum of five dollars," was not bad, though using the word 'punishment' instead of 'fine.' The court said: "There is a sense in which 'punishment' and 'fine' are synonymous."

In *U. S. v. Reisenger*, 128 U. S. 398, it was said that the words "penalty," "liability," and "forfeiture," are synonymous with "punishment," in connection with crimes of the highest grade.

Twice Punished.—See *JEOPARDY*, vol. 11, p. 926.

Infamous Punishments.—See *INFAMOUS CRIMES*, vol. 10, p. 603.

Corporal Punishment seems to mean any kind of corporal privation or suffering which is inflicted by sentence, directly by way of penalty for an offense, and, in this sense, of course, includes imprisonment as well as the pillory. *People v. Winchell*, 7 Cow. (N. Y.) 525. *CORPORAL*, vol. 4, p. 182.

As to the right of a teacher to inflict corporal punishment, see *ASSAULT*, vol. 1, p. 794; *PARENT AND CHILD*, vol. 17, p. 33; *SCHOOLS*.

The Constitution of the *United States* provides that excessive bail shall not be required nor cruel and unusual punishment inflicted. And the same provision is to be found in the constitutions of many of the States. The phrase "cruel and unusual punishment" is incapable of precise definition. It has been treated under CRIMINAL LAW, vol. 4, p. 721, *et seq.*, and CONSTITUTIONAL LAW, vol. 3, p. 736. In addition several recent cases are cited in note 1.

PUNITIVE DAMAGES.—See DAMAGES, vol. 5, p. 21; EXEMPLARY DAMAGES, vol. 7, p. 448.

PUPIL.—See EDUCATION, vol. 6, p. 158; PARENT AND CHILD, vol. 18, p. 331; SCHOOLS.

1. Cruel and Unusual Punishment.—In *Wilkerson v. Utah*, 99 U. S. 130, the court by Clifford, J., said: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator" (4 Bl. Com. 377) "referred to, and all others in the same line of unnecessary cruelty are forbidden by that amendment of the constitution." In that case the prisoner had been sentenced to be shot under a provision of the *Utah* Code, which enacted that every person guilty of murder should suffer death, but did not provide the mode of executing the sentence. It was held that the sentence was not in conflict with the above mentioned provision.

Mr. Cooley says of these words: "It is certainly difficult to determine precisely what is meant by cruel and unusual punishments. Probably any punishment declared by statute for an offense which was punishable in the same way at common law could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of similar nature. But those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual. We may well doubt the right to establish the whipping post and the pillory in States where they were never recognized as instruments of punishment, or in States

whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishments." Cooley's Const. Lim. (4th. ed.)*329.

In re Bayard, 25 Hun (N. Y.) 546, a statute providing that a person convicted of petit larceny in a certain locality should be subject to a different and greater punishment than persons convicted of the same offense in the State at large, was held to be constitutional. The court by Rumsey, J., said: "The courts have rarely had occasion to construe the meaning of the phrase 'cruel and unusual punishment.' And since no punishment can be inflicted until authorized by the legislature which is often elected, and represents the general moral ideas of the people, it is not likely that they will often be called on to construe it. The text writers, however, have discussed it to some extent, and they seem to understand it as prohibiting any cruel or degrading punishment not known to the common law, and probably also those degrading punishments which in any State had become obsolete when its constitution was adopted, and punishments so disproportioned to the offense as to shock the sense of the community."

Criminal Code of *New York*, § 505, reads as follows: "The punishment of death must in every case be inflicted by causing to pass through the body of the convict, a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until the convict is dead." *In re Kemmler* (*sub nom.* *People v. Durston*), 119 N. Y. 580, it was held that this provision prescribed no new punishment for the

PURCHASE—(See also **BUY**, vol. 1, p. 702; **PAYMENT**, vol. 18, p. 150; **PURCHASE MONEY**; **SALES**).—A purchase, in the ordinary and popular acceptation, is the transmission of property from one person to another by their voluntary act and agreement, founded on a valuable consideration.¹ In its strictly technical sense, it is the acquisition of land

offense of murder. The only change made was in the mode of carrying out the sentence, and though the new mode of execution was certainly unusual, it was not cruel within the meaning of the constitution. See also *People v. Durston*, 55 Hun (N. Y.) 64; *In re Kemmler*, 136 U. S. 436.

1. 4 Kent's Com. 509, followed in *Maydwell v. Maydwell*, 9 Heisk. (Tenn.) 577; *Martin v. Strachan*, 1 Wils. 266.

Purchase "means to buy, to obtain property by paying an equivalent in money; it differs from barter only in the circumstance, that in purchasing, the price or equivalent given or secured, is money." Webster's Dict. followed in *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 572.

Iowa Rev. Sts., § 2488, provides that aliens, having certain qualifications, shall have the right to acquire "real estate by descent or by purchase." The next section confers upon every alien the right to acquire real estate by devise or descent, but not by purchase. "In view of the fact that the next section provides for aliens acquiring real estate by 'devise,' and the section following provides for more limited rights for aliens acquiring real estate by purchase," and in order to give every section of the statute some practical effect, it was held, in *Purcell v. Smidt*, 21 Iowa 546, that "purchase," as used in section 2488, must be given its more limited or common signification, to wit, that of acquisition by bargain and sale for a consideration.

"Purchase indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land as are obtained by bargain and sale, for money or other valuable consideration; but this falls far short of the legal idea of purchase." 2 Bl. Com. 241, quoted in *Grant v. Bennett*, 96 Ill. 535.

A *Wisconsin* statute exempts from taxation "the property of all Indians who are not citizens, except lands held by them by purchase." In *Farrington v. Wilson*, 29 Wis. 383, the plaintiff claimed through a half breed who

had received a patent of the lands from the United States. Defendant set up a tax deed. It was held, that the word "purchase," as used in the exemption, is to be taken to mean an acquisition of land for a valuable consideration; and that land patented by the United States to an Indian was not held by "purchase," within the meaning of the provision.

An act incorporating a corporation authorized it to take by "purchase." It was held that the term "purchase" should be taken in its popular sense, and not in its broadest legal sense so as to include a devise. *McCartee v. Orphan Asylum Soc.*, 9 Cow. (N. Y.) 504, 18 Am. Dec. 516. See the dissenting opinions in this case, for an exhaustive citation of authorities in support of the technical meaning of the word "purchase." *McCartee v. Orphan Asylum Soc.*, 9 Cow. (N. Y.) 510.

Retirement of Stock.—Where a building association authorized the purchase, so called, but, in fact, the cancellation and retirement of such shares of stock as could be had at a premium of 20% on the amount paid in, it was held that the transaction was not a "purchase" in the correct sense of that term. The court by Bradbury, J., said: "A purchase implies an acquisition of property; a change or transfer of the ownership. 2 Bouv. Law. Dict. 488. This was not within the contemplation of the parties to the transaction. It was not intended that the shares should be kept alive, so to speak, and remain the property of the association; and, on the contrary, the object sought was their extinguishment by retirement and cancellation." *Wangerien v. Aspell*, 47 Ohio St. 250.

Dower.—A *New York* statute of March 26, 1802, enacts "that all purchases made or to be made by any alien or aliens who have come to this State and become inhabitants thereof, shall be deemed valid to vest the estates to them granted, etc., etc." And a later statute (April 8, 1808), enacts that all persons authorized by it or by the statute first cited, to acquire real estate by

by any lawful act of the party in contradistinction to operation of law, and it includes title by deed, title by matter of record, and title by devise.¹ There is yet another sense in which the word

purchase, may also take and acquire by devise or descent. In *Priest v. Cummings*, 20 Wend. (N. Y.) 356, Verplank, Senator, said: "It seems to me evident that the manner in which the word 'purchase' is used in the act of 1802, shows that it is not used in its peculiar real estate sense, but in its ordinary and habitual one. 'All purchases of lands made' can only mean all lands bought. This use of the word is not colloquial or 'vulgar' (as it has been called by Jacobs and other compilers), but may be found in the written opinions of Hardwicke and Kent, and might well be used in legislative enactments. The phrase used is not the technical language of the old law. I cannot find that the words 'purchases of lands made' are ever used to signify 'lands acquired by purchase.' Cruise, Blackstone and the oldest writers whom they cite always speak 'of estates taken by purchase,' 'lands acquired by purchase,' 'estates unto which one comes by purchase.' 1 Bl. Com. 218; 2 Bl. Com. 243; 3 Crui. 490; Litt. 1, 12. But on the contrary 'purchases of lands made' is an ordinary phrase of lawyers and judges to signify lands bought.

The subsequent statute of 1808, in *pari materia*, has given a legislative construction to the act of 1802 by providing that 'all persons authorized to acquire real estate under these acts may also take by devise,' thus 'evidently showing that in the former act the broader sense of 'purchase,' which would include 'devise' was not meant, but the more limited, natural and common one of buying." And accordingly it was held that title by dower does not come within the meaning of "purchases of land," as used in the statute, and that an alien could not hold lands thus acquired. And see the same opinion for authorities in support of the view that title by dower does not come within the technical meaning of the word "purchase."

"Purchase" in Statutes Has Generally Its Popular Import.—"Technically, purchase includes all modes of acquisition other than that of descent. But generally in statutes as in common use, the word is employed, in a sense not technical, only as meaning acquisition by contract between the parties without

governmental interference." Kohl v. U. S., 91 U. S. 374.

A United States statute provides that "no land shall be purchased on account of the United States, except under a law authorizing such purchase." A conveyance of land to trustees to sell as much thereof as might be necessary to raise sufficient money to pay a debt due the United States, was held not to be a "purchase" by the United States within the meaning of the statute. *Neilson v. Lagow*, 12 How. (U. S.) 98.

Words of Purchase.—See CHILD, vol. 3, p. 232; ESTATES, vol. 6, p. 878; ISSUE, vol. 11, p. 876; SHELLY'S CASE (RULE IN); WILLS; REMAINDERS.

As to the authority of an agent under a power "to purchase," see AGENCY, vol. 1, p. 331; AUTHORITY, vol. 1, p. 1025.

1. 4 Kent's Com. 509. Followed in *Maydwell v. Maydwell*, 9 Heisk. (Tenn.) 577; *Purcell v. Smidt*, 21 Iowa 546; *Martin v. Strachan*, 1 Wils. 266.

Methods of Acquiring Title by Purchase.—There are six ways of acquiring a title by purchase, namely: by deed; by devise; by execution; by prescription; by possession or occupancy; by escheat. Bouvier's L. Dict. To these may be added, title acquired by exercise of the right of eminent domain. Kohl v. U. S., 91 U. S. 374; *Burt v. Merchants' Ins. Co.*, 106 Mass. 364; 8 Am. Rep. 339.

"Purchase includes every lawful method of coming to an estate by the act of a party, as opposed to the act of law. Thus it includes titles obtained by sale of property on execution by a sheriff, or by levy, in which case there is no consent of the debtor, nor any conveyance from him. And it includes titles obtained by exercise of the right of eminent domain. If a statute authorizes the appraisement by a jury, and vests the title upon payment or tender of the amount of the verdict, with costs, the property is held under a statute conveyance, and the title is, in legal phrase, by purchase." *Burt v. Merchants' Ins. Co.*, 106 Mass. 364; 8 Am. Rep. 339.

In *Clay v. Wyatt*, 6 J. J. Marsh. (Ky.) 583, plaintiffs brought ejectment against

is used; viz., procuring, suing out, as a purchase of a writ of error.¹

PURCHASE MONEY—(See also HOMESTEAD, vol. 9, p. 423; PURCHASE; PURCHASE MONEY MORTGAGES; VENDOR AND PURCHASER).—The money agreed to be paid by the purchaser for property.²

The consideration money paid or agreed to be paid to the vendor by the vendee of realty.³ It does not include money the purchaser may have borrowed to complete his purchase.⁴

the defendant for various tracts of land in his possession, which had been deeded to plaintiffs by their father in consideration of \$100 and natural love and affection. The only question presented to the court was whether the deed from the plaintiff's father was void under the *Kentucky* Act of 1824 "relative to champerty and maintenance and more effectually to secure the *bona fide* occupants of land." It was contended on the part of the plaintiffs that the legislature used the word "purchase" in its popular and not in its technical sense. The court by Underwood, J., said: "The principal object of the legislature in passing the act in question was to protect the occupants of land. A father might have claims which he would be unwilling to litigate in his own name because of his liability for costs, and which he would willingly transfer to a son, nephew, or a cousin in consideration of natural love, and afford him an opportunity to profit by the litigation. Such a transaction would tend to defeat the main object of the legislature. . . . The legislature did not intend to prevent the recovery of a man's right, but it was not intended that he or others should speculate upon doubtful claims to the disturbance of the occupant. The construction contended for would tolerate that evil to some extent, which was the great mischief the legislature intended to guard against. We are, therefore, of opinion that the policy of the act requires that we should give to the word 'purchase,' as used in the act, its technical meaning. Besides, the exception in favor of devisees shows that the legislature so intended. That exception excludes all other exceptions, and, hence, a voluntary conveyance to a son cannot be admitted as an exception."

1. *Anderson's L. Dict.*

2. *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568.

A *New York* statute exempted the

working tools and teams, etc., not exceeding \$150 in value, owned by a householder, "provided that such exemption shall not extend to any execution issued on a demand for the purchase money of such furniture and tools or teams, etc." It was held in *Davis v. Peabody*, 10 Barb. (N. Y.) 94, that this exception from the exemption did not apply to a demand on a surety for the purchase money of such articles as those enumerated. The court by Gridley, P. J., said: "'Purchase money,' in the statute should be held to mean the original demand for the property sold, as distinguished from demand on the security given for the payment of the purchase price." See also *Smith v. Slade*, 57 Barb. (N. Y.) 637.

It has been held that the articles enumerated in this statute are liable to seizure and sale, on an execution issued to collect the purchase money of any one of the articles therein specified. *Snyder v. Davis*, 1 Hun (N. Y.) 350. See also *Craft v. Curtiss*, 25 How. Pr. (N. Y.) 163. And this view is adopted by the present section of the Code of Civil Procedure (§1391). But the contrary doctrine was held in *Hickox v. Fay*, 36 Barb. (N. Y.) 9, and implied in *Smith v. Slade*, 57 Barb. (N. Y.) 637.

A debt contracted for lumber, used in the erection of the dwelling house upon a homestead, is not a part of the purchase money of such homestead, so as to bring it within the exception to the *Minnesota* homestead exemption. *Smith v. Lackor*, 23 Minn. 454; *Cogel v. Mickow*, 11 Minn. 475.

3. *Anderson's L. Dict.*, obtained from *Austin v. Underwood*, 37 Ill. 438; 87 Am. Dec. 254; *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568; *Henisler v. Nickum*, 38 Md. 270.

4. The *Illinois* statute declaring that the homestead right shall not be claimed against a debt due for the

PURCHASE-MONEY MORTGAGES.—(See also CHATTEL MORTGAGES, vol. 3, p. 175; INCUMBRANCES, vol. 10, p. 389; MORTGAGES, vol. 15, p. 725; VENDOR AND PURCHASER.)

- I. Definition, 575.
- II. Priority of Purchase-Money Mortgages, 575.
 1. Generally, 575.
 2. Over Judgments, 578.
 3. Over Other Mortgages, 579.
 4. Over Mechanics' Liens, 579.
 5. Over Homestead Exemptions, 580.
 6. Over Dower, 580.
 7. Mortgagees Whose Mortgages Are Entitled to Preference, 581.
 8. How Lost, 582.
- III. Purchase Money, What Constitutes, 583.
- IV. Defense to Foreclosure, 584.
- V. Chattel Mortgages to Secure Purchase Money, 587.
- VI. Statutes Governing Purchase-Money Mortgages, 589.
 1. Judgments, 589.
 2. Mechanics' Liens, 589.
 3. Homestead Exemptions, 590.
 4. Dower, 590.

purchase money of the premises, has reference to a debt created by the purchase of the land, and does not embrace a debt created by borrowing money from a third person which may have been applied by the borrower in the purchase of the land. This provision only applies to parties occupying the relation of vendor and vendee, or those representing them. *Eyster v. Hatheway*, 50 Ill. 521; 99 Am. Dec. 537.

Purchase money means money stipulated to be paid by a purchaser to his vendor, and does not include money that the purchaser may have borrowed to complete his purchase. Purchase money exists only as between vendor and vendee; as between purchaser and lender, the money is "borrowed money." *Henisler v. Nickum*, 38 Md. 270.

In *Illinois* the courts, departing somewhat from the definition of purchase money as given in the text, have held that where a purchaser of land procures the consideration for such land to be paid directly to the vendor by a third person, the debt due by the purchaser to such third party is for "purchase money," and falls within the exception to the homestead exemption law, and within the law of purchase money mortgages. They distinguish between such a case and where money is loaned to pay a pre-existing debt created for the purchase of the land. The definition given by the courts is, "money paid for the land or the debt created by the purchase." In *Austin v. Underwood*, 37 Ill. 438, a party owning and residing upon a homestead, purchased and obtained a conveyance of land adjoining thereto, to be

used as part of the same, and procured the purchase money to be paid by a third person directly to the vendor. It was held that the money thus paid by the third person should be regarded as the purchase money of the land as against the homestead claim of the purchaser for whom it was paid. The court distinguished that case from *Eyster v. Hatheway*, 50 Ill. 521; 99 Am. Dec. 537, cited above, thus: "We said in the case of *Eyster v. Hatheway*, that money borrowed of a third person, and paid out by a purchaser of land, cannot be regarded as purchase money. It is the common understanding of the term 'purchase money' that it means money paid for the land or the debt created by the purchase. In that case the money was borrowed to pay a pre-existing debt; in this the land was purchased with money of appellant, and actually paid over by him for the land, not one dollar of it passing through the hands of the appellee, and the entire consideration of indebtedness was a deed to the appellant. This case is, therefore, clearly distinguishable from that."

A purchaser of land went into possession and occupied it as a homestead. While so in possession he procured a third person to pay the purchase price to the vendor, promising to execute a mortgage to secure the re-payment of the money as soon as he obtained a deed. He obtained the deed, but refused to execute the mortgage. Upon bill filed by the party paying the money, against the purchaser, to enforce his lien upon the land, it was held that the money paid by the complainant, having been paid by him

I. DEFINITION.—A purchase-money mortgage is a mortgage upon real estate given upon a conveyance thereof to secure the balance of purchase money remaining due.¹ The term has been applied also to a similar transaction where a chattel mortgage is given for personal property.²

II. PRIORITY OF PURCHASE-MONEY MORTGAGES.—1. **Generally.**—The system of recording acts in force in the several States has established as a general principle, the doctrine that priority of lien is acquired by priority in the entry of the public record of such lien. Purchase-money mortgages might appear to be an exception to this rule, and the question whether or not a mortgage was given to secure the payment of purchase-money is of most importance in this connection. It is a well-settled principle that a purchase-money mortgage given by the purchaser to the vendor of land to secure a balance of unpaid purchase-money has priority over every claim or lien of any kind arising through the mortgagor to the extent of the land purchased.³ But in spite of doubts which

directly to the vendor for the purpose of having the land conveyed to the purchaser, must be regarded as the purchase money of the premises, against which the defendant could not assert a homestead exemption. *Magee v. Magee*, 51 Ill. 500; 99 Am. Dec. 571. See also *Kimble v. Esworth*, 6 Ill. App. 517. And on this question PURCHASE MONEY MORTGAGES and VENDOR AND PURCHASER should be consulted.

1. Adapted from Anderson's Law Dict., p. 690.

2. *Barker v. Kilderhouse*, 8 Minn. 207; *Blatchford v. Boyden*, 122 Ill. 657; *Pitts Son's Mfg. Co. v. Poor*, 7 Ill. App. 24. See *infra*, this title, *Chattel Mortgages to Secure Purchase Money*.

3. 1 Jones on Mortgages (4th ed.), § 464; *et seq.*, Boone on Mortgages, § 74.

Massachusetts.—*Clark v. Brown*, 3 Allen (Mass.) 509; *Clark v. Munroe*, 14 Mass. 351; *Holbrook v. Finney*, 4 Mass. 566; 3 Am. Dec. 243; *Smith v. McCarty*, 119 Mass. 519; *Hazleton v. Lesure*, 9 Allen (Mass.) 24; *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.) 390; *Burns v. Thayer*, 101 Mass. 426; 11 Allen (Mass.) 407; *Pendleton v. Pomeroy*, 4 Allen (Mass.) 510; *King v. Stetson*, 11 Allen (Mass.) 407.

New York.—*Ellis v. Horrman*, 90 N. Y. 466; *Spring v. Short*, 90 N. Y. 538; *Stow v. Tift*, 15 Johns. (N. Y.) 457; 8 Am. Dec. 266; *Kittle v. Van Dyck*, 1 Sandf. Ch. (N. Y.) 76; *Dusen-*

bury v. Hulbert, 59 N. Y. 541; *Jackson v. Dewitt*, 6 Cow. (N. Y.) 316; *Cunningham v. Knight*, 1 Barb. (N. Y.) 399; *Mills v. Van Voorhis*, 23 Barb. (N. Y.) 125; *Jackson v. Austin*, 15 Johns. (N. Y.) 477; *McGowan v. Smith*, 44 Barb. (N. Y.) 232; *Wilson v. Smith*, 52 Hun (N. Y.) 171.

Illinois.—*Curtis v. Root*, 20 Ill. 518; *Christie v. Hale*, 46 Ill. 117; *Austin v. Underwood*, 37 Ill. 438; 87 Am. Dec. 254; *Elder v. Derby*, 98 Ill. 228.

Minnesota.—*Bolles v. Carli*, 12 Minn. 113; *Banning v. Edes*, 6 Minn. 402; *Jones v. Tainter*, 15 Minn. 512; *Jacoby v. Crowe*, 36 Minn. 93; *Stewart v. Smith*, 36 Minn. 82.

Pennsylvania.—*Cake's Appeal*, 23 Pa. St. 186; 62 Am. Dec. 328; *Britton's Appeal*, 45 Pa. St. 172; *City Nat. Bank's Appeal*, 91 Pa. St. 163.

North Carolina.—*Bunting v. Jones*, 78 N. Car. 242; *Moring v. Dickens*, 85 N. Car. 466.

Maine.—*Gammon v. Freeman*, 31 Me. 243.

New Jersey.—*Lamb v. Cannon*, 38 N. J. L. 362; *Strong v. Van Deursen*, 23 N. J. Eq. 369; *Macintosh v. Thurston*, 25 N. J. Eq. 248.

California.—*Lassen v. Vance*, 8 Cal. 271; 68 Am. Dec. 322; *Guy v. Carriere*, 5 Cal. 511; *Carr v. Caldwell*, 10 Cal. 380; 70 Am. Dec. 740.

Missouri.—*Morris v. Pate*, 31 Mo. 315; *Turk v. Funk*, 68 Mo. 18.

Nevada.—*Virgin v. Brubaker*, 4 Nev. 31; *Hopper v. Parkinson*, 5 Nev. 233.

Kansas.—*Pratt v. Topeka Bank*, 12

might arise as to the application of the recording acts to these mortgages, the better opinion seems to be that they do apply as in other cases. They take precedence of judgments against a mortgagor in all cases when such judgments are obtained before the execution of the purchase-money mortgage, and also of other mortgages, mechanics' liens, homestead exemptions, and the dower rights of the wife of the mortgagor.¹ The authorities do not clearly indicate how far this doctrine has a common-law origin.² It is established by statute in several of the States,³ and seems to be upheld in others irrespective of statutes, and appears to be repudiated in only one State, and is there limited to acknowledging the precedence of the wife's right of dower.⁴

This doctrine is based upon the ground that the deed and mortgage constitute but one act, and in contemplation of law there is no time in which any claim or lien can obtain preference.⁵ The incumbrance is simultaneously operative with the conveyance of the title.⁶ But if an interval is left, during which the interest of the vendee is liable to an execution, the mortgage is not entitled to priority.⁷ However, the two acts need not be literally simultaneous. It is sufficient if they constitute parts of one continuous transaction, and were so intended.⁸ It makes no difference that

Kan. 570; *Andrews v. Alcorn*, 13 Kan. 351; *Nichols v. Overacker*, 16 Kan. 54.

Iowa.—*Christy v. Dyer*, 14 Iowa 438; 81 Am. Dec. 493; *Burnap v. Cook*, 16 Iowa 149.

Texas.—*Flanagan v. Cushman*, 48 Tex. 241.

Arkansas.—*Birnie v. Main*, 29 Ark. 591.

1. See cases cited under the several sections of this title.

2. *Stow v. Tift*, 15 Johns. (N.Y.) 457; 8 Am. Dec. 266.

3. See *infra*, this title, *Statutes Governing Purchase-Money Mortgages*.

4. *Kentucky*.—*Tevis v. Steele*, 4 B. Mon. (Ky.) 339; *McClure v. Harris*, 12 B. Mon. (Ky.) 261.

5. *Banning v. Edes*, 6 Minn. 402; *Holbrook v. Finney*, 4 Mass. 566; 3 Am. Dec. 243; *Clark v. Munroe*, 14 Mass. 351; *Smith v. McCarty*, 119 Mass. 519; *Lassen v. Vance*, 8 Cal. 271; 68 Am. Dec. 322; *Guy v. Carriere*, 5 Cal. 511; *Stow v. Tift*, 15 Johns. (N.Y.) 458; 8 Am. Dec. 266; *McGowan v. Smith*, 44 Barb. (N.Y.) 232.

6. *Bolles v. Carli*, 12 Minn. 113.

7. *Foster's Appeal*, 3 Pa. St. 79; *Cake's Appeal*, 23 Pa. St. 186; 62 Am. Dec. 328; *Grant v. Dodge*, 43 Me. 489; *Houston v. Houston*, 67 Ind. 276; *Cohn v. Hoffman*, 45 Ark. 376.

8. *Wilson v. Smith*, 52 Hun (N.Y.)

171; *South Baptist Soc. v. Clapp*, 18 Barb. (N.Y.) 35; *Stewart v. Smith*, 36 Minn. 82; *Parke v. Neely*, 90 Pa. St. 52.

Parol Evidence.—It is admissible to show by parol evidence that they constitute parts of one transaction. *Pascault v. Cochran*, 34 Fed. Rep. 358.

A mortgage was agreed to be made for the purchase-money of a tract of land, and the grantee's note for the amount was given at the time the agreement was made, which note was afterwards transferred before maturity, and for value, whereupon, the deed not having yet been given, the grantee executed and delivered to the transferee of the note, a mortgage on such land with full covenants of title, to secure such note, as and for the mortgage originally agreed to be made, and for no other consideration whatever; thereafter, and for like purpose, the grantor executed and delivered to the wife of the grantee, as and for the deed agreed upon, a deed of conveyance of such land wherein, however, she was named as the grantee instead of her husband. It appeared from the findings that this deed was taken by the wife with notice of its purpose and full knowledge of all the facts, and that the several instruments were executed as parts of one transaction, though at different times; and it also appeared that no new or inter-

the instruments are executed at different times, if they are delivered at the same time, for they take effect only from their delivery.¹

vening equities had accrued in respect to either of the parties or third persons. It was held, that they must be treated as made at the same time and given legal effect accordingly, and the grantee named in the deed given in pursuance of the settlement, will not be permitted to use the legal title she thereby acquired to the prejudice of the mortgaged security in the hands of an innocent holder for value. *Hurlbert v. Weaver*, 24 Minn. 30.

1. *Pascault v. Cochran*, 34 Fed. Rep. 358; *LaFayette Building etc. Assoc. v. Erb* (Pa. 1887), 8 Atl. Rep. 62; *Gammmon v. Freeman*, 31 Me. 243.

The date of a deed or mortgage is only presumptive evidence of the time of delivery which may be rebutted by parol proof. *Banning v. Edes*, 6 Minn. 402; *Parke v. Neely*, 90 Pa. St. 52.

Notice.—A judgment creditor who advances his money on the faith of the unincumbered title of the vendee will not be postponed to the lien of an unrecorded purchase-money mortgage of which he had no notice when he advanced the money; but if the money was not advanced on the faith of the land, the purchase-money mortgage will have preference. A distinction is to be made between the two cases. *Hulett v. Whipple*, 58 Barb. (N. Y.) 224; *Spring v. Short*, 90 N. Y. 538. See also *Roane v. Baker*, 120 Ill. 308.

A recital in a duly recorded mortgage that the premises are "the same this day conveyed by the said" mortgagee to the mortgagor, "and now re-conveyed to secure the payment of the purchase money," is sufficient to charge all persons who claim through the mortgage with notice of the existence of his deed to the mortgagor. *Center v. Planter's, etc. Bank*, 22 Ala. 743.

Pennsylvania.—In *Pennsylvania* if a judgment creditor has notice before his debt is contracted, of an unrecorded mortgage for the purchase money of land, the mortgage takes priority over the judgment. *Britton's Appeal*, 45 Pa. St. 172; *Nice's Appeal*, 54 Pa. St. 200. See also *Lahr's Appeal*, 90 Pa. St. 507.

Indiana.—If a vendor of real estate neglects to take a mortgage for unpaid purchase money until after the execution of a mortgage thereon to a third

person for value and without notice, his mortgage for purchase money is subject to the prior mortgage. *Houston v. Houston*, 67 Ind. 276.

Where a grantee executes at the same time and place two mortgages on the same lands, one a purchase-money mortgage to his grantor, and the other to a third party for a collateral consideration, the third party cannot, by having his mortgage recorded first, acquire a priority over the purchase-money mortgage, because under the circumstances of the case the third party has notice that the mortgage to the grantor was given for the purchase money. *Brasted v. Sutton*, 29 N. J. Eq. 513; *Clark v. Brown*, 3 Allen (Mass.) 509.

A deed from the vendor to the vendee contained a receipt for \$1,500, part of the purchase money which was paid in cash, and the vendee's "mortgage on the within described lot conveyed for the sum of \$2,500, the consideration within named." The mortgage was executed three days later than the deed, but both were delivered at the same time. *Held*, that the receipt in the deed was sufficient notice to a subsequent mortgagee that the mortgage was a purchase-money mortgage. *LaFayette Building etc. Assoc. v. Erb* (Pa. 1887), 8 Atl. Rep. 62.

A vendor who takes a mortgage for the purchase money of land, and has it recorded at the same time that the deed from him is recorded, is not obliged to examine the record for a mortgage to a third party from the vendee prior to the recording of his deed. If there be delay in recording such deed and mortgage, and the vendee execute another mortgage of the same property to a stranger, and this is recorded before the deed to the vendee and his mortgage for the purchase money is recorded, the recording of such a mortgage is not notice to the vendor because at that time the deed to the vendee had not been recorded. 1 *Jones on Mortgages* (4th ed.), § 568; *Boyd v. Mumdorf*, 30 N. J. Eq. 545; *Losey v. Simpson*, 11 N. J. Eq. 246. Compare *Semon v. Terhune*, 40 N. J. Eq. 364.

The record of a conveyance of land in mortgage, which on the records appeared to be the land of the mortgagee,

2. Over Judgments.—Purchase-money mortgages have priority over all judgments against the mortgagor,¹ even though the mortgage may not be recorded for several months after the execution on the judgment;² and such priority is not restricted to a mortgage given to the grantor of the land.³

is not notice of a prior conveyance thereof by the mortgagee to the mortgagor. *Veazie v. Parker*, 23 Me. 170; *Peirce v. Taylor*, 23 Me. 246; *Losey v. Simpson*, 11 N. J. Eq. 246.

Where a grantee gave back a purchase-money mortgage before delivery of the deed, and afterwards, at the time the deed was actually delivered, this grantee mortgaged the premises to a third party, in whose presence the delivery was made, and who had no notice of the former mortgage, it was held that the delivery of the deed in the latter's presence was notice to him that until then the mortgagor had no title to encumber to his prejudice, and therefore the second mortgage was given precedence of the first. *Heffron v. Flanigan*, 37 Mich. 274.

Any circumstance which tends to give notice or inform a party that there is an incumbrance upon the land, is sufficient to charge him with notice of its existence. Where such information comes to the knowledge of a purchaser or subsequent incumbrancer, the law requires him to pursue it until it leads to notice. *Ætna L. Ins. Co. v. Ford*, 89 Ill. 252.

Knowledge of the existence of a debt for unpaid purchase money of land does not affect a purchaser of cotton grown thereon with notice of an unrecorded mortgage to secure said purchase money. *Bell v. Tyson*, 74 Ala. 353.

Where a deed operates to convey a life estate to one and the fee to another and a mortgage for the purchase money is executed by the grantee of the life estate, the record of the deed is notice to the assignee of the mortgage that the mortgagor had a life estate only, to which alone the mortgage could attach; and he has no equity entitling him to relief against the grantee of the fee, although the latter is not a purchaser for value. *Lehndorf v. Cope*, 122 Ill. 317.

1. *Stewart v. Smith*, 36 Minn. 83; *Banning v. Edes*, 6 Minn. 402; *Fitts v. Davis*, 42 Ill. 391; *Curtis v. Root*, 20 Ill. 518; *Hazleton v. Lesure*, 9 Allen (Mass.) 24; *Cake's Appeal*, 23 Pa. St. 186; 62 Am. Dec. 328; *Wilson v. Smith*, 52 Hun (N. Y.) 171.

A contract was made for the conveyance of a factory with the machinery and improvements contained therein. Before a conveyance was made, the intended vendee executed a mortgage of the premises to the vendor to secure the purchase money. A third person then advanced money to the mortgagors, for which they confessed judgment. At the end of a year, the mortgagee executed a conveyance to the mortgagors. *Held*, that the mortgage for the purchase money had priority over the judgments which had been confessed. *Wilson v. Smith*, 52 Hun (N. Y.) 171.

Statute of Frauds.—Where land is sold under an oral agreement that the vendee will execute a mortgage for the unpaid purchase money, the delivery of possession to the vendee being the consideration for such oral agreement, takes the case out of the Statute of Frauds; and the lien acquired by the vendor by virtue of such oral agreement is superior to that of a subsequent judgment creditor of the vendee, where credit was not extended on the faith of the land. *Devin v. Eagleson*, 79 Iowa 269.

2. *Roane v. Baker*, 120 Ill. 308.

3. *Jackson v. Austin*, 15 Johns. (N. Y.) 477.

A mortgage made to secure \$500 of purchase money and \$500 for a prior debt, and the deeds were recorded on the same day prior to the deed of conveyance, and judgment had been recovered against the vendee, *held*, that as to the purchase money, the lien of the mortgage was prior to the judgment, and that as to the prior debt, the judgment was entitled to priority. *Ray v. Adams*, 4 Hun (N. Y.) 332.

A mortgage given for purchase money on a sale of land, by one defendant in execution to his co-defendant, is not, on the principle of lien for the purchase money, entitled to priority over the antecedent judgment against both, nor can it affect the title of a purchaser under the judgment, although the property was levied on and sold as the

3. Over Other Mortgages.—A purchase-money mortgage has priority over all other mortgages executed by the vendee upon the same land, if the mortgage for the purchase money was given as part of the transaction of sale;¹ nor is it essential for a mortgage to show on its face that it was given for the purchase money, in order for it to be preferred, if the fact that it was so given was known to the mortgagors and mortgagees.²

4. Over Mechanics' Liens.—A mechanic's lien is postponed to a mortgage given for the purchase money of the land on which the lien is sought to be obtained;³ although if legal permission

property of the mortgagor. *Simmons v. Vandegrift*, 1 N. J. Eq. 55.

1. *Jacoby v. Crowe*, 36 Minn. 93; *Bolles v. Carli*, 12 Minn. 113; *Clark v. Brown*, 3 Allen (Mass.) 509; *Dusenbury v. Hulbert*, 59 N. Y. 541; *Moring v. Dickerson*, 85 N. Car. 466; *Morris v. Pate*, 31 Mo. 315; *Turk v. Funk*, 68 Mo. 18.

H, by articles of agreement, sold certain land to N. Before the latter had fully paid therefor, he sold the land to P and W. To avoid the expense of an intermediate conveyance, it was agreed that H should convey directly to P and W, and they should execute a mortgage to him to secure the residue of the purchase money due to him, and also to execute to N another mortgage to secure the payment of the remaining sum agreed to be paid to him for the title. The deed and mortgages were of one date, and were executed, delivered, and recorded the same day. *Held*, that the mortgage to H was entitled to a preference over the mortgage to N. *City Nat. Bank's Appeal*, 91 Pa. St. 163.

Where land was conveyed in fee, subject to the payment of annual rents by the grantee to the grantor, and the deed of conveyance reserved to the grantor the right to re-enter and avoid the conveyance, upon default of payment, it was held that the right of re-entry for non-payment of the rent was equivalent to a mortgage for the purchase money of the land, and therefore, preferred to a mortgage upon the same land created by the grantee. *Stephenson v. Haines*, 16 Ohio St. 478.

Where an undivided interest in land has been purchased, for the price of which the entire tract has been mortgaged, the mortgage will not attach to the entire interest upon its subsequent acquisition by the mortgagor, as against the mortgagee of the entire tract for

the purchase money of the subsequently acquired interest. A purchase-money mortgage cannot attach to property which the mortgagor did not own at the time of giving it. Covenants are not implied in a purchase-money mortgage. *Brown v. Phillips*, 40 Mich. 264; *Beall v. White*, 94 U. S. 382; *Jackson v. Littell*, 56 N. Y. 108; *U. S. v. New Orleans R. Co.*, 12 Wall. (U. S.) 362.

2. *City Nat. Bank's Appeal*, 91 Pa. St. 163.

Parol Evidence.—The consideration of a mortgage can be shown by parol evidence. *Walters v. Walters*, 73 Ind. 425. *Compare*, *Albright v. Lafayette, etc. Assoc.* 102 Pa. St. 411.

3. *Virgin v. Brubaker*, 4 Nev. 31; *Guy v. Carriere*, 5 Cal. 511; *Clark v. Butler*, 32 N. J. Eq. 664; *Gibbs v. Grant*, 29 N. J. Eq. 419; *Paul v. Hoeft*, 28 N. J. Eq. 11; *MacIntosh v. Thurston*, 25 N. J. Eq. 242; *Strong v. Van Deursen*, 23 N. J. Eq. 369; *Wallace v. Silsby*, 42 N. J. L. 1; *Lamb v. Cannon*, 38 N. J. L. 362. See also *Parke v. Neely*, 90 Pa. St. 52; *Moroney's Appeal*, 24 Pa. St. 372; *Huber v. Diebold*, 25 N. J. Eq. 170.

In *Clark v. Butler*, 32 N. J. Eq. 664, the court by Van Fleet, V. C., said: "It is well settled that where lands are purchased under an agreement that the purchase-money shall be secured by mortgage on the lands agreed to be conveyed, and the vendee without the written consent of the owner commences the erection of a building before obtaining title, if a mortgage for the purchase money be given when the title is made to the vendee, it will be entitled to preference over a mechanic's lien, though the mortgage be given at a date subsequent to the commencement of the building."

A house was destroyed by fire before completion. The holder of a purchase-money mortgage executed on

had been given by the mortgagee to the party endeavoring to enforce the mechanic's lien, to erect the buildings or furnish the materials in respect of which the lien is claimed, the lien would be entitled to preference.¹

5. Over Homestead Exemptions.—A purchase-money mortgage, given as part of the same transaction with the conveyance, precludes the mortgagor or his wife from setting up a claim to a homestead, as against the mortgagee;² but they are entitled as against all other persons.³ It is contrary to the policy of the statutes creating homesteads to hold that a purchase-money mortgage is a debt contracted after the purchase of the homestead so as to render the mortgaged property exempt under those statutes.⁴

6. Over Dower.—(See also DOWER, vol. 5, p. 899, n. 6).—A mortgage for the purchase money of land has priority over the wife's right of dower in the mortgaged land, as between the wife and the mortgagee and his assigns, although the wife does not join in the execution of the mortgage.⁵ But the wife is entitled to dower

the same day as his conveyance, had procured insurance payable to himself, but in the name and upon the interest of the mortgagor. *Held*, that the lien of the mortgage on the insurance money was superior to that of a mechanic for lumber and materials used in the house. *Elgin Lumber Co. v. Langman*, 23 Ill. App. 250.

1. *Gibbs v. Grant*, 29 N. J. Eq. 419; *Paul v. Hoeft*, 28 N. J. Eq. 11; *Clark v. Butler* 32 N. J. Eq. 664.

See also *Virgin v. Brubaker*, 4 Nev. 31.

2. *Jones v. Tainter*, 15 Minn. 512; *Pratt v. Topeka Bank*, 12 Kan. 570; *Andrews v. Alcorn*, 13 Kan. 351; *Nichols v. Overacker*, 16 Kan. 54; *Austin v. Underwood*, 37 Ill. 439; 87 Am. Dec. 254; *Magee v. Magee*, 51 Ill. 500; 99 Am. Dec. 571; *Kimble v. Esworthy*, 6 Ill. App. 517; *Allen v. Hawley*, 66 Ill. 164; *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.) 390; *Burns v. Thayer*, 101 Mass. 426; *Hopper v. Parkinson*, 5 Nev. 233; *Christy v. Dyer*, 14 Iowa, 438; 81 Am. Dec. 493; *Burnap v. Cook*, 16 Iowa 149; *Flanagan v. Cushman*, 48 Tex. 241; *Lassen v. Vance*, 8 Cal. 271; 68 Am. Dec. 322; *Carr v. Caldwell*, 10 Cal. 380; 70 Am. Dec. 740. See also *Peterson v. Hornblower*, 33 Cal. 266.

A purchaser in possession of land procured a third person to pay the purchase price of the land to the vendor, by promising to execute a mortgage to secure the repayment of the money as soon as he obtained a deed. He obtained a deed but refused to execute the

mortgage. It was held, upon a bill filed to enforce the lien on the land, by the party who had advanced the money, that the money paid by the complainant having been paid by him directly to the vendor for the purpose of having the land conveyed to the vendee, was to be regarded as the purchase money of the premises, against which the defendant could not assert a homestead exemption. *Magee v. Magee*, 51 Ill. 500; 99 Am. Dec. 571.

The owner of a homestead mortgage for the purchase money cannot, by redeeming from a foreclosure sale for part of the judgment only, hold the land free from the lien of the unsatisfied part. *Campbell v. Maginnis*, 70 Iowa 589.

3. *Allen v. Hawley*, 66 Ill. 164; *Hopper v. Parkinson*, 5 Nev. 233.

4. *Christy v. Dyer*, 14 Iowa 438; 81 Am. Dec. 493. See also *Peterson v. Hornblower*, 33 Cal. 266.

5. 1 *Jones on Mortgages* (4th ed.), § 464; 2 *Minor's Insts.* (3rd ed.) 144; 1 *Washburn on Real Prop.* (5th ed.) 229; *Holbrook v. Finney*, 4 Mass. 566; 3 Am. Dec. 243; *Clark v. Munroe*, 14 Mass. 351; *King v. Stetson*, 11 Allen (Mass.) 407; *Pendleton v. Pomeroy*, 4 Allen (Mass.) 510; *Kittle v. Van Dyck*, 1 Sandf. Ch. (N. Y.) 76; *Stow v. Tift*, 15 Johns. (N. Y.) 458; 8 Am. Dec. 266; *Cunningham v. Knight*, 1 Barb. (N. Y.) 399; *Maybury v. Brien*, 15 Pet. (U. S.) 21; *Thompson v. Lyman*, 28 Wis. 266; *Jones v. Parker*, 51 Wis. 218; *Gammon v. Freeman*, 31 Me. 243; *Young v. Tarbell*, 37 Me. 509; *Bullard v. Bowers*, 10 N. H. 500; *Hinds v. Ballou*, 44 N.

as against all parties except the mortgagee or his assigns;¹ and she has a right to dower in the equity of redemption in the mortgaged property.² Whether the wife shall be endowed depends more upon the character of the husband's seisin than upon its duration;³ and if the husband is beneficially seised, for however short a time, the wife will take dower.⁴ In order to defeat the wife's right of dower, the burden of proof is on the mortgagee to show that the execution of the mortgage was part of one continuous transaction with the conveyance to the mortgagor.⁵ Though the general rule is that a grantee is estopped from denying his grantor's seisin, yet he is not estopped from showing that his grantor's seisin was not of such a character as would entitle his wife to dower.⁶

7. Mortgagees Whose Mortgages Are Entitled to Preference.—A mortgage made to a third person who advances the money paid the vendor is entitled to the same preference as if it were made to the vendor.⁷ But a mortgage to a third person who advances money to make the first payment upon a contract for land, will be postponed to the mortgage of the vendor for the remainder of the purchase money, notwithstanding the mortgage to the third

H. 619; *Adams v. Hill*, 29 N. H. 202; *Thomas v. Hanson*, 44 Iowa 651; *Frazier v. Hunter*, 1 McCord. (S. Car.) 512; *Birnie v. Main*, 29 Ark. 591.

By the *Indiana Code* of 1852, dower was abolished, but this same law invested the wife with an inchoate right to a fee simple to be made consummate by the death of her husband leaving her surviving. This right, however, could not be made to exist as against a mortgage for purchase money executed before the adoption of the Code. *May v. Fletcher*, 40 Ind. 575, overruling *Fletcher v. Holmes*, 32 Ind. 497; *Bowen v. Preston*, 48 Ind. 367; *Baker v. McCune*, 82 Ind. 339; *Walters v. Walters*, 73 Ind. 425. See also *Brenner v. Quick*, 88 Ind. 546; *Barr v. Vanalstine*, 120 Ind. 590.

Kentucky.—The wife is entitled to dower in *Kentucky*, although the mortgage for the purchase money constitutes one continuous transaction with the conveyance of the land. *Tervis v. Steel*, 4 Mon. (Ky.) 339; *McClure v. Harris*, 12 B. Mon. (Ky.) 261. *Compare Gully v. Ray*, 18 B. Mon. (Ky.) 107. See *Henagan v. Harlee*, 10 Rich. Eq. (S. Car.) 285.

1. 1 Jones on Mortgages (4th ed.), § 464; *Bullard v. Bowers*, 10 N. H. 500; *Young v. Tarbell*, 37 Me. 509; *Moore v. Rollins*, 45 Me. 493.

2. *Mills v. Van Voorhies*, 20 N. Y. 412; *Thomas v. Hanson*, 44 Iowa 657;

Young v. Tarbell, 37 Me. 509; *Gage v. Ward*, 25 Me. 101.

3. *McCauly v. Grimes*, 2 Gill & J. (Md.) 318; *Smith v. McCarty*, 119 Mass. 519.

4. *Stanwood v. Dunning*, 14 Me. 290; *Douglass v. Dickson*, 11 Rich. (S. Car.) 417; *Moore v. Rollins*, 45 Me. 493.

5. *Grant v. Dodge*, 43 Me. 489; *Smith v. McCarty*, 119 Mass. 519.

6. *Gully v. Ray*, 18 B. Mon. (Ky.) 107; *Gammon v. Freeman*, 31 Me. 243.

7. 4 Kent's Com. (13th ed.) 39; 1 Washb. on Real Prop. (5th ed.) 229; 1 Jones on Mortgages (4th ed.), § 464; *Jackson v. Austin*, 15 Johns. (N. Y.) 477; *McGowan v. Smith*, 44 Barb. (N. Y.) 232; *Kittle v. Van Dyck*, 1 Sandf. Ch. (N. Y.) 76; *Clark v. Munroe*, 14 Mass. 351; *King v. Stetson*, 11 Allen (Mass.) 407; *Hazleton v. Lesure*, 9 Allen (Mass.) 24; *Curtis v. Root*, 20 Ill. 518; *Magee v. Magee*, 51 Ill. 500; 99 Am. Dec. 571; *Kaiser v. Lembeck*, 55 Iowa 244; *Jones v. Parker*, 51 Wis. 218; *Gammon v. Freeman*, 31 Me. 243; *Smith v. Stanley*, 37 Me. 11; 58 Am. Dec. 771; *Jones v. Tainter*, 15 Minn. 512; *Nichols v. Overacker*, 16 Kan. 54; *Adams v. Hill*, 29 N. H. 202; *Lassen v. Vance*, 8 Cal. 271; 68 Am. Dec. 322; *Carr v. Caldwell*, 10 Cal. 380; 70 Am. Dec. 740; *Flanagan v. Cushman*, 48 Tex. 241.

person was recorded first,¹ but it will be preferred to all other claims.²

8. How Lost.—The priority of a purchase-money mortgage is lost by an agreement of the vendor with another mortgagee of the vendee of the property, that the vendor's mortgage shall be postponed, allowing the other mortgage to be first recorded and knowingly acquiescing in that state of affairs for several years.³ But it is not lost, in the absence of other circumstances by recording the junior mortgage first.⁴ Neither does it lose priority because other lands were included in it besides those for the purchase

Consequently a purchaser at a foreclosure sale under a power contained in a purchase-money mortgage, takes title free from all claims or liens. *Jacoby v. Crowe*, 36 Minn. 93.

1. *Turk v. Funk*, 68 Mo. 18; *Brower v. Witmeyer*, 121 Ind. 83; *Brasted v. Sutton*, 29 N. J. Eq. 513; *Boyd v. Mundorf*, 30 N. J. Eq. 845; *Boies v. Gardner*, 53 Hun (N. Y.) 236.

2. *Boies v. Gardner*, 53 Hun (N. Y.) 236.

A bought of B an undivided one-third of three lots, for which he paid cash in part, and for the balance gave his note and a mortgage on the property. B purchased the property from one H, who by his direction conveyed to A. A borrowed the money with which to make his cash payment from C, under an agreement that it should be secured by a new mortgage, A giving his note for the amount and executing a mortgage accordingly at the time on the same property. This note and mortgage were executed on the same day as the note and mortgage to B, but neither mortgage was delivered until some time afterwards, when A, on the same day, took both mortgages to the recorder's office and delivered them to be recorded, intending that the mortgage to C should have priority, and testifying also that he delivered it first. It was first recorded but the certificate of the recorder showed that they were filed for record at the same time. *Held*, that neither mortgage was entitled to priority over the other, and that both should be satisfied *pro rata* out of the sale of the property. *Koevenig v. Schmitz*, 71 Iowa 175.

3. *Mutual Loan etc. Assoc. v. Elwell*, 38 N. J. Eq. 18.

4. *Elder v. Derby*, 98 Ill. 228; *Brower v. Witmeyer*, 121 Ind. 83; *Heffron v. Flanagan*, 37 Mich. 274; *Brasted v. Sutton*, 29 N. J. Eq. 513; *U. S. v. New*

Orleans R. Co., 12 Wall. (U. S.) 362; *Dusenbury v. Hulbert*, 59 N. Y. 541.

In *Elder v. Derby*, 98 Ill. 228, the court by Walker, J., said: "The recording act of *Illinois* which provides that deeds, mortgages, etc., shall take effect only from the time of filing them for record, as to all creditors and subsequent purchasers without notice," does not apply to purchase-money mortgages. See also *Stafford v. Van Rensselaer*, 9 Cow. (N. Y.) 315.

Compare *Jackson v. Reid*, 30 Kan. 10; *Stansell v. Roberts*, 13 Ohio 149; 42 Am. Dec. 193; *Harding v. Allen*, 70 Md. 395. These cases seem to have been decided under more stringent registry laws. See also *Jones on Mortgages* (4th ed.), § 466, which agrees with the last three cases cited *supra*.

Where land was purchased by deed executed Nov. 13th, 1874, and recorded April 28th, 1875, and a mortgage was given back to the vendor for the purchase money; which mortgage was executed Dec. 23rd, 1874, but not recorded until July 11th, 1875; and on Jan. 7th, 1875, another mortgage was executed to a third party who had no notice of the one to the vendor, and the third party recorded his mortgage Jan. 18th, 1875, it was held that as the vendor's mortgage was not recorded within the six months required by the registration laws of *Maryland*, it was postponed to the lien of the mortgage to the third party. *Harding v. Allen*, 70 Md. 395.

The general rule fails and the general mortgage takes priority when the property purchased is annexed to a subject already covered by the general mortgage and becomes a part thereof; as when iron rails are laid down and become a part of the railroad. *U. S. v. New Orleans R. Co.*, 12 Wall. (U. S.) 362.

money of which it was given.¹ Where the intention of the parties, evidenced by a parol agreement, was that several purchase-money mortgages should be equal liens, an assignee for value and without notice will have priority over another lien of the same dignity in the hands of the original mortgagee,² even where the mortgage postponed would have been entitled to priority if no assignment had been made.³

III. PURCHASE MONEY—WHAT CONSTITUTES.—The term "purchase money," as used in purchase-money mortgages, means money paid for the land, or the debt created by the purchase,⁴ and does not include other money than that which the purchaser stipulates to pay the vendor.⁵ It cannot be extended to include money which is borrowed for the purpose of paying a pre-existing debt for which the land was the consideration.⁶ In order for the third person to be substituted for the vendor in such cases, he must deal directly with the vendor.⁷ When purchase money is the consideration of an instrument, it will continue to be the consideration of any other instrument executed in substitution of the old one.⁸

A vendee received a release of his first mortgage for the purchase money of land, and executed a second for the balance of the purchase money remaining unpaid, and was intrusted by the vendor with both for record. He promptly recorded the release but not the mortgage, and soon after executed another mortgage for his notes to A, given without consideration, which was recorded, and subsequently, together with the notes, assigned before maturity to B, a *bona fide* purchaser for value without notice. After this last mortgage was recorded the first was also. *Held*, that the last mortgage constituted the prior lien. *Ramsey v. Jones*, 41 Ohio St. 685. See also *Flynt v. Arnold*, 2 Met. (Mass.) 619.

1. *Moore v. Rollins*, 45 Me. 493. See also *Austin v. Underwood*, 37 Ill. 438; 87 Am. Dec. 254.

2. 1 *Jones on Mortgages* (4th ed.), § 567; *Decker v. Boice*, 19 Hun (N. Y.) 152; *Stafford v. Van Rensselaer*, 9 Cow. (N. Y.) 316.

3. *Corning v. Murray*, 3 Barb. (N. Y.) 652.

Compare, *Granger v. Crouch*, 86 N. Y. 494.

4. *Austin v. Underwood*, 37 Ill. 439; 87 Am. Dec. 254.

A land warrant with which land is preempted is purchase money within the meaning of the term. *Jones v. Tainter*, 15 Minn. 512.

A debt for lumber bought and used

for building a house is not purchase money of a homestead. *Smith v. Lackor*, 23 Minn. 454.

5. 1 *Jones on Mortgages* (4th ed.), § 465; *Henisler v. Nickum*, 38 Md. 270. See also *Cohn v. Hoffman*, 45 Ark. 376.

6. *Stansell v. Roberts*, 13 Ohio 148; 42 Am. Dec. 193; *Cohn v. Hoffman*, 45 Ark. 376; *Alderson v. Ames*, 6 Md. 52; *Eyster v. Hatheway*, 50 Ill. 521; 99 Am. Dec. 537; *Small v. Stagg*, 95 Ill. 39.

See also *Austin v. Underwood*, 37 Ill. 439, 87 Am. Dec. 254.

7. *Alderson v. Ames*, 6 Md. 52; *Austin v. Underwood*, 37 Ill. 439; 87 Am. Dec. 254; *Small v. Stagg*, 95 Ill. 39.

8. *Austin v. Underwood*, 37 Ill. 438; 87 Am. Dec. 254; *Kimble v. Esworthy*, 6 Ill. App. 517; *Flanagan v. Cushman*, 48 Tex. 241.

A mortgage which is given subsequently to the conveyance of the land and execution of a mortgage thereon to secure the purchase money, and which is intended to be substituted in the place of such mortgage, is a mortgage for the purchase money, although by its terms it may extend the time of payment to a longer period than the former mortgage, and though the wife of the mortgagor may not have joined in its execution as she did in that of the first. *Jones v. Parker*, 51 Wis. 218.

even though part of the purchase money may have been paid before the execution of the second instrument.¹

IV. DEFENSE TO FORECLOSURE.—A purchaser of land, who has paid part of the purchase money, and given a bond and mortgage for the residue, and is in the undisturbed possession, will not be relieved against the payment of the bond, or foreclosure of the mortgage, on the mere ground of a defect of title, there being no allegation of fraud in the sale, nor any eviction. He must seek his remedy at law on the covenants in the deed of the vendor to him.² An allegation that there is an outstanding paramount title will not enable the owner of the equity of redemption

1. *Pratt v. Topeka Bank*, 12 Kan. 570.

2. 2 Jones on Mortgages (4th. ed.), § 1500; *Bumpus v. Platner*, 1 Johns. Ch. (N. Y.) 213; *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519; 7 Am. Dec. 554; *Gouverneur v. Elmendorf*, 5 Johns. Ch. (N. Y.) 79; *James v. McKernon*, 6 Johns. (N. Y.) 543; *York v. Allen*, 30 N. Y. 104; *Withers v. Morrell*, 3 Edw. Ch. (N. Y.) 560; *Davison v. De Freest*, 3 Sandf. Ch. (N. Y.) 456; *Grant v. Tallman*, 20 N. Y. 191; 75 Am. Dec. 384; *Ryerson v. Willis*, 81 N. Y. 277; *Parkinson v. Sherman*, 74 N. Y. 88; 30 Am. Rep. 268; *Edwards v. Bodine*, 26 Wend. (N. Y.) 109; *Burke v. Nichols*, 34 Barb. (N. Y.) 430; *Parkinson v. Jacobson*, 13 Hun (N. Y.) 317; *McConihe v. Fales*, 107 N. Y. 404; *Price v. Lawton*, 27 N. J. Eq. 325; *Hile v. Davison*, 20 N. J. Eq. 228; *Hulfish v. O'Brien*, 20 N. J. Eq. 230; *Alden v. Pryal*, 60 Cal. 215; *Barkhamsted v. Case*, 5 Conn. 528; *Conwell v. Clifford*, 45 Ind. 392; *Church v. Fisher*, 40 Ind. 145; *Simpson v. Hawkins*, 1 Dana (Ky.) 303; *Booth v. Ryan*, 31 Wis. 45; *Peters v. Bowman*, 98 U. S. 56; *Noonan v. Lee*, 2 Black (U. S.) 499. See also *Cook v. Mix*, 11 Conn. 432; *Robards v. Cooper*, 16 Ark. 288; *Hill v. Butler*, 6 Ohio St. 207; *Hart v. Carpenter*, 36 Mich. 402; *Lessly v. Bowie*, 27 S. Car. 193.

Compare Chambers v. Cox, 23 Kan. 393; *Conklin v. Bowman*, 7 Ind. 533.

See *Withers v. Powers*, 2 Sandf. Ch. (N. Y.) 350.

In *Peters v. Bowman*, 98 U. S. 56 the court by Swayne, J., said: "The rule is founded on reason and justice. A different result would subvert the contract of the parties, and substitute for it one which they did not make. In such case the vendor, by his covenants, if there are such, agrees upon

them, and not otherwise, to be responsible for defects of title.

If there are no covenants, he assumes no responsibility, and the other party takes the risk. The vendee agrees to pay according to his contract, and secures payment by giving a lien upon the property. Here it is neither expressed nor implied that he may refuse to pay and remain in possession of the premises, nor that the vendor shall be liable otherwise than according to his contract. Where an adverse title is claimed, it cannot be litigated with binding effect unless the claimant is before the court. He has shown that he cannot be made a party. One suit cannot thus be injected into another. Without his presence the judgment or decree as to him would be a nullity. The law never does or permits a vain thing. A title which cannot be made good otherwise may be made so by the lapse of time or the Statute of Limitations. Is the vendor to wait until this shall occur? And, in the meantime, can the vendee, or those claiming under him, remain in possession and enjoy all the fruits of the contract and pay neither principal nor interest to the vendor?"

In *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519; 7 Am. Dec. 554, Chancellor Kent said: "If there be no fraud in the case, the purchaser must resort to his covenants, if he apprehends a failure or defect of title and wishes relief before eviction. This is not the proper tribunal for trial of titles to land. It would lead to the greatest inconvenience, and perhaps abuse, if a purchaser in the actual enjoyment, and when no third person asserts, or takes any measures to assert, a hostile claim, can be permitted, on suggestion of a defect or failure of title and on the principle of *quia timet*, to stop the payment of the purchase

to arrest the enforcement of a purchase-money mortgage. But if there has been an eviction by title paramount, or an action is pending by an adverse claimant to try the title to the mortgaged premises, the court will interfere.¹ If the vendor has effected the

money and of all proceedings at law to recover it. Can this court proceed to try the validity of the outstanding claim in the absence of the party in whom it is supposed to reside, or must he be brought into court against his will to assert or renounce a title which he never asserted, and perhaps never thought of? I apprehend there is no such practice or doctrine in this court, and that a previous eviction or trial at law is, as a general rule, indispensable.

. . . The only plausible argument for the injunction is that, as the plaintiff has covenants to secure his title, the interference of this court is necessary to prevent a circuitry of action, and that the plaintiff ought not to be compelled to pay the purchase money, when by a suit on his covenants, he might, almost concurrently, be enabled to recover it back again. This argument would apply to every case of mutual and independent covenants, and would prove too much; but the proper answer here is that to sustain the injunction would be assuming the fact of a failure of title before eviction or trial at law, and which this court, as not possessing any jurisdiction over legal titles, is not bound or authorized to assume."

In *Patton v. Taylor*, 7 How. (U. S.) 132, the court by Nelson, J., referring to authorities there cited, said: "These cases will show that a purchaser in the undisturbed possession of the land will not be relieved against the payment of the purchase money, on the mere ground of defect of title, there being no fraud or misrepresentation, and that in such a case he must seek his remedy at law on the covenants in his deed; and if there is no fraud and no covenants to secure the title, he is without remedy, as the vendor selling in good faith is not responsible for the goodness of his title beyond the extent of his covenants in the deed."

Parol Covenants.—The assignee of a purchase-money mortgage, duly recorded, will not be restrained from enforcing his lien against the land, on the ground that the purchaser of the land, under the foreclosure of a second mortgage, had a verbal understanding with the parties to the first mortgage, that its lien would be postponed to that of

the second mortgagee, and that a sale under the second would pass a free title. *Foxwell v. Slaughter*, 5 Del. Ch. 396.

Exceptions.—While the general rule is that stated in the text, yet it has been held in some States that the mortgagor may defend a suit for foreclosure by recoupment or offset of damages for breach of covenants, to the extent of the damages sustained, for a failure or partial failure of title, or any other matter embraced in the covenants. *Coy v. Downie*, 14 Fla. 544; *Lowry v. Hurd*, 7 Minn. 356; *Walker v. Wilson*, 13 Wis. 522; *Scantlin v. Allison*, 12 Kan. 85; *Chambers v. Cox*, 23 Kan. 393.

The more especially is this true when the mortgagee is insolvent. *Knapp v. Lee*, 3 Pick. (Mass.) 452; *McLemore v. Mabson*, 20 Ala. 137.

See *Hall v. Gale*, 14 Wis. 54, as to what constitutes such a covenant as may be set off.

In a suit to foreclose a purchase-money mortgage, the mortgagor and grantee in the conveyance is entitled, by virtue of the covenants against incumbrances therein contained, to have the amount of tax liens outstanding on the mortgaged premises deducted from the amount due on the mortgage, and a decree taken only for the balance. And the assignee of such mortgage holds it subject to the same equity. *Union Nat. Bank v. Pinner*, 25 N. J. Eq. 495; *White v. Stretch*, 22 N. J. 76.

Where a mortgage is given for the purchase money of land conveyed by the mortgagee to the mortgagor with covenant against incumbrances, if it appeared that at the time of the conveyance, the premises were subject to a prior incumbrance, a decree of foreclosure will not be made upon such mortgage until the prior incumbrance is satisfied, or the prior incumbrance will, by the decree, be directed to be first paid out of the proceeds of the sale, and the amount deducted from the sum due upon the mortgage. *Van Riper v. Williams*, 2 N. J. Eq. 407; *Woodruff v. Depue*, 14 N. J. Eq. 168; *Stiger v. Bacon*, 29 N. J. Eq. 442; *Dayton v. Dusenbury*, 25 N. J. Eq. 110.

1. *Price v. Lawton*, 27 N. J. Eq. 325;

sale by fraud, the purchaser may, by moving promptly upon discovery thereof, have the contract of sale and the mortgage for the purchase money rescinded.¹

affirmed *Lawton v. Price*, 28 N. J. Eq. 274, citing *Shannon v. Marselis*, 1 N. J. Eq. 423; *Van Waggoner v. McEwen*, 2 N. J. Eq. 412; *Green v. Whipple*, 12 N. J. Eq. 50; *Hile v. Davison*, 20 N. J. Eq. 229; *Hulfish v. O'Brien*, 20 N. J. Eq. 23; *Coster v. Monroe Mfg. Co.*, 2 N. J. Eq. 467; *Johnson v. Gere*, 2 Johns. Ch. (N.Y.) 546; *Edwards v. Bodine*, 26 Wend. (N.Y.) 109; *Tallmadge v. Wallis*, 25 Wend. (N.Y.) 107.

See also *Couse v. Boyles*, 4 N. J. Eq. 212.

Nebraska.—In *Latham v. McCann*, 2 Neb. 276, it is held that defect of title is no defence to an action for foreclosure of a mortgage given for purchase money, if the deed contains only a covenant of warranty; otherwise, if it contains a covenant of seisin.

Indiana.—In *Wilber v. Buchanan*, 85 Ind. 42, it is held that while a defective title cannot be pleaded in bar of the foreclosure of a mortgage for purchase money, it can be as a failure of the consideration of the notes given for the title, which would incidentally defeat the foreclosure.

Compare *Rice v. Goddard*, 14 Pick. (Mass.) 293; *Tallmadge v. Wallis*, 25 Wend. (N.Y.) 107.

As to what constitutes eviction, see *Wilber v. Buchanan*, 85 Ind. 42; *Withers v. Powers*, 2 Sandf. Ch. (N. Y.) 350; *Simers v. Saltus*, 3 Den. (N. Y.) 214; *Cowdrey v. Coit*, 44 N. Y. 382.

I. Booth v. Ryan, 31 Wis. 45; *Furman v. Meeker*, 24 N. J. Eq. 110.

The vendee of land cannot claim in a foreclosure suit a deduction from the mortgage money, on the ground that his vendor, who was not the mortgagor, misstated the number of acres of the land conveyed, and that the vendor of such vendor, who was the mortgagee and complainant, when he sold such lands, made a similar misstatement. To authorize such deductions, the mortgagee and the owner must be privies in contract. *Davis v. Clark*, 33 N. J. Eq. 579; *Clark v. Davis*, 32 N. J. Eq. 530; *Northrop v. Sumney*, 27 Barb. (N. Y.) 196; *Champlin v. Laytin*, 6 Paige (N. Y.) 189; *Dresbach v. Stein*, 41 Ohio St. 70.

Several tracts of land were sold under one contract, and separate deeds

naming a distinct consideration were given for each tract. *Held*, that fraud and want of consideration in the sale of one tract could not be set up as a defense in a suit to foreclose the purchase-money mortgage upon another of such tracts. *Hicks v. Jennings*, 4 Fed. Rep. 855.

Disposition of Proceeds of Sale.—Where a purchaser of land has paid no part of the purchase money, but has given mortgages therefor, some of which had been assigned to third persons as security, he is not entitled to a surplus, notwithstanding the vendor had agreed not to foreclose until prior incumbrances were canceled by means of a sale of such mortgages, or by money to be furnished by the purchaser; the latter not having paid the moneys to cancel any part of the prior incumbrances. *Johnson v. Blydenburgh*, 31 N. Y. 427.

Where a mortgage was taken by a vendor on one-third and one-third of a sixth of various tracts of land which the mortgagees took expressly subject to prior liens against former owners of the land, in distributing the proceeds of sale of the land which was sold at sheriff's sale, the mortgagee will not be confined to one-third and one-third of a sixth of the balance of the money for payment of the prior liens and costs; but if they were paid by the other portions of the land except one-third and one-third of a sixth, then that amount of the purchase money would be applicable to the mortgage in preference to judgments subsequent to the mortgage obtained against the owner of the land existing at the time of the sale. *Devor's Appeal*, 13 Pa. St. 412.

On the 4th of December, 1846, the plaintiff executed two mortgages on the same premises for the purchase money; one to S for \$221.56, payable in nine equal annual installments; and the other for \$86.23, payable to the defendant in three equal annual installments, the first to become due December 4, 1856. It was agreed that the mortgage to S should be the first lien on the premises. This mortgage was subsequently assigned by S to the defendant, and was foreclosed under the statute. Upon the sale of the premises on the 5th of January, 1850, the same was

V. CHATTEL MORTGAGES TO SECURE PURCHASE MONEY.—Chattel mortgages have sometimes been given to secure the payment of the purchase money of the chattel mortgaged. In one instance,

struck off to M for \$431.56, a sum larger than the amount due upon the mortgage, with the costs of foreclosure. *Held*, that the defendant was entitled to have the mortgage for \$36.23 first satisfied out of the surplus money, and that the plaintiff was entitled only to the balance remaining after paying that mortgage with interest. *Barber v. Cary*, 11 Barb. (N. Y.) 549.

Miscellaneous Cases Under Foreclosure.—When a mortgagee whose covenant against incumbrances has not been kept, sells land under a trust deed given to secure the purchase-money, the sale will be set aside; especially where the mortgage is the purchaser. *Coffman v. Scoville*, 86 Ill. 300.

When one standing in the position of junior mortgagee or owner requests a sale in parcels, and offers in good faith to bid the amount of the mortgage debt, cost and expenses upon a specified parcel, which can be conveniently sold and conveyed separately, although the premises are described in the mortgage as one tract, a purchase-money mortgagee may not sell the whole mortgaged property in one parcel on a statutory foreclosure.

Ellsworth v. Lockwood, 42 N. Y. 89.

But see *Griswold v. Fowler*, 24 Barb. (N. Y.) 135.

Where a mortgage is payable by installments and the mortgage has been foreclosed and the property sold by the mortgagee for one installment, he still retains a lien on the land for the installment not due, and may, as they successively become due, foreclose and sell the same land for each installment as many times as there are installments. *Watkins v. Hackett*, 20 Minn. 106; *Walker v. Hallett*, 1 Ala. 379.

A strict foreclosure of a purchase-money mortgage is not improper, where the bill shows that the mortgage was given for the entire purchase-money, of which no part either principal or interest has been paid; and that the value of the premises is not more than the amount due, and that they are the only security for the debt, the mortgagors having absconded. *Wilson v. Geisler*, 19 Ill. 49.

A homestead is liable for its purchase money, and if it is sold upon foreclosure of a mortgage therefor, and

only part of the debt is realized, and the mortgagor redeems, it remains liable in his hands for the balance of the purchase money. *Campbell v. Maginnis*, 70 Iowa 589.

One who sells and conveys his land to another, and then takes back a deed of trust to secure the payment of the purchase price, may bid, either for himself or as the agent of another, in the sale of the property under the deed of trust. *Loveland v. Clark*, 11 Colo. 265.

Where there were two separate mortgages on the same property belonging to different mortgagees, and the holder of the first mortgage filed a bill of foreclosure against the second mortgagee, and the owners of the mortgaged premises, and the same solicitor filed another bill, in behalf of the second mortgagee, against the first mortgagee, and the owner of the premises, to foreclose the second mortgage, it was held that only one bill of foreclosure was necessary, and that the owners of the equity redemption were to be charged with the cost of one suit only. *Wendell v. Wendell*, 3 Paige (N. Y.) 509.

An answer to a bill to foreclose cannot draw in question the fairness and validity of the sale, the purchase money of which the mortgage was given to secure, or impeach the contract on which the title of the mortgagor is founded. These matters can only be drawn in question by cross bill. *Miller v. Gregory*, 16 N. J. Eq. 274.

Proof of defense not pleaded cannot be received at the trial of the suit for foreclosure of the purchase-money mortgage. *Sandford v. Travers*, 2 Bosw. (N. Y.) 498.

The fact that a mortgagee in possession first conveyed the land with a covenant against incumbrances, and then took the mortgage, under which he holds possession, as security for a portion of the purchase money, will not render him chargeable with rent or for damages equal to rent, for a period of time during which a third party held possession of the land without right and without the consent of the mortgagee, such possession not constituting an incumbrance within the meaning of the law, or a breach of the covenant against incumbrances. *Dinsmore v. Savage*, 68 Me. 191.

the principle was applied that the dower interest of the wife was not superior to the lien of such mortgage, although the wife's dower rights were secured by statute.¹ In another case, the lien of a judgment creditor was held superior to that of an intended chattel mortgage for purchase money, which had not been recorded, because, under the statutes, a record is essential to such mortgage, which differs from mortgages of real estate in that in the one case delivery of the evidence of title is alone essential, while in the other, no mortgage can exist until properly recorded.²

1. In *Barker v. Kelderhouse*, 8 Minn. 207, a chattel mortgage had been executed upon certain household furniture which, by statute was exempt from execution. This mortgage had been given to secure the purchase money of said furniture, but the wife of the mortgagor had not joined in its execution. The mortgagee, upon the mortgagor's failure to pay a promissory note which the mortgage secured, brought an action against the mortgagor, claiming judgment for the delivery of the property and damages. It was held that the fact of the wife not having joined in the execution of the mortgage was no defense, and that the mortgagee could recover in the action. The principle of the decision was that the purchase of the property, and the execution of a mortgage thereupon to secure the purchase money, constituted in law one transaction, which left no interval of time in which any interest the wife might have under the statute could attach. The interest in the property given to the wife by the statute, which required that she should join in the execution of the mortgage, was declared to be analogous to a dower interest, and the court by Atwater, J., said: "The same principle has been applied as against the dower right of the wife of a mortgagor executing a mortgage to secure the purchase money. See cases cited in *Banning v. Edes*, 6 Minn. 402, above quoted. These cases, it is true, are those of mortgages of real estate, but it is not perceived why the principle is not equally applicable to the case of a chattel mortgage given to secure the purchase money of the property mortgaged, where, as in this case, it appears that 'it was a part of the agreement on the purchase of said property, that the defendant should execute said mortgage to the plaintiff to secure part of the purchase money of such property.' The dower right of the wife has been,

perhaps, regarded with as much favor, and as jealously guarded by the courts, as any other for which the protection of law has been invoked; and while this is held secondary to the mortgagee's lien for the purchase money, it is not perceived why the statutory right of exemption should be viewed with more favor."

2. In *Blatchford v. Boyden*, 122 Ill. 657, a chattel mortgage was foreclosed by the mortgagee by means of a sale of the property covered by the mortgage to the mortgagor. A new mortgage on the same property to secure the purchase money was executed by the mortgagor, but the mortgagee did not take the property into his possession and failed to record the mortgage. Certain executions against the mortgagor were issued against the property before the mortgage was recorded. It was held that the lien of such execution creditors was superior to that of the mortgagee upon the ground that the lien of a chattel mortgage under the *Illinois* statute can be preserved in only two ways, first, by the mortgagee retaining possession of the property, or second, by recording the mortgage. The court by Shope, J., said: "We are referred to cases where mortgages have been taken to secure the purchase money of the land, and holding that, where such mortgage is executed as a part of a transaction of the conveyance to the mortgagor, such mortgage will take precedence of judgments against the mortgagor. In those cases, this superiority of lien is given to the mortgage, not because of any equity the vendor might be supposed to have for the purchase money of the land, but upon the grounds: 'The execution of the deed and mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through the hands and vests in the mortgagee, without stop-

In a third case, the judgment debt was postponed to the lien of a recorded purchase-money mortgage.¹

VI. STATUTES GOVERNING PURCHASE-MONEY MORTGAGES—1. Judgments.—In *New York* it is provided that where real property is sold and conveyed and, at the same time, a mortgage thereupon is given by the purchaser to secure the payment of the whole or a part of the purchase money, the lien of the mortgage, upon that real property, is superior to the lien of a previous judgment against the purchaser.² In *Mississippi* a purchase-money mortgage has priority over judgments and other debts of the mortgagor to the extent of the land purchased.³ A similar provision exists in *New Jersey*.⁴

2. Mechanics' Liens.—In some States by statutes a mechanic's lien has precedence of any mortgage given to secure the payment of money to be used in the construction or repair of the building, except such part as was given to secure the purchase money of the land.⁵

ping at all in the purchaser, and during this instantaneous passage the judgment lien cannot attach to the title.' *Curtis v. Root*, 20 Ill. 518; *Christie v. Hale*, 46 Ill. 117; *Jones on Mortgages*, (4th ed.), § 464, *et seq.* In the conveyance of real estate, and taking back a mortgage to secure the purchase money, the title is vested in the mortgagor subject to the mortgage delivered simultaneously with the deed. Nothing further than the proper execution and delivery of the instruments is necessary to give validity to the mortgage. Under the chattel-mortgage act the recording of the chattel mortgage is as essential to its validity, as against third persons, as any other element entering into the making of a valid chattel mortgage. It is a valid lien only from the time of its being filed for record, even as against purchasers and creditors with actual notice. *Frank v. Miner*, 50 Ill. 444; *Lemen v. Robinson*, 59 Ill. 117. The title to personal property vests immediately upon its sale and delivery to the purchaser. The fact that the mortgage is for the purchase money, or the intention of the parties is to be secured thereby, can give no vitality to the lien of the mortgage."

1. In *Pitt's Sons Mfg. Co. v. Poor*, 77 Ill. App. 24, the mortgagee sold a thrashing machine to the mortgagor, who was to take it on trial, and if satisfied with it was to pay part cash, securing the balance by chattel mortgage on the machine. After the lapse of several weeks the

mortgagor decided to keep the machine, made the first payment thereon, and gave a chattel mortgage for the deferred payments, antedated to the time of the delivery of the machine, for the purpose of securing interest for the full time on the notes. Between the date of the delivery of the machine for trial, and the consummation of the purchase and giving of the mortgage, an execution was issued by a justice of the peace against the mortgagor, and after that date was levied upon the machine in the hands of the mortgagor. It was held that the antedating of the mortgage was for a proper purpose, and the judgment creditor not having advanced the money on the faith of the machine was to be postponed to the superior claim of the mortgagee.

2. *New York Code Civ. Proc.*, § 1254; *Birdseye's Stat.*, tit., Judgments, § 54. See also *Stow v. Tiff*, 15 Johns. (N. Y.) 458; 8 Am. Dec. 266.

3. *Rev. Code Mississippi 1880* § 1205.

4. *Wallace v. Silsby*, 42 N. J. L. 1. In *Wallace v. Silsby*, 42 N. J. L. 1, the court by *Beasley, C. J.*, said: "The provision of the *New Jersey* statute which gives preference to a purchase-money mortgage over previous judgments against the grantee, is merely declaratory of the common law."

5. *Stims. Am. Stat. Law.*, § 1982, citing *New Jersey Laws of 1879*, p. 52; *Pennsylvania Mechanic's Liens* (Am. Dig. 1877) 1; *Laws of 1881*, p. 65.

3. Homestead Exemptions.—The homestead exemption does not, by the constitutions of twelve States, avail as against any obligation or debt contracted for the purchase of the premises.¹ By the constitutions of two States, no mortgage, deed of trust, or other lien on the homestead is ever valid except for the purchase money thereof, or improvements thereon.²

4. Dower.—There is a special provision in many States, that if lands are purchased by the husband during marriage and at the same time mortgaged to secure the purchase money, the widow has dower only in the equity of redemption, even if she did not join in the mortgage,³ and the same provision exists as to the husband's curtesy in the wife's lands in some of the States.⁴ The widow has dower in the surplus remaining after satisfaction of the mortgage debt when land has been mortgaged by the husband for the purchase money of the land.⁵

PURPORT—(See also EFFECT, vol. 6, p. 169; TENOR).—The word "purport" means no more than the substance of the instrument which appears to every eye that can read.⁶

1. Stims. Am. Stat. Law § 84, citing the constitutions of *Kansas, Virginia, West Virginia, North Carolina, Tennessee, Arkansas, Texas, Nevada, California, Georgia, Florida, Louisiana.*

2. Stims. Am. Stat. Law, § 85, citing the constitutions of *Texas and Louisiana.*

See *Christy v. Dyer*, 14 Iowa 438; 81 Am. Dec. 493; *Peterson v. Hornblower*, 33 Cal. 266.

3. *New York*, 2135; *Indiana*, 2495; *Illinois*, 41, 4; *Michigan*, 5736; *Wisconsin*, 2163; *Nebraska*, 1, 23, 4; *West Virginia*, *North Carolina*, 1272; 2106; *Arkansas*, 2575; *Oregon*, 174; *Georgia*, 1763 a; Stimson's Am. Stat. Law, § 3213.

South Carolina.—In *South Carolina* it is provided that "nothing in this chapter (concerning the record of deeds) shall be construed to bar any widow of any mortgagor of any lands from her dower and right in or to said lands, who did not legally join with her husband in such mortgage, or otherwise bar or exclude herself from such dower or right." *South Carolina*, 1782.

4. *Delaware*, v. 15, 165, 3; v. 16, 126; Stims. Am. Stat. Law 3113.

5. *Massachusetts*, 124, 5; *Maine*, 103, 12; *Vermont*, 2217; *New York*, 1, 1, 3, 6; *Illinois*, 41, 5; *Michigan*, 5737; *Wisconsin*, 2164; *Nebraska*, 1, 23, 5; *Virginia*, 106, 3; *West Virginia*, 1882, 86, 3; *Kentucky*, 52, 4, 5; *Arkansas*,

2576; *Oregon*, 17, 5; Stims. Am. Stat. Law, § 3216.

Authorities.—Jones on Mortgages (4th ed.); Boone on Mortgages.

6. 3 Chitty's Crim. Law, p. 1040, followed in *State v. Fenly*, 18 Mo. 454, the question in that case being the sufficiency of an indictment for forgery which failed to allege in the words of the statute that it was "an instrument or writing being or purporting to be the act of another." See also FORGERY, vol. 8, pp. 503, n. 510 *et seq.*; INDICTMENT, vol. 10, p. 594; LIBEL AND SLANDER, vol. 13, p. 457.

Purport Distinguished from Tenor.—In *Gilchrist's Case*, 2 Leach 657, Buller, J., said: "Old cases have given rise to much learning and argument on the words 'purport' and 'tenor'; and the books are full of distinctions as to the meaning of these words, and the necessity for using the one or the other of them in indictments where written instruments are to be stated. But in the many cases upon this subject I can find no judicial determination that the purport and tenor should both be stated in any case whatever. Purport means the substance of an instrument as it appears on the face of it to every eye that reads it, and tenor means an exact copy of it; and, therefore, when an instrument is stated according to its tenor, the purport of it must necessarily appear." See 2 Russell on Crimes 804; *Fogg v. State*, 9 Yerg. (Tenn.) 302. See also *State v. Atkins*, 5 Blackf.

PURPOSELY.—See note 1.

PURPRESTURE.—See NUISANCES, vol. 16, p. 939; INJUNCTIONS, vol. 10, p. 841.

PURSUANCE.—(See also IN, vol. 10, p. 324).—See note 2.

PUTTING IN FEAR.—See ROBBERY.

PUTS (in Contracts).—See GAMBLING CONTRACTS, vol. 8, p. 1004.

(Ind.) 458; *Myers v. State*, 101 Ind. 381.

It was held in *State v. Pullens*, 81 Mo. 387, that it has never been required, either at common law or by any statute in *Missouri*, that the purport and tenor of an instrument charged to have been forged should both be set out in the indictment. An indictment setting out the instrument forged according to its tenor only is undoubtedly sufficient. "Where the tenor is given, the purport must necessarily appear, as the tenor of an instrument means an exact copy of it, whereas purport means the substance of it as it appears on the face of the instrument to every eye which reads it." See also *FORGERY*, vol. 8, p. 510, *et seq.*; *LIBEL AND SLANDER*, vol. 13, p. 457; *INDICTMENT*, vol. 10, p. 594.

Purport Clause.—"In the ordinary form of an indictment (forgery), we have seen, the recitation of the tenor of the instrument is preceded by its mention as 'purporting' to be a bond, . . . or whatever else it appears on its face to be. This is termed a purport clause. Now, in reason, the purport of recited words is a matter not of fact but of law—not for the jury, but for the court, and on familiar principles need not be alleged. Therefore it is believed that the purport clause in an indictment for forgery is never necessary." 2 Bishop Crim. Proc., § 413, followed in *Myers v. State*, 101 Ind. 381. See also *Sharley v. State*, 54 Ind. 168; *State v. Gustin*, 5 N. J. L. 749; *Harding v. State*, 54 Ind. 359.

1. As used in an Indiana statute, defining murder in the second degree. "purposely" means intentionally and designedly. To constitute the offense, the purpose, design or intention to perpetrate it must be formed before the act is committed. *Fahnestock v. State*, 23 Ind. 231.

The meaning of the word may be fully expressed in an indictment by the

use of the words "with intent" or by "feloniously." *Carder v. State*, 17 Ind. 307. See generally *HOMICIDE*, vol. 9, p. 529.

2. An exceptional notice of action is frequently required to be given to one against whom a suit is brought for something done by him "in pursuance," or "under or by virtue," or "in execution" of a statute. For example, the act 24 and 25 Vict., relating to the offense of uttering, tendering, etc., false or counterfeit coin, authorizes any person whatsoever to apprehend any one offending against the act. And the 33d section of the act provides that notice in writing of all actions and prosecutions to be commenced against any person for anything done by him in pursuance of this act shall be given to the defendant one month at least before the commencement of the action. In strictness, anything not authorized by a statute cannot be "in pursuance" or "under or by virtue" of it; whilst if authorized, it would need no other protection. But if effect were given to such construction, it would altogether do away with the protection intended to be given by the requirement of such notices. Accordingly, it is held that if any public or private body or person charged with the execution of an act, honestly intends to put the law in motion, and really and not unreasonably believes in the existence of facts, which, if existent, would justify his acting and acts accordingly, his conduct will be "in pursuance" or "under or by virtue" of the statute under which he believes he is acting, although he errs in such belief. The question whether there was in fact reasonable ground for such belief, is a subordinate question, and one very material to be pressed on the minds of the jury. But the presence or absence of such reasonable ground can only be relied on for the purpose of determining whether the belief was *bona fide* or not. *Herman v. Seneschal*, 13

QUALIFICATION—(*Compare* QUALIFIED).—The endowment or acquirement which renders eligible to place or position.¹

QUALIFIED—(*Compare* QUALIFICATION).—See note 2.

QUALIFY—(*Compare* QUALIFICATION; QUALIFIED).—See note 3.

C. B., N. S. 392, and cases there cited. See also *ACT*, vol. 1, p. 172; *Roberts v. Orchard*, 2 H. & C. 769; *Selnes v. Judge*, L. R., 6 Q. B. 724; *Chamberlain v. King*, L. R., 6 C. P. 474; *Midland R. Co. v. Witherington*, 11 Q. B. Div. 788; *Hughes v. Buckland*, 15 M. & W. 346; *Lea v. Facey*, 19 Q. B. Div. 352; *Rochfort v. Rind*, 9 L. R. Ir. 204; *O'Dea v. Hickman*, 18 L. R. Ir. 233.

1. *Hyde v. State*, 52 Miss. 672.

Qualification is any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character with success. Webster's Dict. Quoted in *Cummings v. Missouri*, 4 Wall. (U. S.) 319.

As Used in the Kentucky Constitution.—"Qualification" and "Qualified," in the constitution of *Kentucky*, have their most comprehensive sense, referring not only to circumstances which render a citizen eligible to office or entitle him to vote, but also to those that exempt him from all legal disqualifications for either purpose. *Anderson's L. Dict.; Com. v. Jones*, 10 Bush. (Ky.) 744.

The word implies not only the presence of every requisite which the constitution demands, but also the absence of every disqualification which it imposes. *Hall v. Hastetter*, 17 B. Mon. (Ky.) 786.

Qualifications of United States Jurors.—An act of Congress of July 20, 1840, prescribed that jurors in the Federal courts must have the same "qualifications" as jurors in the State courts.

"Qualifications," as here used, refers to general qualifications, as age, citizenship, etc., and not to personal objections, such as bias, interest, and the like, which do not disqualify generally but only at the instance of a party. *U. S. v. Williams*, 1 Dill. (U. S.) 495. See also *JURY AND JURY TRIALS*, vol. 12, p. 322.

Qualification for Office.—(See also PUBLIC OFFICERS).—"Qualification for office, as defined by the most approved lexicographer, is 'endowment or accomplishment that fits for an office; having the legal requisites, endowed with qual-

ities fit or suitable for the purpose.'" *State v. Seay*, 64 Mo. 101; 27 Am. Rep. 206.

For the qualifications of the various officers, public and private, see the specific title, under which they are treated, such as Governor, Sheriffs, Officers (Private Corporations), etc., etc.

2. "Liable" tantamount to "qualified."—See *JURY AND JURY TRIAL*, vol. 12, p. 322.

Qualified Voters—Electors.—See also ELECTIONS, vol. 6, pp. 260, 445; MUNICIPAL SECURITIES, vol. 15, pp. 1279, 1280.

"Qualified voters," as used in the *Mississippi* constitution, which requires the assent of two-thirds of the qualified voters of a county to an issue of municipal bonds, means those qualified and actually voting, and not those qualified and entitled to vote. *Carroll Co. v. Smith*, 111 U. S. 556.

The constitution of *Colorado* makes ineligible to hold any county office, every person who is not a "qualified elector." The term "qualified elector" is here used in its broadest sense, meaning a person qualified to vote generally, and does not include women. *Notaries Public*, 9 Colo. 628.

Qualified for Office.—Where a statute provided for the appointment of clerks *pro tempore* to fill vacancies, and authorized them to hold office until their successors should be elected and "qualified," it was held that the word "qualified" meant nothing more than that the person elected has complied with the requisitions of the statute, by giving bond and taking the oath of office. *State v. Neibling*, 6 Ohio St. 44.

Duly qualified.—"Qualified," in the expression "duly qualified," may refer to the condition or *status* of the officer or to the act of taking the oath. *Anderson's L. Dict., citing People v. Crissy*, 91 N. Y. 616; *Morse v. Johnson*, 77 Va. 300, 271. See also *DULY*, vol. 6, p. 55.

Qualified fee.—A base or determinable fee. See also *BASE FEE*, vol. 2, p. 129; *ESTATES*, vol. 6, p. 878; *REAL PROPERTY*.

3. **Qualify.**—"The word 'qualify,' in

QUALITY.—See IMPLIED WARRANTY, vol. 10, p. 127; INDICTMENT, vol. 10, p. 563; PLEADING; REPRESENTATIONS; WARRANTY.

QUANDO ACCIDERINT.—When they shall come in; when they shall come to hand. A judgment against an executor or administrator directed to be satisfied out of the assets when they shall afterwards come to his hands, is termed a judgment *quando acciderint*. Such a judgment is proper if the defendant has pleaded *plene administravit*, and admits that the defendant has fully administered up to that time.¹

QUANTI MINORIS.—An action of the civil law, adopted in *Louisiana*, to obtain a reduction in the price of a thing sold in consequence of defects found in the article after the sale. The action must be commenced within twelve months from the date of the sale, or at least from the time within which the defect became known to the purchaser. And it lies equally in cases where the seller knew of the defects of the thing sold, as in those wherein he was ignorant of them and acting in good faith.²

QUANTITY.—See INDICTMENT, vol. 10, p. 563; PLEADING.

QUANTUM DAMNIFICATUS.—An issue directed by a court of equity to be tried in a court of law, to ascertain by a trial before a jury the amount of damages suffered by the non-performance of some collateral undertaking which a penalty has been given to secure. When such damages have thus been ascertained the court will grant relief upon their payment.³

QUANTUM MERUIT.—In pleading—as much as he has deserved. Where a person employs another to do work for him, without any agreement as to compensation, the law implies a promise to pay for the services as much as they may deserve or merit. In such case the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then aver that his trouble was worth such a sum of money, which the defendant has omitted to pay. This is called an assumpsit on a *quantum meruit*.⁴

QUANTUM VALEBAT.—See ASSUMPSIT, vol. 1, p. 884.

its legal sense, means to take an oath to discharge the duties of an office, and when an executor named in a will alleges that he desires to qualify as such, and the court orders that letters testamentary issue to him upon his complying with the requisites of the law, we understand that they are to be issued to him when he shall have taken the oath well and faithfully to discharge the duties of his trust." *Hale v. Salter*, 25 La. Ann. 324.

"Qualify" held to be equivalent to "probate" where used in a statute au-

thorizing "probate judges" "to qualify wills by receiving the evidence of witnesses, etc." *Bent v. Thompson* (N. Mex. 1890), 23 Pac. Rep. 238.

1. *Anderson's Law Dict.* See also EXECUTORS AND ADMINISTRATORS, vol. 7, pp. 382, 389.

2. *Millandon v. Sonbercase*, 3 Mart., N. S. (La.) 287.

3. *Bouv. L. Dict.*, *Citing*, 4 *Bouvier's Insts.*, n. 3913.

4. *Bouv. Law Dict.*; 2 Bl. Comm. 162; 1 *Viner's Abr.* 346. See ASSUMPSIT, vol. 1, p. 882. For illustrations, see

QUARANTINE.—(See also BOARD OF HEALTH, vol. 2, p. 429; CONSTITUTIONAL LAW, vol. 3, p. 670; HEALTH, vol. 9, p. 318; HOSPITAL, vol. 9, p. 771; INTERSTATE COMMERCE, vol. 11, p. 555-8; MUNICIPAL CORPORATIONS, vol. 15, p. 1173; POLICE POWER).

The term was originally used to denote the forty days, during which a ship arriving in port and known or suspected to be infected with a malignant or contagious disease was not allowed to land its passengers, freight, or crew, for fear of communicating such disease. In modern usage, it applies to a space of time, varying according to the exigencies of the case, during which certain persons are required to forbear all intercourse with others in order to prevent the spread of some disease with which they are supposed to be infected.¹

LOGS AND LUMBER, vol. 13, p. 1021; MASTER AND SERVANT, vol. 14, p. 776; PARENT AND CHILD, vol. 17, p. 339.

1. Anderson's Law Dict.; Century Dict. See also 10 Law Mag. & Rev. (14th series) 73; 2 Bl. Com. 135.

Constitutionality of Quarantine Laws.

—There is no doubt that a State may pass such laws regarding quarantine as may be necessary for the protection of its citizens. See POLICE POWER; Morgan L. & T. R. etc. Co. v. Louisiana, 118 U. S. 455; Passenger Cases, 7 How. (U. S.) 283.

And such laws will be upheld, even though they may, in some instances, appear to infringe upon the right of Congress to regulate commerce. The constitutionality of such acts depends upon the right which every State possesses to preserve and protect its citizens. See Gibbons v. Ogden, 9 Wheat. (U. S.) 203; Peete v. Morgan, 19 Wall. (U. S.) 581. This right was recognized in the case of Hannibal etc. R. Co. v. Husen, 95 U. S. 465, although the statute under consideration in that particular case (prohibiting the importation of any Texas or Mexican cattle into the State of Missouri at any time between March and December in each year) was held unconstitutional.

United States Quarantine Laws.—The United States statutes provide that the quarantine regulations established by any State respecting vessels arriving in or bound to any port thereof, shall be observed by the officers of the United States, and that their enforcement shall not be interfered with. U. S. Rev. Stat., § 4792; supplement to U. S. Rev. Stat., ch., 66, § 5. See Gibbons v. Ogden, 9 Wheat. (U. S.) 203; Mor-

gan L. & T. R. etc. Co. v. Louisiana, 118 U. S. 455.

The President is authorized to purchase or erect suitable quarantine storehouses, and the Secretary of the Treasury to extend the time for entry of vessels subject to quarantine laws. U. S. Rev. Stat., §§ 4794-5-6. By Act of Congress of August 30, 1890, the Secretary of Agriculture is authorized to quarantine imported cattle at the expense of the owner at such ports as he may designate, and to appoint veterinary surgeons, inspectors, etc., and he may cause to be slaughtered all animals adjudged to be infected with contagious diseases, or to have been exposed to infection, etc. U. S. Stat at L., 1888-9, p. 416.

Quarantine Ordinances.—In *Kosciusko v. Slomberg* (Miss. 1891), 9 So. Rep. 297, it was held that an ordinance prohibiting any one from bringing second-hand clothing into a town, or from exposing it for sale therein, unless such person should furnish proof to the mayor that it did not come from an infected district, is not, in the absence of an epidemic showing an apparent necessity therefor, a valid exercise of the charter power to establish and enforce quarantine regulations, but an unreasonable restraint upon trade, and, therefore, void. The same view is taken in *Greensboro v. Ehrenreich*, 80 Ala. 579; 18 Am. & Eng. Corp. Cas. 483; 60 Am. Rep. 130. See also *Wells v. Ricord*, 24 N. J. Eq. 169.

Quarantine Commissioners.—Laws of *New York*, 1863, ch. 358, make it the duty of the governor to appoint quarantine commissioners for each district, who shall be citizens of the State and

Definition. *QUARE CLAUSUM FREGIT*—*QUARRY.* **Definition.**

QUARE CLAUSUM FREGIT.—See TRESPASS.

QUARREL.—See note 1.

QUARRY.—(See also MINES AND MINING CLAIMS, vol. 15, p. 499; PROFITS Á PRENDRE).—The word “quarry” is derived from the French word *quarriere*. In the Latin of the lower ages, *quadratararius* was a stone-cutter *qui marmora quadrat*, and hence *quarriere*, the place where he *quadrates*, or cuts the stone in squares; generally a stone pit; clearly, therefore, referring to a place upon or above, and not under, the ground.²

“residents” of such district. Under this act, it was held that one whose domicile is not within a certain district is not a “resident” there, even though he actually lives there. *People v. Platt*, 117 N. Y. 159.

Quarantine Fees—Interference with Commerce.—The requirement that each vessel passing a quarantine station shall pay a fee fixed by a State statute for examination as to her sanitary condition, etc., it is a part of all quarantine systems, and is a compensation for services rendered to the vessel, and not a tax, within the provision of the constitution forbidding the imposition of a tonnage tax by any State. *Morgan L. & T.R. etc. Co. v. Louisiana*, 118 U. S. 455.

But in *Peete v. Morgan*, 19 Wall. (U. S.) 581, it was held that a State cannot levy a tonnage tax on vessels owned in foreign ports and entering her harbors in pursuit of commerce, merely in order to defray the expenses of keeping them quarantined.

Authority of Municipal Corporation to Establish Quarantine.—In *New Decatur v. Berry*, 90 Ala. 432; 33 Am. & Eng. Corp. Cas. 644, it was held that a municipal corporation authorized under the General Statutes (Code of Alabama, §§ 1486, 1516) has no power to establish and enforce quarantine regulations, and is not liable for the compensation of an officer employed to enforce such regulations against a neighboring town in which an epidemic is prevailing. The court, by McClellan, J., insisted that the power was not granted in express words; nor fairly implied as an incident to the powers expressly granted; nor was it essential to the declared objects and purposes of the corporation; citing 1 Dillon Mun. Corp., § 89 and cases.

But it is generally conceded that it is within the power of municipal corporations to provide for the health and safety of their inhabitants. See MUNI-

CIPAL CORPORATIONS, vol. 15, p. 1173-4, where the cases are collected. See also *O'Donovan v. Wilkins*, 24 Fla. 281; 23 Am. & Eng. Corp. Cas. 1, 11 note; 1 Dillon Mun. Corp. (4th ed.), §§ 144-5; *Harrison v. Mayor etc. of Baltimore*, 1 Gill (Md.) 264.

Other Cases.—General reference may be made to *Elwell v. Fabre*, 52 Hun (N. Y.) 70 (contract concerning wharves, as effected by quarantine); *Bloom v. State*, 57 Miss. 572 (indictment against shipmaster for not displaying flag at half-mast on coming into port, etc.); *Train v. Boston Disinfecting Co.*, 144 Mass. 523; 19 Am. & Eng. Corp. Cas. 548; 59 Am. Rep. 113 (regulation of a board of health concerning imported rags); *Richmond v. Henrico Co.*, 83 Va. 204 (establishment of city small-pox hospital); *Ferrari v. Board of Health*, 24 Fla. 390 (Florida quarantine law construed).

In Real Property—Meaning of Quarantine.—In real property law the term “quarantine” is used to denote the right which belonged to the widow to remain for forty days in her husband’s mansion house unless her dower were assigned earlier. See *DOWER*, vol. 5, p. 923, note 4; 2 Minor’s Inst. (3rd ed.) [135] 156; 1 Thom. Coke-Lit. 584.

1. “It takes two to make a quarrel.” *Carr v. Congers*, 84 Ga. 287; 28 Am. & Eng. Corp. Cas. 138.

2. *Bell v. Wilson*, L. R., 1 Ch. App. Cas. 309.

Working a Quarry.—The lease of a slate quarry contained the following covenant: “The party of the second part agrees to forfeit the lease when they fail in not working the quarry for a space of three successive months.” The lessor brought ejectment against the lessee for an alleged breach of this covenant. The court by Williams, J., upon the question of what constituted a “working of a quarry,” within the meaning of the covenant, said: “The quarry is an excavation or pit from

Definition.

QUASH—QUASI CORPORATIONS.

Definition.

QUASH—(See also ABATEMENT, vol. 1, p. 9; CRIMINAL PROCEDURE, vol. 4, p. 762; PLEADING).—Quash, from the French *quasser*, is defined to mean to overthrow; annul;¹ to make void or abate.²

QUASI.—As if. A Latin word, which marks a resemblance, and which supposes a difference between two objects.³

QUASI CORPORATIONS; QUASI MUNICIPAL CORPORATIONS.—

See CORPORATIONS, vol. 4, p. 188; FRANCHISES, vol. 8, p. 588; COUNTIES, vol. 4, p. 346; MUNICIPAL CORPORATIONS, vol. 15, p. 946; MUNICIPAL SECURITIES, vol. 15, p. 1234; SCHOOLS; TOWNSHIP.

which the slate is taken. Working the quarry, therefore, is the working of the pit. The doing of any work necessary to the proper and convenient use of the pit, such as the removal of earth, debris, water, ice, or snow, would seem to be working the quarry as truly and as usefully as the blasting and removal of the slate rock, for the latter cannot be done unless the quarry is kept reasonably free from obstruction." And accordingly it was held, that a forfeiture of the lease was not incurred by failure to remove slate from the quarry, during a period when it was necessarily interrupted by the work of removing the water, snow, and ice in the quarry, to make it possible to reach and remove the slate. *Miller v. Chester Slate Co.*, 129 Pa. St. 81.

Quarry Distinguished From Mine.—

See MINES AND MINING CLAIMS, vol. 15, p. 504.

That a Trespasser May Be Restrained From Quarrying by Injunction—see INJUNCTION, vol. 10, p. 884.

1. *Crawford v. Stewart*, 38 Pa. St. 36.

2. *Anderson's L. Dict.*

When proceedings are clearly irregular and void, the courts will quash them both in civil and criminal cases. For example, when the array is clearly irregular, as if the jurors have been selected by persons not authorized by law, it will be quashed. The ground for the exercise of such a power is to clear the record of irregular, void, or defective proceedings, and the remedy appears to be applicable to such proceedings alone. *Crawford v. Stewart*, 38 Pa. St. 36, citing 3 *Bouvier's Insts.* n. 3342, and other authorities.

Quash and Dismiss Distinguished.—

In *Bosley v. Bruner*, 24 Miss. 457, plaintiff sued the defendants as sureties on the bond of one Elizabeth Newsom. The condition to the bond was as follows: "Now if the said Elizabeth Newsom shall prosecute her writ of error *coram nobis* aforesaid to effect, and

shall pay the said judgment, damages, interest and costs, in case said writ of error *coram nobis* shall be dismissed . . . then this obligation to be void. The court by Yerger, J., said: "The question arises, to what extent have the conditions been broken, and how far can a recovery be had against the defendants. They were only liable to pay the original judgment, etc., of *Bosley v. Newsom*, in the event the writ of error was dismissed. By the special verdict it appears that the writ of error was 'quashed' not 'dismissed.' Is there any difference between 'quashing' and 'dismissing' a writ of error? We incline to the opinion that there is. The term 'quash,' as applied to writs of error or other writs, is predicated of some defect in the writ itself, or in the form of the writ, which defect does not reach to the merits of the case. (*Tidd's Pr.* 161, 1163). The usual practice in this State has been, as far as we have been able to ascertain it, whenever a writ is 'quashed' for mere formal exceptions, to grant a party a new writ upon his original plaint. The term 'dismiss' was not originally applied to common law proceedings, but seems to have been borrowed from proceedings in the court of chancery, where in practice the term is applied to the removal of a cause out of court, without any other hearing (*Bouvier's L. Dict.*). The term when used is applied to the removal or disposal of the cause itself, and not to the mere annulment of the writ. Such we conceive to have been the sense in which the parties to this bond used the word 'dismissal.' And in our opinion, the condition of the bond to pay the judgment, etc., if the writ of error should be 'dismissed,' has not been broken by a refusal to pay on the judgment of the court 'quashing' the writ."

3. *Bouvier's L. Dict.*; *People v. Bradley*, 60 Ill. 402.

QUASI CRIMES.—See note 1. (See also PENALTIES, vol. 18, p. 269.)

QUASI DEPOSIT.—See DEPOSIT, vol. 5, p. 571.

QUASI DERELICT.—See note 2.

QUASI PUBLIC RECORDS.—See RECORDS.

QUAY—(See also WHARF).—A wharf at which to load or land goods.³

QUESTION.—See note 4.

1. The constitution of *Illinois* provides that the criminal court of Cook County shall have the jurisdiction of a circuit court in all cases of a criminal and *quasi* criminal nature, arising in the County of Cook. Upon the question, what constitutes a *quasi* crime, the court in *Wiggins v. Chicago*, 68 Ill. 375, by Walker, J., said: "Wharton, in his Law Lexicon, defines *quasi* crime to be the act of doing damage or evil involuntarily, but this cannot be the sense in which the framers of our constitution intended to use the term. When the entire section is considered, in the light of our jurisprudence, we must conclude that it was intended to embrace all offenses not crimes or misdemeanors, but that are in the nature of crimes, a class of offenses against the public which have not been declared crimes, but wrongs against the general or local public, which it is proper should be repressed or punished by forfeitures and penalties. This would embrace all *quasi* actions and forfeitures imposed for the neglect or violation of a public duty." See also *State v. Lee*, 29 Minn. 452.

Prosecutions for *bastardy*, though civil proceedings, are often termed *quasi* criminal proceedings, and would fall within the above definition. *State v. Snure*, 29 Minn. 132; *Wiggins v. Chicago*, 68 Ill. 375; *BASTARDY*, vol. 2, p. 144.

2. *Quasi Derelict.*—A case of "*quasi derelict*" occurs when the vessel is not abandoned, but those on board are physically and mentally incapable of doing anything for their safety. *Sturtevant v. The George Nicholas*, 1 Newb. Adm. 452.

See also, for a general treatment of "goods derelict at sea," *SALVAGE*.

3. *Bouv. L. Dict.*

In *Mayor etc. of New Orleans v. U. S.*, 10 Pet. (U. S.) 715; the vacant space in contest had been dedicated by the Western Company to public use, so

far as a dedication was shown by the plan of the city and the indorsement of the word "quay" upon it. The court by M'Lean, J., said: "In the agreed facts a quay is admitted to be a vacant space between the first row of buildings and the water's edge, and it is used for the reception of goods and merchandise imported or to be exported. The term is well understood in all commercial countries; and whilst there may be some difference of opinion as to its definition, there can be little or none in regard to the probable and commercial signification of it. It designates a space of ground appropriated to the public use; such use as the convenience of commerce requires."

4. *Question.*—The Compiled Laws of *Michigan*, § 5209, provide that when a probate judge is interested in any question to be decided by the court, he shall be deemed incapacitated for acting in the decision of that question. In *McFarlane v. Clarke*, 39 Mich. 45, a will was presented for allowance in a probate court, the judge of which was a legatee under the will. The probate judge made an order assigning a date for a hearing thereon, and requiring notice thereof to be given by publication in a daily paper for three successive weeks previous to said day of hearing.

The court by Cooley, J., said: "Neither, when the order for notice was made by him was there any question to be decided by the judge in which he was interested. A question implies something in controversy or which may be the subject of controversy; but this order was the determination of no question; it was only preliminary to the making of questions. It was in no proper sense judicial action at all." See generally *JUDGE*, vol. 12, p. 52.

Leading Question.—See *EVIDENCE*, vol. 7, p. 108. *WITNESSES*.

Reasonable Question.—See *REASONABLE*.

QUESTIONS OF LAW AND FACT—(See CRIMINAL PROCEDURE, vol. 4, p. 729; INSTRUCTIONS, vol. 11, p. 236; JUDGE, vol. 12, p. 2; JURY AND JURY TRIAL, vol. 12, p. 318; TRIAL; VERDICT).

- I. Questions of Law, 598.
 1. *Pure Questions of Law for the Judge*, 598.
 2. *Jury as Judges of the Law*, 598.
 3. *Arguing to the Jury Upon the Law*, 620.
- II. Questions of Fact, 625.
 1. *Pure Questions of Fact for the Jury*, 625.
 2. *Power of Judge to Decide Certain Questions of Fact*, 625.
 - a. *Preliminary Questions Touching Admissibility of Evidence*, 625.
 - b. *Other Matters of Fact*, 632.
 - c. *Judge Charging Jury as to Facts*, 633.
- III. Mixed Questions of Law and Fact, 633.
- IV. Various Classes of Questions, 634.
 1. *Existence*, 634.
 - a. *Of Facts*, 634. [635.
 - b. *Of Laws and Ordinances*,
 - c. *Of Foreign Laws*, 635.
 - d. *Of Customs*, 635.
 - e. *Of Contracts*, 635. [635.
 - (1) *Express Contracts*,
 - (a) *Date*, 636.
 - (b) *Consideration*, 637.
 - (c) *Signature*, 637.
 - (d) *Seal*, 637.
 - (e) *Delivery*, 637.
 - (f) *Acceptance*, 639.
 - (2) *Implied Contracts*, 639.
 2. *Constitutionality, Legality, Validity*, 639.
 3. *Reasonableness*, 640.
 - a. *Reasonable Time*, 640.
 - b. *Reasonable Doubt*, 645.
 - c. *Other Cases Involving the Question of Reasonableness*, 645.
 4. *Interpretation and Construction*, 646.
 - a. *Written Language*, 646.
 - b. *Spoken Language*, 656.
 5. *Intent*, 657.
 6. *Duress*, 658.
 7. *Usury*, 658.
 8. *Other Questions*, 639.

I. QUESTIONS OF LAW—1. **Pure Questions of Law for the Judge.**—If the facts of a case are admitted, as, for example, by demurrer, or if they are determined in a special verdict, there is said to arise a pure question of law, which in all instances is for the decision of the court. As the law only comes into operation when facts exist to which it can apply, the question will be: "Such and such facts being given, what is the law that governs them?" The answer to this question, according to the better opinion, falls in all cases, both civil and criminal, within the province of the court.¹

2. **Jury as Judges of the Law.**—It is generally admitted that in civil cases, the jury are in no sense judges of the law, but must take the law from the court.² The question whether in criminal cases the jury are judges of the law, has been much discussed, and eminent authorities may be brought forward on both sides.³ The

1. See generally the next subdivision.

2. 1 Thomp. Tr., § 941; 2 Thomp. Tr., § 2132; *Levi v. Milne*, 4 Bing. 195, per Best, C. J.; 13 E. C. L. 396; *Merrill v. Nary*, 10 Allen (Mass.) 416, per Bigelow, C. J.; *St. Louis Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514; *State v. Croteau*, 23 Vt. 14. *Contra*, *Baylis v. Lawrence*, 11 A. & E.

920; 39 E. C. L. 270; *Georgia v. Brailsford*, 3 Dall. (U. S.) 1 (but see the comment on this case in U. S. v. Morris, 1 Curt. (U. S.) 23); *U. S. v. Wilson*, Baldw. (U. S.) 78 (but see *United States v. Shive*, Baldw. (U. S.) 510, for an opposing view); *Coffin v. Coffin*, 4 Mass. 25 (slander case).

3. For instance, in opposition to the doctrine that juries are judges of the

point has arisen most frequently in prosecutions for criminal libel, and in *England*, towards the close of the eighteenth century, the question was agitated with great vehemence and ability.¹ And in

law, Chief Justice Vaughan, in *Bushell's Case*, *Vaugh.* 135, 143; Lord Hardwicke in *Rex v. People, Lee temp. Hard.* 28; 1 *Jur.* 942; Lord Mansfield, in *Rex v. Dean of St. Asaph*, 3 *T. R.* 428, note, and in *Rex v. Woodfall*, 5 *Burr.* 2661; Lord Kenyon, in *Rex v. Withers*, 3 *T. R.* 428; Parke, B., in *Parmiter v. Coupland*, 6 *M. & W.* 105; Best, C. J., in *Levi v. Milne*, 12 *Moo. C. P.* 418; 4 *Bing.* 195; 13 *E. C. L.* 396; and in *Rex v. Burdett*, 4 *B. & Ald.* 95; 6 *E. C. L.* 404; Story, J., in *U. S. v. Battiste*, 2 *Sumn. (U. S.)* 240, 243; Curtis, J., in *U. S. v. Morris*, 1 *Curt. (U. S.)* 23; Holman, J., in *Townsend v. State*, 2 *Blackf. (Ind.)* 151; Shaw, C. J., in *Com. v. Porter*, 10 *Met. (Mass.)* 263; and in *Com. v. Anthes*, 5 *Gray (Mass.)* 185; Campbell, J., in *Hamilton v. People*, 29 *Mich.* 173; Parker, C. J., and Gilchrist, J., in *Pierce v. State*, 13 *N. H.* 536; Lewis, C. J., and Livingston, J., in *People v. Croswell*, 3 *Johns. Cas. (N. Y.)* 337, 394; Addison, P., in *Pennsylvania v. Bell*, *Add. (Pa.)* 156; and in *Pennsylvania v. McFall*, *Add. (Pa.)* 255; Bennett, J., dissenting, in *State v. Croteau*, 23 *Vt.* 14, 48; and see the view of Samuel Chase, 1 *Chase's Trial* 34.

Contra, in favor of the doctrine, Jay, C. J., in *Georgia v. Brailsford*, 3 *Dall. (U. S.)* 1; Baldwin, J., in *U. S. v. Wilson*, *Baldw. (U. S.)* 99 (but see *U. S. v. Shive*, *Baldw. (U. S.)* 510). Parsons, C. J., in *Coffin v. Coffin*, 4 *Mass.* 25; Putnam, J., in *Com. v. Knapp*, 10 *Pick. (Mass.)* 477, 496; Kent, J. (afterwards Chancellor), and Thompson, J., in *People v. Croswell*, 3 *Johns. Cas. (N. Y.)* 337; Sharswood, C. J., in *Kane v. Com.*, 89 *Pa. St.* 522; 33 *Am. Rep.* 787; and Hall, J., in *State v. Croteau*, 23 *Vt.* 14.

1. The first case in which this was made a subject of much controversy was in 1770, in *Rex v. Woodfall*, 5 *Burr.* 2661. This was an information for seditious libel against the publisher, Woodfall, for the publication of one of the Junius letters. Lord Mansfield instructed the jury that whether the paper was in law a libel was a question of law upon the face of the record, and that all they had to consider was whether the defendant had published

the paper set out in the information, and whether the innuendoes, imputing a particular meaning to particular words, were true. This charge obviously required the jury, if satisfied that the publication was made and had the meaning attributed to it, to render a verdict of guilty, notwithstanding they might believe the criminal element of malice to be wanting. The jury returned a verdict of "guilty of printing and publishing only," which was afterwards set aside as ambiguous, and a new trial ordered.

In *Miller's Case*, 20 *How. St. Tr.* 870, 891, tried in the same year, Lord Mansfield charged the jury similarly, that a verdict of guilty or of not guilty could establish finally nothing save the fact of publication or non-publication of the libel.

But the great struggle on this subject took place in *Rex v. Dean of St. Asaph*, 3 *T. R.* 428, note. This case was tried before Buller, J., who, in summing up, charged that there were two facts for the consideration of the jury, viz., the fact of publication and the truth of the innuendoes. It came before the full court, and was argued in a masterly fashion for the defendant by Lord Evershine, in one of his most celebrated speeches. The opinion of the court was given by Lord Mansfield, who again affirmed the correctness of the ruling, and upon the same grounds, and cited many authorities to show that this had long been the established practice.

In *Rex v. Withers*, 3 *T. R.* 428, Lord Kenyon, a few years later, instructed the jury in the same terms.

These views of the law were assailed as not only destructive of the liberty of the press, but as taking from the jury the right to cover by their verdict all the matters charged and constituting the alleged offence. In the House of Lords they were attacked by Lord Chatham; and Lord Camden, the Chief Justice of the Common Pleas, in direct contradiction to Lord Mansfield, declared his instructions not to be the law of *England*. Cooley's *Const. Lim.* (6th ed.), 565-6. Nevertheless the judges generally followed the view of Lord Mansfield, and it continued to be enforced, so far as juries would suffer

several cases in the *United States* the question has come up and has been argued with conspicuous learning.¹

themselves to be controlled by the instructions of the court, until the passage, in 1792, of the celebrated statute (32 Geo. III, c. 60), known as Fox's Libel Act. This was entitled "An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel," and it declared and enacted that on every such trial the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue upon the indictment or information, and shall not be required or directed by the court or judge to find the defendant guilty, merely on proof of the publication by the defendant of the paper charged to be a libel, and of the sense ascribed to the same in the indictment or information; that on every such trial the court or judge shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue in like manner as in other criminal cases; that nothing in the act shall be construed to prevent the jury from finding a special verdict at their discretion as in other criminal cases; and that in case the jury shall find the defendant guilty, it shall be lawful for him to move in arrest of judgment on such ground and in such manner as he might have done before the passing of the act.

But the controversy did not cease with this enactment. The friends of the statute claimed that it made juries the rightful judges of the law as well as of the facts in libel cases; others maintained that it only placed these cases on the same footing as other criminal prosecutions, leaving it the duty of the jury to accept and follow the instructions of the judge upon the criminal character of the publication. See on the general subject Cooley's Const. Lim. (6th ed.) 566; Forsyth's Trial by Jury, c. 12; May's Const. Hist. Engl. c. 9; Campbell's Lives of the Chancellors, c. 178; Introd. to Speeches of Ld. Erskine, ed. by J. L. High; Com. v. Anthes, 5 Gray (Mass.) 185; State v. Croteau, 23 Vt. 14.

In *State v. Croteau*, 23 Vt. 14, the court by Bennett, J., said: "The discussions that have at different times taken place in libel prosecutions are calculated to mislead on the question now before us, without a careful attention to the points in controversy. It was always conceded that the fact of

publication and the meaning were purely matter of fact and exclusively for the jury; but when we come to the question of the tendency of the publication, and the intention of the publisher, a remarkable doubt has prevailed whether they were purely questions of law, and to be abstracted from the jury on the trial, or whether they were mixed questions of law and fact, and to be submitted to the jury with proper directions from the court, like any other mixed questions of law and fact. The essence of a libel consists in its tendency to produce mischief; and it has been insisted that the intrinsic illegality of the publication is not a mere question of law, since it consists in its tendency; nor is it claimed to be a mere question of fact, but it has been sometimes treated as an ambiguous question in its nature, depending for its solution upon a sound judgment and discretion, applied to the alleged libel, and the state and circumstances of society, and not purely on a profound knowledge of the law on the one hand, or the aid of evidence on the other."

But the real question here seems to have been, not whether the jury were judges of the law or not, but whether the question of libel was a question of law for the court, or a question of fact for the jury. Com. v. Anthes, 5 Gray (Mass.) 185, 212, 219; U. S. v. Morris, 1 Curt. (U. S.) 23.

And see 3 Wynne's Eunomus, 237-8, where the author says: "The least reflection will be sufficient to show that the power and province of juries is the same in case of libels as in every other criminal case."

1. In the *United States* two trials occurred at an early date, involving the functions of the jury in libel prosecutions.

Callender's case, Whart. St. Tr. 688, was an indictment in the Circuit Court of the United States, under the so-called Sedition Law, for a seditious libel upon John Adams, President of the United States. The defence insisted that this law was unconstitutional, and proposed to argue that question to the jury; but Judge Samuel Chase, of the United States Supreme Court, declared that the question of the constitutionality of the statute was a judicial question, and could only be passed upon by the court.

Starting with the maxim that juries are judges of the law in criminal cases, the discussion seems to have been directed less to the soundness of the maxim in its general terms, than to certain aspects in which it might be regarded as true. In the minds of those who have debated the proposition, two questions seem to have existed: "Have juries the right to judge the law?" and, "Have they the power (though not the right) to judge the law?" And as the point at issue has not always been clearly distinguished, there is perhaps less difference in effect between the opposite views taken of the general maxim than the advocates on both sides have supposed.

In regard to the former question: "Have juries the right (which includes here the power) to judge the law in criminal cases?" few have maintained the affirmative; and the position of those who have, is thought to be wholly untenable. Both from principle and from the weight of authority, it is believed to be deducible that in criminal as well as in civil cases, juries have not the right in any sense to pass upon the law. It is true that juries have the right in criminal¹ as in civil² cases to render at their option a

The law, however, under which this prosecution was instituted, expressly provided that the jury should have the right to determine the law and the fact under the direction of the court, as in other cases. The conduct of Judge Chase in this trial was afterwards made one of the grounds for his impeachment before the Senate of the United States.

In *People v. Croswell*, 3 Johns. Cas. (N. Y.) 337, which was an indictment for a libel upon President Jefferson, the court were equally divided in opinion whether in libel cases the jury were to decide the law as well as the fact. Kent and Thompson, J. J., maintained the affirmative, while Lewis, C. J., and Livingston, J., took the opposite view.

At present, however, in many of the States, the question is set at rest by constitutional provisions, that in prosecutions for libel, the jury shall have the right to determine the law and the fact. In several it is added, "as in other cases," or "under the direction of the court," or "under the direction of the court as in other cases." See *infra*, p. 616, note 3. As to the effect of such provisions, see Cooley's Const. Lim. (6th ed.) 567, where the author says: "It would seem that a constitutional provision which allows the jury to determine the law, refers the questions of law to them for their rightful decision. Wherever such provisions exist, the jury, we think, are the judges of the law; and the argument

of counsel upon it is rightfully addressed to both the court and the jury, nor can the distinction be maintained which was taken by Judge Chase, and which forbids the jury considering questions affecting the constitutional validity of statutes. When the question before them is, what is the law of the case, the highest and paramount law of the case cannot be shut from view. Nevertheless, we conceive it to be proper, and indeed the duty of the judge, to instruct the jury upon the law in these cases, and it is to be expected that they will generally adopt and follow his opinion. Where, however, the constitution provides that they shall be judges of the law 'as in other cases,' or may determine the law and the fact 'under the direction of the court,' we must perhaps conclude that the intention has been simply to put libel cases on the same footing with any other criminal prosecutions, and that the jury will be expected to receive the law from the court."

1. 4 Bl. Com. 361; 4 Minor's Inst. (2d ed.) *751; Bushell's Case, Vaugh. 135; U. S. v. Taylor, 11 Fed. Rep. 470; *People v. Antonio*, 27 Cal. 404; *Com. v. Porter*, 10 Met. (Mass.) 285; *Pierce v. State*, 13 N. H. 563.

2. 1 Thomp. Tr., § 2137; Cooley's Const. Lim. (6th ed.) 393; *Mayor, etc., of Devizes v. Clark*, 3 A. & E. 506; 30 E. C. L. 135; *Pierce v. State*, 13 N. H. 563; *Woodward v. Woodson*, 6

general verdict,¹ and thus apparently to resolve all questions, as well

Munf. (Va.) 227. And compare *Mosley v. Walker*, 7 B. & C. 53, 56; 14 E. C. L. 13; *Macclesfield v. Pedley*, 4 B. & Ad. 403.

1. That there is in principle no difference between the functions of the jury in finding a general verdict and when they find only the facts in a special verdict, is shown in *Com. v. Anthes*, 5 Gray (Mass.) 185, 199-201, where the court by Shaw, C. J., said: "In criminal cases, special pleading, technically admissible, has never been practised, and all trials, therefore, in which both law and fact are controverted, are had upon a general plea of 'not guilty,'" and the result is a conviction, if both the law and the fact are found against the accused, or an acquittal, if either is found in his favor. Both must be tried, that is, submitted fully and freely to the consideration of the appropriate tribunal appointed by law, to exercise its reason and judgment without control or restraint; but the result is one single response to both questions—"Is there such a law?"—"Has the defendant done the acts charged?"—and that response is expressed, and entered and placed on the record in due form, 'guilty' or 'not guilty.' We are then to look at the means by which these two questions are resolved by a single answer; through what intellectual processes of reason and judgment the elements of these two distinct questions must pass, in order to reach this one required result. Assuming it as the theory and fundamental principle of the common law, that the judge is to adjudicate the law, and the jury the fact, it follows that the mind of the judge should act freely and fully, and within the scope of its proper authority and province, finally and exclusively decide upon the question of law, and that the mind of the jury should act freely and fully, and within the scope of its authority and duty, definitely and exclusively, in deciding the truth of the fact; and this is to be done in one of two modes. By the one, the jury, in the exercise of their exclusive right, find the facts in detail, which can only be done in the form of a special verdict; and then the court in the exercise of their judgment, determine whether in law, under all the aspects in which these facts can be placed, they do bring

the accused within the penal provisions, and the result is declared by the court, 'guilty' or 'not guilty.' But how is it if the plain, intelligible, and usual course is adopted by the return of a general verdict? Do not the same ingredients, in another form, enter into and compose the elements from which the same result is drawn? The judge directs the jury in all matters of law, at each step of the trial, as questions arise, and ultimately in its application to the facts of the case, if proved by the evidence submitted to them. As the judge cannot foresee how the jury will find the facts, until they have retired to consider of their verdict, these directions are of necessity hypothetical; if they find certain facts proved, he directs them that the law affixes to them a certain character, and so upon each material point of law, and then if they find so, the accused is guilty, if otherwise, not guilty, and that they are to return their verdict accordingly. The law presumes that every man will do his duty, more especially every man invested with a high power in the administration of justice; it will presume that both judges and jurors have done their duty. If they have, and it is within the province of the jury to adjudicate on the question of fact, and of the judge to adjudicate on the question of law, the general verdict of 'guilty' or 'not guilty,' is as full and complete an answer to the compound question of law and fact, each adjudged by its appropriate organ, as the like conviction pronounced by the judge after a special verdict. As the law presumes that each has done its appropriate duty, in case of a special verdict, the court cannot question the truth of any fact expressly found by the jury, or assume the existence and truth of any fact not so found, or draw any inferences of fact not drawn by the jury and expressed in the verdict. By parity of reasoning, the law presumes, in case of a general verdict, that the jury have understood and conformed to the directions of the judge in matters of law, and so, as before said, the general verdict in the latter is as full a response to the compound question. The difference is, that, in the former case, of a general verdict, the law, coming authoritatively from the rightful source, is first stated to the

of law as of fact, that may be involved in the case.¹ But it is

jury for their government, is assumed to have its legitimate and proper effect, is by them combined with their own conclusive findings in matters of fact on the evidence, and so the combined result is effectually embodied in their verdict of conviction or acquittal."

1. See *Montee v. Com.*, 3 J. J. Marsh. (Ky.) 149; *Com. v. Knapp*, 10 Pick. (Mass.) 477; *Com. v. Porter*, 10 Met. (Mass.) 263; *Com. v. Anthes*, 5 Gray (Mass.) 185; *State v. Allen*, 1 McCord (S. Car.) 525.

In *Com. v. Anthes*, 5 Gray (Mass.) 185, the court by Shaw, C. J., said: "The result of these several rules and principles is, that, in practice, the verdict of a jury, both upon the law and fact, is conclusive; because, from the nature of the proceeding, there is no judicial power by which the conclusion of law thus brought upon the record by that verdict, can be reversed, set aside, or inquired into. A general verdict, either of conviction or acquittal, does embody and declare the result of both the law and the fact, and there is no mode of separating them on the record so as to ascertain whether the jury passed their judgment on the law, or only on the evidence. The law authorized them to adjudicate definitively on the evidence; the law presumes that they acted upon correct rules of law given them by the judge; the verdict, therefore, stands conclusive and unquestionable, in point both of law and fact. In a certain limited sense, therefore, it may be said that the jury have a power and a legal right to pass upon both the law and the fact. And this is sufficient to account for many and most of the *dicta* in which the proposition is stated. But it would be more accurate to state, that it is the right of the jury to return a general verdict; this draws after it, as a necessary consequence, that they incidentally pass upon the law. But here again is the question, what is intended by 'passing upon the law?' I think it is by embracing it in their verdict, and thus bringing it upon the record, with their finding of the facts. But does it follow that they may rightfully, and by authority of the common law, by which all are conscientiously bound to govern their conduct, proceed upon the same grounds and principles in the one case as the other?

What the jury have a right to do, and what are the grounds and principles upon which they are in duty and conscience bound to act and govern themselves in the exercise of that right, are two very distinct questions. The latter is the one we have to deal with. Suppose they have a right to find a general verdict, and by that verdict to conclude the prosecutor in the matter of law, still it is an open and very different question, whether, in making up that verdict and thereby embracing the law, they have the same right to exercise their own reason and judgment, against the statement of the law by the judge, to adjudicate on the law, as unquestionably they have on the fact. The affirmative of this proposition is maintained by the defendant in this case, and by others in many of the cases before us. If I am right in the assumption that the judge is to adjudicate the law, and the jury the fact only, it furnishes the answer to this question, to what extent the jury adjudicate the law; and it is, that they receive authoritative directions from the court, and act in conformity with them, though by their verdict they thus embrace the law with the fact, which they may rightfully adjudicate."

In *Com. v. Porter*, 10 Met. (Mass.) 263, 282, the court by Shaw, C. J., said: "In every charge of crime, there must be a question of law and a question of fact, to-wit: Is there any such rule of law as that on which the indictment is founded? Has the defendant done the acts charged in the indictment, which amount to a violation of such rule of law, and constitute the offence charged? The decision of both of these is necessarily involved in a verdict of 'guilty' or 'not guilty.' The former affirms that there is such a law, and that the accused has violated it; the latter affirms, either that there is no such rule of law, or, if there is, that the accused has not done any acts which amount to a violation of it.

"How, then, are these two questions to be decided and combined into one, if one is to be referred exclusively to the court, and the other to the jury? The jury may, in any case, if they think fit, find a special verdict; that is, they may find and report, in the form of a verdict, all the material facts, which are proved to their satisfaction, and call

not true that, in making up their verdict, they have a right to exercise their own reason and judgment, against the statement of, the law by the judge, and to adjudicate upon the legal questions involved.¹ The considerations that appear to prove this proposition may be briefly outlined.

To attain an understanding and mastery of the law in its fundamental principles, and in its comprehensive details, requires a long course of preparatory training, of profound study, and of active practice,² a preparation which is essential in order to decide matters of law, but which is not to be expected, nor perhaps desired,³ in juries. Questions of law often involve the utmost difficulty and delicacy, turning upon the abstruse but most necessary duty of judges, the interpretation of statutes. Connected with this are inquiries touching the ordinary and technical meaning of the language used, the preamble and other provisions of the same statute, all other statutes and parts of statutes on the same subject, the previous state of the common law, and the mischief

upon the court to decide whether, in point of law, the accused is guilty or not guilty upon the facts thus found. But this is the privilege of the jury, which they may exercise or not, and in no case are they bound to find a special verdict. The question then recurs, in case the jury return a general verdict, how is the law to be decided by the court, when, as we have seen, it is to be declared by the jury, as involved in the general verdict? As both questions are involved in the verdict, the appearance on the record is that both are decided by the jury, because both are declared by them. But this is in appearance only, and can scarcely mislead those who are acquainted with the practice of courts of justice in criminal trials, though it has sometimes led to the argument, that because they must, in a general verdict, declare the rule of law on which it rests, they have a power to pass upon it and therefore a rightful authority to decide it. But we think the course of proceeding, in such case, is very clear, is quite consistent with the principle before stated, and is constantly practised upon in such trials. It is the only and proper course which can be adopted, in order that the law may be carried into effect, in its spirit and integrity. That course is, for the judge to direct the jury hypothetically, to declare what the law is, with its exceptions and qualifications, to explain it, and to state the reasons and grounds of it, if, in his judgment, such explanation is necessary to make it clearly

intelligible to the minds of men of good judgment and common experience, but without legal knowledge and skill; then to state to the jury, that if certain facts necessary to constitute the offence, and which there is evidence tending to prove, are proved to their satisfaction, they are to find the defendant guilty; but if certain material facts, which there is some evidence tending to prove, are not proved to their satisfaction, they are to find the defendant not guilty."

1. *Com. v. Anthes*, 5 Gray (Mass.) 208, quoted in preceding note.

2. *Com. v. Anthes*, 5 Gray (Mass.) 235. But compare *Com. v. Anthes*, 5 Gray (Mass.) 284; *State v. Croteau*, 23 Vt. 44.

3. See *Harris' Before and at Trial* (Am. ed.), c. 26, and note; *Hamilton v. People*, 29 Mich. 191, where the court by Campbell, J., said: "It may fairly be regarded as one of the best features of the jury system that the law, though interpreted by professional interpreters, can only be applied to facts through the understandings of ordinary men of average capacity, and usually including in their number some very simple minds. By this process it is divested of all that would not be readily comprehended by all men. In this way over nicety and technicality becomes less dangerous, if not absolutely harmless; and an apparent deviation in the verdict from the rules laid down, is often no departure from the rules as supposed to be laid down."

intended to be suppressed,—all requisite in order to ascertain the true intent and meaning of the legislature in the specific enactment in question.¹ That juries possess neither the knowledge nor the training necessary for such duties, needs hardly to be said; and the argument becomes even stronger when it is considered that if juries are held to be judges of the law, they are, since the constitution is the law, judges also of the constitutionality of legislative acts.² This is a duty requiring the most accurate and complete knowledge of both the written and the unwritten law, and an equally thorough and practical knowledge of constitutional law, as derived from the statutes and constitutions of the United States and of the State in which the case arises, from the adjudications thereon, ancient and modern, and from the books of acknowledged authority in which this branch of the law is treated. Questions of constitutional law have taxed the minds of the most eminent statesmen and jurists from the adoption of the Federal

1. *Com. v. Anthes*, 5 Gray (Mass.) 190.

2. *Cool. Const. Lim.* (6th ed.) 567; *Callender's Case*, Whart. St. Tr. 688, 710; *U. S. v. Morris*, 1 Curt. (U. S.) 23; *State v. Buckley*, 40 Conn. 246; *Lynch v. State*, 9 Ind. 541; *Com. v. Anthes*, 5 Gray (Mass.) 188; *Com. v. Kneeland*, 20 Pick. (Mass.) 227; *Pierce v. State*, 13 N. H. 536, 551, 557, 561, 570-1. *Contra*, *Franklin v. State*, 12 Md. 236, 246, 249.

In *U. S. v. Morris*, 1 Curt. (U. S.) 23, the court by Curtis, J., said: "What is here insisted on, is that every jury impaneled in every court of the United States is the rightful and final judge of the existence, construction, and effect, of every law which may be material in the trial of any criminal case; and not only this, but that every such jury may, and, if it does its duty, must, decide finally, and without any possibility of a revision, upon the constitutional power of Congress to enact every statute of the United States which on such a trial may be brought in question. So that we should have . . . a vast number of courts having final jurisdiction over the same causes, arising under the same laws; and these courts chosen by lot among us, and selected by the marshal elsewhere, out of the body of the people with no reference to their qualifications to decide questions of law; not allowed to give any reasons for their decisions; . . . not sworn to decide the law nor even to support the Constitution of the United States; and yet possessing complete authority to determine

that an act passed by the legislative department, with all the forms of legislation, is inoperative and invalid. The practical consequences of such a state of things are too serious to be lightly encountered; and, in my opinion, the Constitution did not design to create or recognize any such power."

In *Com. v. Anthes*, 5 Gray (Mass.) 188, the court by Shaw, C. J., said: "We really can perceive no ground upon which the power of the jury to decide on the question of constitutionality can be distinguished, in principle, from the power to decide on any other question of law, involved in the verdict. Many criminal prosecutions are of such a nature, that they impose a duty on some department of the judicial authority to decide, whether a particular legislative enactment be consistent with, or repugnant to, the Constitution of the Commonwealth, or of the United States, and it must be definitely adjudged, on true and just principles, by either judge or jury."

In *Pierce v. State*, 13 N. H. 570, the court by Parker, C. J., said: "Had the jury in this case been advised that the statute was unconstitutional, and the plaintiffs in error been acquitted, another jury in a subsequent case, on a similar state of the fact, and having similar advice, might, notwithstanding, rightfully convict them, having a different opinion upon the constitutional question. And it could never be settled, so far as the administration of criminal justice was concerned, whether the statute is or is not constitutional. For if a case were carried by error to

Constitution to the present time.¹ And it may well be doubted, whether there be in the jury box any such inspiration as would enable twelve men of ordinary intelligence and training, and with no knowledge of the law, to determine *per saltum* grave questions requiring for their solution profound knowledge, patient study, and time for undisturbed reflection.² It is to be considered further, that decisions on points of law constitute precedents to be followed in all subsequent cases depending on the same facts and involving the same principles. This makes it necessary, not only that all decisions on matters of law should be made in the first instance by competent tribunals, but that they should be re-examinable in a single court of last resort.³ But if juries were judges of the law, there could be no such court, and no such uniformity of interpretation as is necessary in order to make the law known and certain. The decisions upon the law by juries would vary according to the tempers and capacities, the prejudices and passions of the individual jurors.⁴ Such decisions could furnish no fixed rules for future guidance; and similar cases arising afterwards might be decided in exactly the opposite way,⁵ bringing

the Supreme Court of the United States, and that court should hold the law to be constitutional, that decision would be no more binding upon those who were rightful judges of the law, in each case, than the instructions of a judge presiding at the trial."

1. *Com. v. Anthes*, 5 Gray (Mass.) 192, 193.

2. *Pierce v. State*, 13 N. H. 553.

3. *Com. v. Anthes*, 5 Gray (Mass.) 194; *U. S. v. Morris*, 1 Curt. (U. S.) 23.

4. *U. S. v. Battiste*, 2 Sumn. (U. S.) 243; *Townsend v. State*, 2 Blackf. (Ind.) 158, 159; *Montee v. Com.*, 3 J. J. Marsh. (Ky.) 151; *Com. v. Porter*, 10 Met. (Mass.) 280; *Pennsylvania v. Bell*, Add. (Pa.) 160.

In *Townsend v. State*, 2 Blackf. (Ind.) 151, 158-9, the court by Holman, J., said: "If juries were authorized to determine matters of law, their rules of decision, and consequently the rights of individuals, would necessarily be uncertain and fluctuating. They neither have, nor are presumed to have, a competent knowledge to decide according to any settled principles; and being so frequently succeeded by each other, it would be impossible, in any future time, to establish any permanent rules of decision. If the court decide contrary to law, the decision may be corrected in an appellate tribunal, and no matter how often an erroneous decision may be made in the same case, it can be as often set right by a reversal

of the judgment. If the jury may decide the law, the court, it is true, may set aside the verdict; but as only two new trials can be granted to the same party, if three successive juries concur in an erroneous verdict, the evil is without a remedy. The most important controversies might thus be determined, contrary to the plainest principles of law, without a possibility of redress. Thus, the rights of individuals might be destroyed by the decision of men who were never presumed to know the law, and that, too, in the presence of a competent tribunal, fully aware of the injustice that was done, but without the power to prevent it. If the jury have a right to find a verdict contrary to the direction of the court, it would not only render the rules of decision uncertain, and the rights of individuals precarious, but it would also prostrate the dignity of the court; and would ultimately effect a material change, if not the destruction of this branch of the government."

In *Montee v. Com.*, 3 J. J. Marsh. (Ky.) 151, the court by Robertson, C. J., said: "If the court had no right to decide on the law, error, confusion, uncertainty, and licentiousness would characterize the criminal trials; and the safety of the accused might be as much endangered as the stability of public justice would certainly be." See to the same effect *Pennsylvania v. Bell*, Add. (Pa.) 160.

5. *Pierce v. State*, 13 N. H. 570. In

about that greatest of all evils, a *jus vagum*.¹ As juries are totally irresponsible bodies, giving no reason for their decisions, and subject neither to impeachment nor to attain², there would be no restraint upon any vagaries they might see fit to adopt; they could disregard with impunity constitutional provisions, statutes, the instructions of the court, and the plainest principles of justice. Or supposing the jury to arrive conscientiously at a view of the law different from that laid down in the instructions of the court, there would arise, if the court still retained the right to set the verdict aside, this anomaly, viz., that it would be the duty of the jury to bring in a verdict which it would be the duty of the judge immediately to annul.³ It can hardly be maintained that such a conflict of duties could arise from the consistent principles of the law.⁴

this case, the court by Parker, C. J., said: "If any further matter is necessary to show that the jury have not and ought not to possess this right, it is found . . . in the uncertainty which must attend the administration of criminal justice, under the present organization of our courts, if such a principle were admitted. If one jury may so judge, all may. The decisions of one jury furnish no rule for the action of another. This is so as a matter of fact, and would be equally so in matter of law. No person could know what the criminal law was, for one jury might lawfully convict, even the same individual, upon a similar state of the fact, and under the same statute, upon which another had acquitted him."

1. *Misera est servitus ubi jus est vagum aut incertum*. Broom's Leg. Max. (8th Am. ed.) *150; *Pierce v. State*, 13 N. H. 552.

2. *Pierce v. State*, 13 N. H. 553; *Hamilton v. People*, 29 Mich. 191. In this case, the court by Campbell, J., said: "It is necessary, for public and private safety, that the law shall be known and certain, and shall not depend on each jury that tries a cause. And the interpretation of the law can have no permanency or uniformity, and cannot become generally known, except through the action of the courts. . . . If the court is to have no voice in laying down these rules, it is obvious that there can be no security whatever, either that the innocent may not be condemned, or that society will have any defence against the guilty. A jury may disregard a statute just as freely as any other rule. A fair trial in time of excitement would be almost

impossible. All the mischief of *ex post facto* laws would be done by tribunals and authorities wholly irresponsible, and there would be no method of enforcing with effect many of our most important constitutional and legal safeguards against injustice. Parties charged with crime need the protection of the law against unjust convictions, quite as often as the public needs it against groundless acquittals. Neither can be safe without having the rules of law defined and preserved and beyond the mere discretion of any one."

3. *Pierce v. State*, 13 N. H. 569.

4. See *Duffy v. People*, 26 N. Y. 591, where the court by Selden, J., gives a summary of the arguments against the doctrine that jurors are the judges of the law, as follows:—

"1. The selection of jurors from all classes of the people whose education and business cannot, as a general rule, have qualified them to decide legal questions, renders it unreasonable as well as apparently unsafe to require them to pass upon such questions.

"2. If jurors were to determine the law, its stability would be subverted, and it would become 'as variable as the prejudices, the inclinations, and the passions of men.' Every case would be governed, not by any known or established rule, but by a rule made for the occasion. Jurors would become not only judges, but legislators as well.

"3. All questions in regard to the admission or rejection of evidence, being questions of law, are required to be decided by the court. If jurors are to decide law and fact, their jurisdiction should extend to these questions, which often control the verdict.

The above view of the question in the light of principle, is supported strongly by the fact, that, according to the better opinion, juries were not allowed at common law to decide any legal questions whatever. The maxim *ad quaestionem facti non respondent iudices, ad quaestionem legis non respondent juratores*,¹ which occurs frequently in the old books, expresses the doctrine in the form in which, according to the weight of opinion, it seems to have prevailed historically at common law. This view is supported by many of the authorities already cited, and by those in the note below.² The maxim that juries are judges of the law was, in the opinion of a learned author,³ a kind of legal fiction, introduced to secure the independence of jurors. Previously they were liable to punishment by attain, if they took upon themselves to return a general verdict that, in the opinion of the judges, was erroneous in point of law.⁴ But under the view that they were judges of the law, they could no longer be punishable, for a judge is not subject to punishment for rendering a mistaken decision.⁵ Since a leading case⁶ decided in 1670, it has been well settled that

"4. Where the jury finds the facts of a case by special verdict, if they also find a conclusion of law different from that which the law would derive from the same facts, the court disregards the conclusion, and gives judgment according to the facts found.

"5. If the jury find a verdict in a civil case against law, the court sets it aside. That the same is not done in criminal cases, is owing, I think, more to the tenderness of the common law toward persons accused of crime than to any recognized right of jurors to decide legal questions.

"6. In all cases, civil and criminal, where only legal questions are raised, as by demurrers to pleadings, demurrers to evidence, special verdicts, bills of exceptions, and motions in arrest of judgment, such questions are decided by the court and not by the jury.

"7. The fact of guilt being ascertained and declared by the jury, the court determines the punishment which the law prescribes for the offence."

And see on the other side, 8 Alb. L. J. 201-4.

1. See Broom's Leg. Max. (8th Am. ed.) 101; Best's Ev. (Am. ed.), § 82; Co. Litt. 155 b, 226 a, 295 b; 8 Co. 155 a, 9 Co. 13 a, 25 a; 11 Co. 10 b; Bishop of Meath v. Marquess of Winchester, 3 Bing. N. Cas. 217; 32 E. C. L. 90; 4 Cl. & F. 557; Bushell's Case, Vaugh. 135, 149; 6 How. St. Tr. 999; Fernie v. Young, L. R. 1 H. L. 78.

2. 3 Wynne's Eunomus, § 53; Har-

grave's note, 1 Inst. 155 b; Nalson's Collection of State Papers, 575, 582; Bushell's Case, Vaugh. 135; 6 How. St. Tr. 999; Rex v. Poole, Lee temp. Hard. 28; Rex v. Dean of St. Asaph, 3 T. R. 428, note; Rex v. Withers, 3 T. R. 428; Rex v. Woodfall, 5 Burr. 2661; Levi v. Milne, 4 Bing. 195, per Best, C. J.; 13 E. C. L. 396; 12 Moo. C. P. 418; Rex v. Burdett, 4 B. & Ald. 131, 132; 6 E. C. L. 419, 420; Parmiter v. Coupland, 6 M. & W. 108; U. S. v. Morris, 1 Curt. (U. S.) 23; Townsend v. State, 2 Blackf. (Ind.) 151, 157-8; Com. v. Porter, 10 Met. (Mass.) 263; Com. v. Anthes, 5 Gray (Mass.) 193-4, 202-6, 219; Hamilton v. People, 29 Mich. 173; Pierce v. State, 13 N. H. 536; People v. Croswell, 3 Johns. Cas. (N. Y.) 337, per Lewis, C. J.; State v. Allen, 1 McCord (S. Car.) 523; State v. Croteau, 23 Vt. 14, per Bennett, J.

3. 2 Thomp. Tr., § 2135.

4. Co. Litt. 155 b, 228 a; 3 Bl. Com. *378; 4 Bl. Com. *361.

5. JUDGE, vol. 12, p. 32.

6. Bushell's Case, Vaugh. 135; 6 How. St. Tr. 999. This case was as follows: In 1670, William Penn and George Mead were tried before the Recorder of London under an indictment for seditiously preaching to a crowd. The jury were charged that the court was the sole judge of the question of sedition, and that all they had to do was to find whether the defendants had preached or not. As this fact was not denied, the instruction virtually di-

jurors are not subject to any penalty whatever, even for the most erroneous verdict.¹ And it would seem, in consequence, that whatever practical utility the view that jurors are judges of the law may have once possessed, has long since become obsolete.

A modified aspect in which it is sometimes said that juries are judges of the law arises out of the second question propounded above: "Have juries the power (though not the right) to judge the law in criminal cases?" It is conceded that juries may, in their discretion, render a general verdict. Does not this confer on them the power, at least, whether it be exercised well or ill, to determine not only the facts, but also the law of the case? In reply to this question, it may be said, in the negative, that the power is, in one case, subject to be annulled, viz., where, contrary to the opinion or instructions of the court upon the law, the jury return a verdict of guilty. In this instance, the verdict may be set aside, and in practice pretty certainly will be. The power to take a view of the law which is subject, if erroneous, to instant reversal, is not a power to judge the law. If it be replied that the opinion of the lower courts, which have undoubted power to judge the law, is also liable to be reversed in the appellate court, the answer is that such judgment, until reversed, is a valid and binding adjudication upon the law, so that execution, unless stayed by *super-sedeas*, may be issued upon it; while a decision of a jury which mistakes the law, being immediately swept aside, is practically a mere nullity. On the other hand, where the jury acquit the prisoner, although, in arriving at the verdict, they may have disregarded both the evidence before them, and the law as set forth by the court, the result is final. The verdict cannot, unless so authorized by statute, be set aside or reversed and the accused brought to trial again;² nor can the jury be pun-

rected that the jury find for the crown. But they acquitted the prisoners, and the court, considering it as a contempt, imposed a fine of forty marks on each of the jurors. One of them, Edward Bushell, refused to pay the fine, and on being arrested therefor, sued out a writ of *habeas corpus* before Chief Justice Vaughan, of the Court of Common Pleas, who, without hesitation, discharged him from the imprisonment on the ground that it was illegal and arbitrary.

1. See *supra*, p. 607, note 2.

2. 4 Bl. Com. 361-2; 1 Chit. Cr. L. (5th Am. ed.) §657; 1 Bishop's Cr. L. (7th ed.), §992; 1 Bishop's Cr. Pro. (3d ed.), §1272; Cooley's Const. Lim. (6th ed.) 394; Rex v. Reynell, 6 East 315; 2 J. P. Smith 406; Rex v. Bear, 1 Salk. 646; Rex v. Challicombe, 6 Jur. 481; Rex v. Praed, 4 Burr. 2257; Anonymous, Lofft 451; Rex v. Read, 1

Lev. 9; Rex v. Jackson, 1 Lev. 124; Rex v. Cohen, 1 Stark. 516; 2 E. C. L. 197; Rex v. Silvertown, 1 Wils. 298; Rex v. Merchant, 2 Keb. 409; Rex v. Fenwick, 1 Sid. 153; Rex v. Lea, 2 M. C. C. 9; Rex v. Mann, 4 M. & S. 337; Rex v. Burbon, 5 M. & S. 392; Rex v. Brice, 1 Chit. 352; 18 E. C. L. 105; Rex v. Furser, Say. 90; Rex v. Wandsworth, 1 B. & Ald. 63; 2 Chit. 282; 18 E. C. L. 337; Rex v. Chigwell, 1 B. & Ald. 67; Rex v. Sutton, 5 B. & Ad. 52; 2 N. & M. 57; 27 E. C. L. 31; Rex v. Jones, 8 Mod. 201; Rex v. Davis, 12 Mod. 9; 1 Show. 336; Rex v. Russell, 3 E. & B. 942; 77 E. C. L. 942; 26 Eng. L. & Eq. 230; U. S. v. Gilbert, 2 Sumn. (U. S.) 19; Nonemaker v. State, 34 Ala. 211; State v. Hicklin, 5 Ark. 190; State v. Hand, 6 Ark. 169; State v. Denton, 6 Ark. 259; Jones v. State, 15 Ark. 261; State v. Goff, 20 Ark. 289; People v. Webb, 38 Cal. 467; People v. Bange-

ished;¹ nor, in fact, is any one at liberty to allege or assume that they have disregarded the law, because, since they give no reason for their verdict, the precise grounds for it can never be legally known, and it is always presumable that it was given in favor of the accused because the evidence was insufficient.²

Here, then, the decision of the jury upon the law seems to be final.³ But this power of the jury is in no proper sense a power to decide legal questions. It is, as a learned writer well expresses it, a power to set aside the law, and not a power to judge the

neur, 40 Cal. 613; Hannaball v. Spalding, 1 Root (Conn.) 86; State v. Brown, 16 Conn. 54; State v. Jones, 7 Ga. 422; State v. Lavinia, 25 Ga. 311; Black v. State, 36 Ga. 447; People v. Dill, 2 Ill. 257; People v. Royal, 2 Ill. 557; Martin v. People, 13 Ill. 341; State v. Davis, 4 Blackf. (Ind.) 345; State v. Dark, 8 Blackf. (Ind.) 526; State v. Johnson, 8 Blackf. (Ind.) 533; State v. Daily, 6 Ind. 9; State v. Douglass, 1 Greene (Iowa) 550; State v. Johnson, 2 Iowa 549; State v. Certain Intoxicating Liquors, 40 Iowa 95; State v. Kinney, 44 Iowa 444; State v. Carmichael, 3 Kan. 102; Olathe v. Adams, 15 Kan. 391; Oswego v. Belt, 16 Kan. 480; State v. Crosby, 17 Kan. 396; State v. Phillips, 33 Kan. 100; Com. v. Sanford, 5 Litt. (Ky.) 289; Com. v. Jefferson, 6 B. Mon. (Ky.) 313; Com. v. Thompson, 13 B. Mon. (Ky.) 159; Com. v. Van Tuyl, 1 Metc. (Ky.) 1; Com. v. Anthony, 2 Metc. (Ky.) 399; Terrell v. Com., 13 Bush (Ky.) 246; State v. Upton, 5 La. Ann. 438; State v. Rentiford, 14 La. Ann. 211; State v. Cason, 20 La. Ann. 48; Com. v. Cummings, 3 Cush. (Mass.) 212; Com. v. Anthes, 5 Gray (Mass.) 185; State v. McGrorty, 2 Minn. 224; State v. Anderson, 3 Smed. & M. (Miss.) 751; State v. Heatherly, 4 Mo. 478; State v. Spear, 6 Mo. 644; State v. Carroll, 7 Mo. 286; State v. Rowe, 22 Mo. 328; State v. De Hart, 7 N. J. L. 172; State v. Kanouse, 20 N. J. L. 115; People v. Mather, 4 Wend. (N. Y.) 229; 21 Am. Dec. 122; People v. Comstock, 8 Wend. (N. Y.) 549; Paige v. People, 3 Abb. App. Dec. (N. Y.) 439; People v. Corning, 2 N. Y. 9; 49 Am. Dec. 364; People v. Merrill, 14 N. Y. 78; People v. Nestle, 19 N. Y. 583; People v. Bork, 78 N. Y. 346; People v. Tarbox, 30 How. Pr. (N. Y.) 320; People v. Dempsey, 31 Hun (N. Y.) 526; 66 How. Pr. (N. Y.) 371; State v. Jones, 1 Murph. (N. Car.) 257; State v. Taylor, 1 Hawks (N. Car.) 462; State v. Martin, 3 Hawks (N. Car.) 381; State v.

Credle, 63 N. Car. 506; State v. Phillips, 66 N. Car. 646; State v. Freeman, 66 N. Car. 647; State v. West, 71 N. Car. 263; State v. Lane, 78 N. Car. 547; State v. Brown, 5 Oregon 119; State v. Lee, 10 R. 1. 494; Steel v. Roach, 1 Bay (S. Car.) 63; State v. Riely, 2 Brev. (S. Car.) 444; State v. Wright, 3 Brev. (S. Car.) 421; Treadw. Const. (S. Car.) 517; State v. McKee, 1 Bailey (S. Car.) 651; State v. Nicholas, 2 Strobb. (S. Car.) 278; State v. Reynolds, 4 Hayw. (Tenn.) 110; State v. Fields, Mart. & Y. (Tenn.) 137; State v. Norvell, 2 Yerg. (Tenn.) 24; State v. Tolls, 5 Yerg. (Tenn.) 363; State v. Solomons, 6 Yerg. (Tenn.) 360; 27 Am. Dec. 469; Slaughter v. State, 6 Humph. (Tenn.) 410; Esmon v. State, 1 Swan (Tenn.) 14; State v. Burris, 3 Tex. 118; State v. Daugherty, 5 Tex. 1; State v. Manning, 14 Tex. 402; Temple v. Com., 1 Va. Cas. 163; Com. v. Harrison, 2 Va. Cas. 202; Com. v. Scott, 10 Gratt. (Va.) 749; State v. Kittle, 2 Tyler (Vt.) 471; U. S. v. Salter, 1 Pin. (Wis.) 278; State v. Kemp, 17 Wis. 669. And see JEOPARDY, vol. 11, p. 926.

1. 4 Bl. Com. (Cooley's 3d ed.) *361, note 14; Bushell's Case, Vaugh. 135; 6 How. St. Tr. 999; Groenwelt v. Burwell, 1 Ld. Raym. 454; Com. v. Anthes, 5 Gray (Mass.) 185, 198, 209, *et seq.*

2. Cooley's Const. Lim. (6th. ed.) 394; Com. v. Anthes, 5 Gray (Mass.) 200, 201; Hamilton v. People, 29 Mich. 189, 190.

3. People v. Croswell, 3 Johns. Cas. (N. Y.) 337; Montgomery v. Ohio, 11 Ohio 424; State v. Wilkinson, 2 Vt. 480.

In *Montgomery v. Ohio*, 11 Ohio 424, the court by Birchard, J., said: "The court were asked to charge that the jury were judges of the law and facts. The court refused to instruct in this form; but said the jury had the power, and, if they chose to exert it, the right to determine all questions of law and

law.¹ And the fact, that in such a case juries can, without fear of punishment, disregard their moral duty and the obligation of their oaths, does not alter the nature of the question.²

It should be added that there is still another sense in which it is sometimes loosely said, that juries are the judges of the law, viz., in consequence of the power which they sometimes have of applying the law to the facts. As in cases where the facts are undisputed, or are found by the jury in a special verdict, the court has the duty not only of determining the law, but of applying it to the facts;³ so in the case where a mixed question

fact, so far as to acquit, and if they did so, there was no power to correct any error committed by them in such acquittal, and that they were not exclusive judges of both law and fact, as a general rule, in criminal prosecutions; for, if they found the accused guilty, and it turned out that their finding was illegal, they had no power, but the court had, to set aside their verdict and grant a new trial. In this refusal to instruct, as requested, and in the instruction given, it is alleged there was error. It does not, however, appear to us that there was anything erroneous which could prejudice the rights of the plaintiff. We are aware that in some parts of the State, an opinion prevails that in all criminal trials the jury have a right, independent of the directions of the court, to determine as well the law of a case as the facts. By the last clause of § 6 of art. 8 of the constitution of this State, it is declared that 'in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.' It would seem from this, that the framers of our bill of rights, did not imagine that juries were rightfully judges of law and fact in criminal cases, independently of the directions of courts. Their right to judge of the law, is a right to be exercised only under the direction of the court; and, if they go aside from that direction and determine the law incorrectly, they depart from their duty and commit a public wrong; and this in criminal, as well as in civil cases."

1. 2 Thomp. Tr., § 2133, where the author expresses the opinion that this power in cases of hardship to prevent the rigid application of the law, is one of the grounds for the public esteem in which jury trial has ever been held.

2. See Lord Mansfield's remarks in *Rex v. Dean of St. Asaph*, 3 T. R. 431: "Every species of criminal prose-

cution has something peculiar in the mode of procedure; therefore, general propositions, applied to all, tend only to complicate and confound the question. No deduction or conclusion can be drawn from what a jury may do from the form of the procedure, to what they ought to do upon the fundamental principles of the constitution and the reason of the thing, if they will act with integrity and a good conscience. The fundamental definition of trials by jury, depends upon an universal maxim, without an exception, *ad questionem facti*, etc. Where the question can be severed by the form of the pleadings, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the court. But where, by the form of the pleadings, the two questions are blended together and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the jury. . . . It is the duty of the judge, in all cases upon general issues, to tell the jury how to do right, though they have it in their power to do wrong."

3. 2 Thomp. Tr., §§ 1030, 2242, *et seq.*; *Porter v. Havens*, 37 Barb. (N. Y.) 343; *People v. Bennett*, 49 N. Y. 141, 142; *Powell v. Powell*, 23 Mo. App. 365; *U. S. v. Taylor*, 3 McCrary (U. S.) 585; 11 Fed. Rep. 470, 474. In this case, the court by McCrary, J., said: "It is now well settled in the Federal Courts that in civil cases, where the facts are undisputed and the case turns upon questions of law, the court may direct a verdict in accordance with its opinion of the law. . . . It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside." Although the above remark is not true of criminal cases, the statement in the text is not thereby

of law and fact is submitted to a jury under the instructions of the court, the jury, in addition to deciding the facts, have the function likewise of applying the law to the facts; and, in the latter case, it is sometimes said that this function constitutes them judges of the law.¹ But that this is erroneous may be readily shown:—

It has frequently been remarked that a legal proceeding resembles a syllogism in logic, the law as declared by the judge constituting the major premise, and the facts found by the jury forming the minor.² But, by the definition of a syllogism, where the premises are laid down, the conclusion at once follows of necessity,³—so much so, that it has been maintained by high authority that a logical reasoning is one organic whole, comprising only a single movement of the mind.⁴ This being so, where the facts and the law are ascertained, the conclusion, no matter by whom drawn, must follow with absolute certainty. The so-called application of the law to the facts, whether made by judge or jury, amounts simply to pronouncing the conclusion that must follow incontestably from a major premise of law and a minor premise of fact. Any difficulty that appears to arise in applying the law to the facts will be found, on analysis, to arise either from the law not being well settled, or the facts not being clearly ascertained. To take a familiar example,⁵ a statute⁶ makes it a felony to steal "sheep or other cattle." A man steals a cow; and the question arises, "Is he guilty under the statute or not?" It will be readily seen that the difficulty here lies in the question, "Do the words 'other cattle' in a penal statute include cows?" and that, this question being a question of law, the difficulty lies, not in the application of the law to the facts, but in the ascertainment of the law. With far greater frequency the difficulty consists in determining the facts. But it is submitted that after the facts are

affected; for in criminal cases the question is regulated by constitutional provisions, securing trial by jury in all such cases without exception, so that it cannot be waived even by the prisoner himself. 2 Thomp. Tr., § 2149; *State v. Maine*, 27 Conn. 261. And see *U. S. v. Anthony*, 11 Blatchf. (U. S.) 200, holding that even in criminal cases the court may, where the facts are undisputed, direct a verdict of guilty. And compare *Theel v. Com.* (Pa., 1888.), 12 Atl. Rep. 148.

1. *U. S. v. Morris*, 1 Curt. (U. S.) 23; *Pleasant v. State*, 13 Ark. 360; *Sweeney v. State*, 35 Ark. 585.

2. See *Com. v. Anthes*, 5 Gray (Mass.) 185, per Shaw, C. J.

3. Compare Whately's *Elements of Logic*, bk. 2, c. 3, § 1; Aristotle's *Prior Analytics*, bk. 1, c. 1; Aristotle's *Topics*,

bk. 1, c. 1; and the rendering (by Aulus Gellius, XV. 26) of Aristotle's definition of a syllogism: "*Oratio in qua, consensus quibusdam et concessis, aliud quid quam quæ concessa sunt, per ea quæ concessa sunt, necessario conficitur.*"

4. "Though, when expressed in language, it be necessary to analyze a reasoning into parts, and to state these parts one after another, it is not to be supposed that in thought one notion, one proposition, is known before or after another; for, in consciousness, the three notions and their reciprocal relations constitute only one identical and simultaneous cognition." Sir William Hamilton's *Lectures* (Blackwood's ed.), vol. 3, p. 276; Lecture 15 (on Logic).

5. 1 Bl. Com. 88.

6. 14 Geo. II., c. 6.

determined by the jury, and the law is declared by the court, the mere power that the jury has, in cases where they render a general verdict, of pronouncing the inevitable conclusion, does not constitute them in any sense judges of the law. If it be said that the jury may, with impunity, adopt the wrong conclusion, and bring in a verdict of acquittal contrary both to the evidence and to the instructions of the court, the reply is, as before, that this is a power rather to set aside than to judge the law; and as it must be assumed that every man concerned in the administration of justice will do his duty,¹ no argument can be drawn from the fact that either judges or juries sometimes disregard it.

The prevailing doctrine, then, except in certain jurisdictions,² is that, the province of the jury being only to determine questions of fact, they have no power to decide any question of law whatever, arising in the course of a trial, and far less questions of constitutional law.³ Questions of law are decided *ex officio* by the

1. Cooley's Const. Lim. (6th ed.) 394; Com. v. Anthes, 5 Gray (Mass.) 185, where the court by Shaw, C. J., said: "The law presumes that every man will do his duty, more especially every man invested with a high power in the administration of justice; it will presume that both judges and juries have done their duty."

2. See *post*, p. 616, note 3.

3. 2 Thomp. Tr., § 2133; Co. Litt. 155-6; Fost. Cr. L. 255-6; Willion v. Berkley, Plowd. 223; Grendon v. Bishop of Lincoln, Plowd. 493; Rex v. Oneby, 2 Str. 766, per Raymond, C. J.; Rex v. Dean of St. Asaph, 3 T. R. 428; Parmiter v. Coupland, 6 M. & W. 165; Levi v. Milne, 4 Bing. 195; 13 E. C. L. 396; U. S. v. Battiste, 2 Sumn. (U. S.) 240; U. S. v. Morris, 1 Curt. (U. S.) 23; U. S. v. Watkins, 3 Cranch (C. C.) 441; U. S. v. Fenwick, 4 Cranch (C. C.) 675; U. S. v. Greathouse, 4 Sawy. (U. S.) 457; 2 Abb. (U. S.) 364; U. S. v. Keller, 19 Fed. Rep. 633; U. S. v. Riley, 4 Blatchf. (U. S.) 204; Pierson v. State, 12 Ala. 149; Batre v. State, 18 Ala. 119; Washington v. State, 63 Ala. 135; 35 Am. Rep. 8; Townsend v. State, 2 Blackf. (Ind.) 156; State v. Miller, 53 Iowa 156; State v. Wright, 53 Me. 328; Massey v. Tingle, 29 Mo. 437; Pierce v. State, 13 N. H. 536; Carpenter v. People, 8 Barb. (N. Y.) 610; People v. Upton, 38 Hun (N. Y.) 107; People v. Bennett, 49 N. Y. 137; Robbins v. State, 8 Ohio St. 166, 167; and see authorities in note 4, p. 614. *Contra*, U. S. v. Wilson, 1 Baldw. (U. S.) 78.

In U. S. v. Battiste, 2 Sumn. (U. S.)

243, 244, the court by Story, J., said: "My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law, as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err, in laying down the law to

judge,¹ who is bound, upon the request of either party, to instruct the jury upon the law of the case,² and cannot, either in civil or in criminal cases, submit to the jury, in instructing them, a question of law for their decision.³ In his instructions to the jury, the judge presents his views of the law as authority, and not as matter to be submitted to their review; and the jury are bound to accept the law as laid down by the court, and to govern themselves thereby in their decision.⁴ Hence, the jury have no right to

the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or, a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it. If I thought, that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion."

In *U. S. v. Greathouse*, 4 Sawy. (U. S.) 464; 2 Abb. (U. S.) 364; the court by Field, J., said: "There prevails a very general, but erroneous opinion that in all criminal cases, the jury are the judges as well of the law as of the fact,—that is, that they have a right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury. They have the power, it is true, to disregard the instructions of the court, and in case of acquittal their decision will be final, for new trials are not granted in criminal cases where a verdict is passed in favor of the defendant; but they have no moral right to adopt their own views of the law. It is their duty to take the law from the court and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law rests solely with the court, and the responsibility of finding

correctly the facts rests solely with the jury. The separation of the functions of the court from those of the jury, in this respect, is essential to the efficacy and safety of jury trials. Any other doctrine would lead only to confusion and uncertainty in the administration of justice. . . . You will, therefore, in this case, gentlemen, take the law from the court, and follow it. If the court err, the responsibility will not be shared by you."

1. See *supra* the title, *Pure Questions of Law for the Judge*; *Sweeney v. State*, 35 Ark. 601.

2. See INSTRUCTIONS, vol. 11, p. 251; *Smith v. Carrington*, 4 Cranch (U. S.) 62; *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.) 544; *Pennock v. Dialogue*, 2 Pet. (U. S.) 15, 16; *Washington v. State*, 63 Ala. 135; 35 Am. Rep. 8; *Taylor v. Hillyer*, 3 Blackf. (Ind.) 433; *Montee v. Com.*, 3 J. J. Marsh. (Ky.) 150; *Coffin v. Coffin*, 4 Mass. 25; *Com. v. Porter*, 10 Met. (Mass.) 286; *Zabriskie v. Smith*, 13 N. Y. 338; *Foster v. People*, 50 N. Y. 601; *Chapman v. McCormick*, 86 N. Y. 479; *Kendrick v. Cisco*, 13 Lea (Tenn.) 247; *Nels v. State*, 2 Tex. 280; *Souther v. State*, 18 Tex. App. 352; *Washburn v. Tracy*, 2 D. Chip. (Vt.) 128; *Fletcher v. Howard*, 2 Aik. (Vt.) 115; *State v. Wilner*, 40 Wis. 306; *Wheeler v. Konst*, 46 Wis. 398; *Connors v. State*, 47 Wis. 528; *Campbell v. Campbell*, 54 Wis. 98; *Sailer v. Barnousky*, 60 Wis. 169.

3. *Remon v. Hayward*, 2 A. & E. 666; 29 E. C. L. 173; *U. S. v. Carlton*, 1 Gall. (U. S.) 400; *Thomas v. Thomas*, 15 B. Mon. (Ky.) 178; *Ragan v. Gaither*, 11 Gill & J. (Md.) 472; *Com. v. Davis*, 11 Gray (Mass.) 4; *Fugate v. Carter*, 6 Mo. 267; *Newman v. Lawless*, 6 Mo. 279; *Hickey v. Ryan*, 15 Mo. 63; *Valle v. Cerre*, 36 Mo. 575; *Glacius v. Black*, 67 N. Y. 563; *Green v. Hill*, 4 Tex. 465; *Keen v. Monroe*, 75 Va. 427. *Contra*, *Bavlis v. Lawrence*, 11 A. & E. 920; 39 E. C. L. 270.

4. *Rex v. Burdett*, 4 B. & Ald. 95; 6 E. C. L. 404; *U. S. v. Anthony*, 11

undertake in the jury room an independent investigation of the law of the case, and it is error in both civil and criminal cases to allow them to take law books—even the statute book of their State—to their room for that purpose.¹

Blatchf. (U. S.) 211; *Batre v. State*, 18 Ala. 119; *Pleasant v. State*, 13 Ark. 360; *Winkler v. State*, 32 Ark. 539; *Robinson v. State*, 33 Ark. 180; *Sweeney v. State*, 35 Ark. 585; *People v. Anderson*, 44 Cal. 65; *Townsend v. State*, 2 Blackf. (Ind.) 151; *Williams v. State*, 10 Ind. 503; *Sowerwein v. Jones*, 7 Gill & J. (Md.) 335; *Bell v. State*, 57 Md. 120; *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32; *Com. v. Blanding*, 3 Pick. (Mass.) 305; *Com. v. Porter*, 10 Met. (Mass.) 286; *Com. v. Rock*, 10 Gray (Mass.) 4; *Hamilton v. People*, 29 Mich. 192; *People v. Mortimer*, 48 Mich. 38; *People v. Waldvogel*, 49 Mich. 337; *State v. Rheams*, 34 Minn. 18; *Williams v. State*, 32 Miss. 389; *Hardy v. State*, 7 Mo. 607; *Parrish v. State*, 14 Neb. 60; *Lord v. State*, 16 N. H. 325; 41 Am. Dec. 729; *People v. Pine*, 2 Barb. (N. Y.) 566; *New York F. Ins. Co. v. Walden*, 12 Johns. (N. Y.) 513; *Duffy v. People*, 26 N. Y. 588; *People v. Bennett*, 49 N. Y. 137; *Montgomery v. Ohio*, 11 Ohio 427; *Robbins v. State*, 8 Ohio St. 166, 167; *Adams v. State*, 29 Ohio St. 412; *Pennsylvania v. Bell*, Add. (Pa.) 156; *State v. Drawdy*, 14 Rich. (S. Car.) 87; *Nels v. State*, 2 Tex. 280. *Contra*, *Patterson v. State*, 7 Ark. 59.

Hence it is error for the judge to instruct the jury in a criminal case that they are the exclusive and paramount judges of all questions of both law and fact, arising in the case. *Com. v. Anthes*, 5 Gray (Mass.) 185; *Hamilton v. People*, 29 Mich. 173. And see *Hardy v. State*, 7 Mo. 607. But *contra* in those jurisdictions where juries are held to be judges of both law and facts. See *infra*, p. 616, note 3.

1. *Burrows v. Unwin*, 3 C. & P. 310; 14 E. C. L. 322; *Graves v. State*, 63 Ga. 740; *Newkirk v. State*, 27 Ind. 1; *State v. Gunter*, 30 La. Ann. 539; *State v. Nelson*, 32 La. Ann. 842; *State v. Harris*, 34 La. Ann. 118; *State v. Kimball*, 50 Me. 409; *Merrill v. Nary*, 10 Allen (Mass.) 416; *Barker v. Pool*, 6 Mo. 260; *Harrison v. Hance*, 37 Mo. 185, partly overruling *Hardy v. State*, 7 Mo. 607; *State v. Hopper*, 71 Mo. 425; *People v. Hartung*, 4 Park. Cr. Rep. (N. Y.) 256; *Wilson v. People*, 4

Park. Cr. Rep. (N. Y.) 632; *People v. Gaffney*, 14 Abb. Pr. N. S. (N. Y.) 36; *Gandolpho v. State*, 11 Ohio St. 114; *State v. Smith*, 6 R. I. 33; *Loew v. State*, 60 Wis. 559. And see *JURY AND JURY TRIAL*, vol. 12, pp. 376-7; 2 *Thomp. Tr.*, § 2586.

In *Burrows v. Unwin*, 3 C. & P. 310; 14 E. C. L. 322; the jury, after retiring, sent to the court, desiring to have Selwyn's *Nisi Prius* supplied them. But Lord Tenderden, C. J., although no objection was made by counsel on either side, refused to send the books, saying: "The regular way is for the jury to come into court and state their question, and receive the law from the court; and for the sake of precedent, that course should be adopted now."

In *State v. Kimball*, 50 Me. 409, the court by Tenney, C. J., said: "It is the duty of the judge to give the principles of law, which he regards as applicable to the facts, as the jury may find them.

... But a party has not the right to require the judge to furnish the statutes for the jury, and allow them therefrom to ascertain the law and judge of its applicability to the facts presented. The construction of statutes is often much aided by general principles, not laid down therein, and can only be known by careful study of elementary treatises and reports of decisions, requiring much and long labor. The simple statement of the defendant's proposition upon this point cannot fail to impress the mind, well informed on legal subjects, with its utter impracticability, uncertainty, danger and absurdity."

In *Merrill v. Nary*, 10 Allen (Mass.) 416, the court by Bigelow, C. J., said: "These important ends cannot be surely attained, unless the advice and direction of the court on all questions of law arising in the course of a trial by jury, are given in open court, and suitable precautions are taken in order to prevent the minds of jurors from being instructed or influenced by information or knowledge derived from other sources. If this course is not taken and strictly adhered to, there would be no safety in the ordinary presumption that the instructions of the court are

A consequence of this doctrine is, that the judge in every criminal trial has the right, whether requested or not, to instruct the jury upon the law of the case.¹ This is true, even where the jury are by law made express judges (for example, in prosecutions for libel) of the law and the facts. But even here, so it has been held, an erroneous instruction may be prejudicial, although the court charge the jury that the instructions given are advisory only, that they are not bound to follow them, and that they have the right to determine both the law and fact.²

But to the above general conclusions, exceptions exist in various States, in which, by statute or otherwise, juries have been made judges of the law either in criminal cases generally, or in prosecutions for libel.³

fully understood and properly applied by the jury. On the contrary, it would be quite as reasonable to suppose that they acted on views and opinions derived from other sources concerning matters of law involved in an issue submitted to them, as that they followed those which they received in the instructions of the court. The practical result would be, that, although the law might be laid down with precision and accuracy by the court, there could be no certainty that the rules prescribed would be acted on by the jury, and parties would be deprived of the right to know the principles on which their cases had been determined, and the privilege of obtaining a revision of them, if they were erroneous or mistakenly applied. . . . Every one familiar with the practice of the law and the administration of justice, in our courts, knows that cases not unfrequently turn on nice distinctions, and that the most simple and common rules of law are difficult of application, and that it often requires careful study, nice discrimination, and a well instructed mind, to perceive the distinctions on which the decision of cases depends. Certainly they cannot be apprehended in the brief time allotted to the deliberations of the jury room. Indeed, we know of no method that could be adopted which would more effectually tend to confuse the minds of jurors, and to mislead them in the proper discharge of their duty, than to permit them to read or refer to law books during their consultations for the purpose of ascertaining the rules of law which were applicable to the cases which are submitted for their determination. Nor are we able to see that there would be any difference in

this respect whether the books which they were allowed to read were treatises, or books of reports, or volumes of statutes. The latter are often quite as difficult to interpret and apply as are the rules and principles contained in the former."

But, *contra*, it has been held that, under certain circumstances, it is not error for the jury to have had law books in their room. See *JURY AND JURY TRIAL*, vol. 12, p. 377, note 6.

1. *Montee v. Com.*, 3 J. J. Marsh. (Ky.) 132; *Gwatkin's Case*, 9 Leigh (Va.) 678.

But in *Virginia* it is said that unless instructions are asked, the court should in general not instruct the jury upon the law. *Dejarnette v. Com.*, 75 Va. 867. See *INSTRUCTIONS*, vol. 11, p. 251.

2. *State v. Rice*, 56 Iowa 431.

3. In the following note are collected the chief peculiarities, worthy of remark, arising from constitutional or statutory provisions in the several States mentioned:—

Alabama.—In all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court. Const., art. 1, § 13.

California.—The Constitution (art. 1, § 9) provides that in all criminal prosecutions or indictments for libels, the jury shall have the right to determine the law and the fact.

Colorado.—In all suits and prosecutions for libel, the jury, under the direction of the court, shall determine the law and the fact. Const., art. 2, § 10.

Connecticut.—In all prosecutions or indictments for libel, the jury shall have the right to determine the law and the facts under the direction of the court. Const., art. 1, § 7.

By statute, the jury are made judges of the law in criminal cases, but not in any such sense that they are at liberty to disregard the law. The court is to state its opinion to the jury upon all questions of law arising in a criminal trial. The jury are to inquire what the law is, and when their judgment is satisfied, the law, as thus ascertained, is binding upon them, and should be their guide, whether it is, or is not, as they may think it ought to be. *State v. Buckley*, 40 Conn. 246; *State v. Thomas*, 47 Conn. 546; 36 Am. Rep. 98.

Delaware.—In all indictments for libels, the jury may determine the facts and the law, as in other cases. Const., art. 1, § 5.

Georgia.—The constitution of Georgia (art. 1, § 2, par. 1) declares that the jury in all criminal cases shall be the judges of the law and the facts. See Ga. Code of 1882, § 5019. In the earlier cases under this provision, it was held that the jury had the power to determine the law otherwise than as instructed by the court. *Holder v. State*, 5 Ga. 441; *Berry v. State*, 10 Ga. 511; *McGuffie v. State*, 17 Ga. 497; *Keener v. State*, 18 Ga. 194; *McPherson v. State*, 22 Ga. 478; *Dickens v. State*, 30 Ga. 383. But the later cases hold that it is the province of the court to construe the law and give it in charge, and the duty of the jury to take the law as given them by the judge. *Anderson v. State*, 42 Ga. 9; *McMath v. State*, 55 Ga. 303; *Hill v. State*, 64 Ga. 454; *Ridenhour v. State*, 75 Ga. 382; *Danforth v. State*, 75 Ga. 614; *Hunt v. State*, 81 Ga. 140.

Illinois.—The jury are by statute judges of the law as well as of the facts in criminal cases, and are not bound by the opinion of the court as to what the law is. *Schnier v. People*, 23 Ill. 11; *Fisher v. People*, 23 Ill. 218; *Adams v. People*, 47 Ill. 376. But in *Mullinix v. People*, 76 Ill. 211, it was held that an instruction was "eminently just and proper" which ran as follows: "It is the duty of the jury to accept and act upon the law as laid down to you by the court, unless you can say, upon your oaths, that you are better judges of the law than the court; and, if you can say, upon your oaths, that you are better judges of the law than the court, then you are at liberty to so act." And this was regarded as strictly within what was laid down in the preceding case of *Fisher v. People*, 23 Ill. 218. See also *Davison v. People*, 90 Ill. 221,

231, 232; *Spies v. People*, 122 Ill. 1, 252.

Indiana.—The constitution of the State (Bill of Rights, § 19) makes the jury in all criminal cases the ultimate judges of the law. Hence, while it is the duty of the court to instruct as to the law, the jury are not bound by such instructions. The instructions are merely advisory, and are designed, not to bind the consciences of the jury, but to enlighten their judgments. *Warren v. State*, 4 Blackf. (Ind.) 150; *Armstrong v. State*, 4 Blackf. (Ind.) 247; *Murphy v. State*, 6 Ind. 490; *Driskill v. State*, 7 Ind. 338; *Lynch v. State*, 9 Ind. 541; *Williams v. State*, 10 Ind. 503; *Daily v. State*, 10 Ind. 536; *Clem v. State*, 31 Ind. 480; *McCarthy v. State*, 56 Ind. 203; *McDonald v. State*, 63 Ind. 544; *Keiser v. State*, 83 Ind. 234; *Fowler v. State*, 85 Ind. 538; *Powers v. State*, 87 Ind. 144; *Nuzum v. State*, 88 Ind. 599; *Hudelson v. State*, 94 Ind. 429; *Stout v. State*, 96 Ind. 407. Compare the earlier and, in part, overruled cases, *Townsend v. State*, 2 Blackf. (Ind.) 151; *Carter v. State*, 2 Ind. 617; *Stocking v. State*, 7 Ind. 326, 330; *Hogg v. State*, 7 Ind. 552. Notwithstanding this, if the instructions are erroneous, the judgment will be reversed. *Clem v. State*, 42 Ind. 447; 13 Am. Rep. 369.

Hence, it is error to instruct the jury that they must be governed by the decisions of the Supreme Court of the State. *Keiser v. State*, 83 Ind. 234.

Hence, also, counsel must be allowed to argue questions of law to the jury, and to read and discuss in argument the law applicable to the case. *Lynch v. State*, 9 Ind. 541; *Harvey v. State*, 40 Ind. 516; *Stout v. State*, 96 Ind. 407.

Kentucky.—In all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases. Const., art. 13, § 10.

Louisiana.—Juries have, by the constitution of the State, the right to judge both of the law and the facts in criminal cases, and while it would doubtless be a safe rule for the jury to take the law from the judge as their guide, and while they are expected and ought so to receive it, they are not bound to do so. *State v. Jurche*, 17 La. Ann. 71; *State v. Saliba*, 18 La. Ann. 35; *State v. Tally*, 23 La. Ann. 677. Compare *State v. Hannibal*, 37 La. Ann. 619; *State v. Vinson*, 37 La. Ann. 792. But see *State v. Ford*, 37 La. Ann. 443, 465, and several

earlier cases; *State v. Ballerio*, 11 La. Ann. 81; *State v. Scott*, 11 La. Ann. 421; *State v. Scott*, 12 La. Ann. 396. Compare also *Tresca v. Maddox*, 11 La. Ann. 206, 209.

It is not error, however, in charging the jury that they are judges of the law in criminal cases, to add the proviso "if you believe that you know more law than the judge does." *State v. Johnson*, 30 La. Ann. 904; *State v. Hannibal*, 37 La. Ann. 619.

Maine.—In all indictments for libel, the jury, after having received the direction of the court, shall have a right to determine at their discretion the law and the fact. Declaration of Rights, § 4.

In *State v. Snow*, 18 Me. 346, it was held that the jury are judges of the law in all criminal cases. But this case is overruled by *State v. Wright*, 53 Me. 328.

Maryland.—By the constitution, juries are judges of the law in all criminal cases. They are not bound by any instruction the court may choose to give, such instructions being merely advisory. *Wheeler's Case*, 42 Md. 569; *Bloomer's Case*, 48 Md. 539; *Forwood's Case*, 49 Md. 537; *Swann v. State*, 64 Md. 423.

Massachusetts.—The Mass. Sts. of 1855, ch. 152, enact that "in all trials for criminal offenses, it shall be the duty of the jury, to try, according to established forms and principles of law, all causes which shall be committed to them, and, after having received the instructions of the court, to decide at their discretion, by a general verdict, both the law and the fact involved in the issue, or to find a special verdict at their election; but it shall be the duty of the court to superintend the course of the trials, to decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon collateral and incidental proceedings, and also to charge the jury, and to allow bills of exception; and the court may grant a new trial in cases of conviction."

Prior to this statute, it was held in some earlier cases that in criminal prosecutions the jury are the judges of both law and fact. *Com. v. Worcester*, 3 Pick. (Mass.) 475; *Com. v. Blanding*, 3 Pick. (Mass.) 305. And see *Com. v. Knapp*, 10 Pick. (Mass.) 496. Compare also a dictum of Parsons, C. J., in a civil case, *Coffin v. Coffin*, 4 Mass. 1, 25. But in several later cases, though still before the en-

actment of the statute of 1855, it was held that it was the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions as far as they understood them, in applying the law to the facts to be found by them; and that it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the court in matter of law. *Com. v. Porter*, 10 Met. (Mass.) 286; *Com. v. White*, 10 Met. (Mass.) 14; *Com. v. Abbott*, 13 Met. (Mass.) 123-4.

As respects the statute, it is held that if it purports to allow to the jury in criminal trials the rightful power to determine, against the instructions of the court, questions of law involved in the issue (as to which point the court were evenly divided), it is unconstitutional; for neither before nor since this statute have the jury had any rightful power to determine questions of law involved in the issue against the instructions of the court. *Com. v. Anthes*, 5 Gray (Mass.) 185, and 303, note; *Com. v. Rock*, 10 Gray (Mass.) 4; *Com. v. Anthes*, 12 Gray (Mass.) 29.

Michigan.—In all prosecutions for libels, the jury shall have the right to determine the law and the fact. Const., art. 6, § 25.

Mississippi.—In all indictments for libel, the jury shall determine the law and the facts under the direction of the court. Const., art. 1, § 4.

Missouri.—In all suits and prosecutions for libel, the jury, under the direction of the court, shall determine the law and the fact. Const., art. 2, § 14.

Nevada.—On the trial of an indictment for libel, the jury shall have the right to determine the law and the fact. Gen. Sts., § 4264.

New Jersey.—In all prosecutions or indictments for libel, the jury shall have the right to determine the law and the fact. Const., art. 1, § 5.

In *State v. Jay*, 34 N. J. L. 368, the question was left undecided whether in a prosecution for libel the jury can, on the cause being submitted to them, lawfully disregard the instruction of the judge as to the law of the case.

New Mexico.—In all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases. Comp. Laws of 1884, § 2589.

New York.—In all criminal prosecutions or indictments for libels, the jury shall have the right to determine the law and the fact. Const., art. 1, § 8; Code of Cr. Proc., § 418.

North Carolina.—In this State juries in criminal cases may by statute rightfully judge of the law independently of the court. *State v. Miller*, 75 N. Car. 73.

Oregon.—In all criminal cases the jury shall have the right to determine the law and the facts, under the direction of the court as to the law; and the right of new trial, as in civil cases. Const., art. 1, § 16. But all discussions of law are to be addressed to the court, and juries are bound to receive as law what is laid down as such by the court. *Hill's Ann. Laws of 1887*, §§ 1374-5.

Pennsylvania.—In all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases. Const., art. 1, § 7.

In this State the power which the jury have to judge of the law in a criminal case is considered one of the most valuable securities guaranteed by the Bill of Rights; and it is held not to have been changed by the adoption of a new constitutional provision, providing for a writ of error in criminal cases. *Kane v. Com.*, 87 Pa. St. 522; 33 Am. Rep. 788. But in *Nicholson v. Com.*, 96 Pa. St. 503, the following instruction was given: "The only safe course for you to pursue, so far as the law regarding offenses which you may have given you in charge, is to receive your instructions from the court, for the reason you are not supposed to be learned in the law; and if you should commit an error therein, or counsel should be mistaken in stating the law to you, and you, relying on their version, or your own ideas, in either case should you commit an error, there is no remedy for such error." This instruction was held not to be erroneous, the court having an undoubted right to instruct the jury as to the law, and to warn them against finding contrary to it. *Compare*, *Theel v. Com.*, 12 Atl. Rep. 148. See also the earlier case of *Pennsylvania v. Bell*, Add. (Pa.) 156, 160.

South Carolina.—In all indictments for libel, the jury shall be judges of the law and the facts. Const., art. 1, § 8.

Tennessee.—In all indictments for libel, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other criminal cases. Const., art. 1, § 19.

In this State, the right of counsel to discuss to the jury propositions of law along with the facts, is upheld in civil as well as criminal cases. *Hannah v. State*, 11 Lea (Tenn.) 201. See *infra* this title, p. 621, note 1.

Texas.—In all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases. Const. of 1876, § 8.

The jury are the exclusive judges of the facts in every criminal cause, but not of the law in any case. They are bound to receive the law from the court, and to be governed thereby. *Willson's Crim. Sts.*, § 2331.

Utah.—On the trial of an indictment for libel, the jury shall have the right to determine the law and the fact. *Comp. Laws of 1888*, § 5058.

Vermont.—In this State the jury are judges of law as well as fact in criminal cases, and this is considered to be the doctrine also of the common law. *State v. Wilkinson*, 2 Vt. 480, 488-9; *State v. Croteau*, 23 Vt. 14. There is no qualification of the right of the jury, in a criminal cause, to disregard the instructions of the court as to the law; and they may adopt their own theory of the law, even if it be more prejudicial to the prisoner than the law given them by the court. *State v. Meyer*, 3 Atl. Rep. 195, 199. But there is no objection to the judge's stating to the jury that the above rule is not intended for ordinary criminal cases; that it is a matter of favor to the defendant, and should not be acted upon by the jury, except after the most thorough conviction of its necessity and propriety; that any departure by the jury from the law laid down by the court must be taken solely upon their own responsibility; and that the safer, and better, and fairer way in ordinary criminal cases is to take the law from the court, in doing which the jury are always justifiable. *State v. McDonnell*, 32 Vt. 491, 532.

Wisconsin.—In all criminal prosecutions or indictments for libels, the jury shall have the right to determine the law and the fact. Const., art. 1, § 3.

3. Arguing to the Jury Upon the Law.—In those jurisdictions where juries are, by constitutional or statutory provisions, or by the decisions of the courts, made judges of the law in criminal cases, or in cases of indictment for libel, the argument of counsel upon the law of the case is rightfully directed to the jury. This implies the right to read to the jury out of books of the law; and the refusal to allow this, is error, for which a new trial will be granted.¹

In those jurisdictions where the better doctrine prevails, that juries are not judges of the law, in either criminal or civil cases,—whether counsel should be allowed to address arguments on the law to the jury, and read to them out of law books, is not settled. But on principle it would seem that, although, where a pure question of law is at issue, it should be argued to the court alone,² still, since the law and the facts of a case are generally inseparable,³ and since, in reality, the law can hardly be said to exist apart from the facts,⁴ it follows that counsel should be allowed to develop their whole case to the jury, law as well as fact,⁵ and hence to read to the jury out of law books;⁶ for unless the jury

1. Cooley's Const. Lim. (6th ed.) 567; *McMath v. State*, 55 Ga. 304; *Warmock v. State*, 56 Ga. 503; *Johnson v. State*, 59 Ga. 189; *Jones v. State*, 65 Ga. 506; *Lynch v. State*, 9 Ind. 541; *Harvey v. State*, 40 Ind. 516; *Stout v. State*, 96 Ind. 407; *State v. Verry*, 36 Kan. 416. But see *Carter v. State*, 2 Ind. 617; *Murphy v. State*, 6 Ind. 490.

In *Georgia*, there exists in civil cases the qualified rule that counsel may, subject to the direction of the court, argue to the jury their view of the law, or what they expect the court to charge as to law. *Robinson v. Adkins*, 19 Ga. 398; *Ransome v. Christian*, 56 Ga. 351.

2. In this class constitutional questions, which are in general wholly for the court, appear to fall, and it seems that the argument upon such questions should be directed to the judge alone. Compare *Callender's Case*, Whart. St. Tr. 688, 710; *U. S. v. Riley*, 5 Blatchf. (U. S.) 204; *Franklin v. State*, 12 Md. 236. And see *Com. v. Murphy*, 10 Gray (Mass.) 1.

3. Even in those courts in which counsel are not allowed to argue to the jury upon the law, it is necessary, in addressing the jury, to assume a certain state of the law as applicable to the facts, and from that assumption to proceed to the discussion of the facts.

4. *Ex facto jus oritur*. Broom's Leg. Max. (8th Am. ed.) *102. Apart from the facts, the law may, perhaps, be

said to have only an abstract, potential, or hypothetical existence,—requiring a given state of circumstances to call it into actual operation. Any assemblage of facts having been settled by the jury, the law that governs them comes into actual existence through the determination of the judge, who declares, upon a view of all the facts, what the law of that particular case is.

5. *People v. Keenan*, 13 Cal. 581; *Com. v. Porter*, 10 Met. (Mass.) 263; 1 Thomp. Tr. § 951, where the author says: "A just conclusion seems to be that in those jurisdictions where the practice of the English courts of law is followed, under which counsel make their arguments to the jury before the charge of the court is given, counsel must be permitted, within reasonable limits, to state and to argue their views and theories of the law applicable to the case; that in every such argument, it is necessary to the full presentation of the view upon which the prosecution or the defense rests, that a state of the law applicable to the facts should be assumed to exist, for which reason counsel must be permitted, in the very nature of things, to address the jury upon the whole case, both upon the law and the facts."

6. *Reg. v. Courvoisier*, 9 C. & P. 362; 38 E. C. L. 155; *Robinson v. Adkins*, 19 Ga. 398; *Harvey v. State*, 40 Ind. 516; *Com. v. Abbott*, 13 Met. (Mass.) 120; *Legg v. Drake*, 1 Ohio

understand the rule of law with its exceptions, limitations, and qualifications, they cannot know how, after the determining facts, to draw the proper conclusion in a general verdict.¹

Accordingly it has been held that counsel has the right, by way

St. 286; *Lott v. State*, 18 Tex. App. 627; *Wade v. De Witt*, 20 Tex. 398; *Mayfield v. Cotton*, 37 Tex. 229. *Contra*, *Murphy v. State*, 6 Ind. 490; *Good v. Mylin*, 13 Pa. St. 538.

In *Com. v. Abbott*, 13 Met. (Mass.) 120, the court by Shaw, C. J., said: "If it be asked, where, then, is the propriety of arguing questions of law to the jury, the just answer is, that, correctly speaking, questions of law, as such, are not argued to the jury. The mode of conducting a trial before the court and jury arises from necessity and convenience, from the obvious practical difficulty of adopting any other mode. The whole trial, embracing law and fact, and resulting in a general verdict, is necessarily conducted before the court and jury conjointly; and the law must be stated and explained by the counsel, first, for the consideration and decision of the court, and secondly, to enable the jury to apply the law to the facts they may find, which they must do, in order to return a general verdict. But this course of counsel in arguing questions of law before the court and jury at once, under the general direction of the court, no more implies that the jury may rightfully pass their judgment upon the questions of law, contrary to the instructions of the court, than it does that the court may rightfully pass a definitive judgment upon the questions of fact, upon the weight of evidence, and the credit due to witnesses, against the judgment and conviction of the jury, which they clearly cannot."

In a few instances, it has been held that the statement in the text does not apply to civil cases, but that in these, counsel should not be allowed to argue to the jury upon the law, nor to read to them from law books. *Tuller v. Talbot*, 23 Ill. 298; *Sprague v. Craig*, 51 Ill. 288; *Philpot v. Taylor*, 75 Ill. 309; *Chicago v. McGiven*, 78 Ill. 347; *Heagy v. State*, 85 Ind. 260. However, to permit them to do so, seems, even here, not to be considered an irregularity sufficient in itself to authorize the reversal of a judgment. *Philpot v. Taylor*, 75 Ill. 309.

1. *Hannah v. State*, 11 Lea (Tenn.) 201; *Com. v. Porter*, 10 Met. (Mass.) 263.

In *Hannah v. State*, 11 Lea (Tenn.) 201, the court by Turney, J., said: "During the trial of the cause . . . the court ruled that counsel might argue the law to the court, and read his authorities to the court, but would not be allowed to read the law books to the jury, or argue the law of the case to the jury. This was error. It is impossible to understand how counsel can make out a case from facts, while he is forbidden to state and argue the law applicable to the facts. It requires both facts and law to make a prosecution or defense in either civil or criminal proceedings. Without facts, there is no law to operate. To hold that the facts may be argued, but the law shall not be presented with these facts, is to deny the benefit of counsel. The value of facts depends upon the law that governs them. No lawyer can discuss propositions except in a combination of law and facts."

In *Com. v. Porter*, 10 Met. (Mass.) 263, 283, the court by Shaw, C. J., said: "In thus conducting a jury trial in a criminal case, with a view to the return of a general verdict, it is obvious that the whole matter of law as well as of fact must be stated and explained to the jury, so that they may fully understand and apply it to the facts; because, as we have seen, in the form of the general verdict, they do declare the law as well as the fact. For this purpose, it seems to be necessary, and in our State it is the usual practice, for the parties, respectively, by their counsel, to state the law to the jury, in the presence, and subject to the ultimate direction, of the judge; because, unless the jury understand the rule of law, with its exceptions, limits, and qualifications, they cannot know how to apply the evidence, and determine the truth of the material facts necessary to bring the case of the accused within it. In thus presenting their respective views of the law to the jury, under the direction of the court, for the better information of both the judge and jury, great latitude has been

of argument or illustration, to read books of the law to the jury, where he adopts the views therein laid down as his own, and makes them a part of his address to the jury.¹ But this principle does not authorize counsel, under pretence of reading legal authorities to the jury, to read passages bearing upon questions of fact which are before the jury for consideration, thus introducing to the minds of the jury evidentiary matters which have not been regularly admitted by the presiding judge.²

allowed in the practice of this Commonwealth, and counsel have been permitted to state and enforce their views of the law, especially in capital cases, by definitions, and cases from such works of established authority as the court may approve. In this, great latitude has been allowed, in tenderness to the accused, and a liberal confidence reposed in counsel called to defend the accused in the hour of his trial. But such an address, whether it be upon the matter of fact or the matter of law, and whether in form it be directed to the court or jury, is in legal effect and actual operation an address to both; not because they have not several duties to perform, and distinct questions to pass upon, but because it is one trial carried on at once before court and jury, in which the judge must have a clear comprehension of the nature and scope of the evidence, conducing to the proof of facts, which may or may not render the accused amenable to the law, in order that he may give such directions in matter of law as the state of the evidence may require; and the jury must have a clear comprehension of the rules of law, in order to determine whether the facts proved bring the accused within them; and because the minds of both judge and jury, acting in their respective departments, must result in that general verdict of acquittal or conviction, which is the appropriate determination of the cause. Considering the latitude which has been allowed in this commonwealth, by a long course of practice, and the difficulty of drawing an exact line of distinction between that full statement and exposition of his views of the law, which counsel may properly make in a general address to the court and jury, upon the questions embraced in the issue, and involved in a general verdict, and an address to the jury separately upon questions of law, we are of opinion that a party may by his counsel address the jury upon

questions of law, subject to the superintending and controlling power of the court, to decide questions of law, by directions to the jury, which it is their duty to follow. In ordinary cases, such directions to the jury, upon the questions arising in the cause, are not given until the parties, by their counsel, have submitted their respective views of the law and the facts in an argument to the court and jury. . . . As the jury have a legitimate power to return a general verdict, and in that case must pass upon the whole issue, this court are of opinion that the defendant has a right by himself or his counsel to address the jury, under the general superintendence of the court, upon all the material questions involved in the issue, and to this extent, and in this connection, to address the jury upon such questions of law as come within the issue to be tried. Such address to the jury, upon questions of law embraced in the issue, by the defendant or his counsel, is warranted by the long practice of the courts in this commonwealth in criminal cases."

1. *Reg. v. Courvoisier*, 9 C. & P. 362; 38 E. C. L. 155; *Harvey v. State*, 40 Ind. 516; *Legg v. Drake*, 1 Ohio St. 386. The reason is, that, as counsel have an undoubted right, in arguing to the jury, to set forth the principles of law from recollection, it is better to have the law stated from authentic sources, than from the memory of impassioned orators strongly biased in favor of one side.

2. *Baldwin's Appeal*, 44 Conn. 37; *Evansville v. Wilter*, 86 Ind. 414; *Com. v. Wilson*, 1 Gray (Mass.) 337; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; *Dempsey v. State*, 3 Tex. App. 429.

Of the above rule, several illustrations may be given.

Insanity.—Thus, the party upholding a will which is attacked on the ground that the testatrix was of unsound mind,

The doctrine in the above paragraph as to the right of counsel to argue to the jury upon the law and to read to them out of law books, supposes that the practice of the English courts of law is followed, under which counsel make their arguments to the jury before the charge of the judge is given. But if the charge of the judge precedes the argument of counsel, or if the court has already decided any propositions of law in the trial, counsel cannot be allowed to controvert them in argument;¹ for this would be to appeal from the official expounder of the law to the jury, who are unlearned in the law, and who are not, as we have seen,

cannot be allowed to read to the jury from decided cases, for the purpose of showing that the facts set forth in such cases were not inconsistent with the soundness of mind necessary to the making of a valid will. *Baldwin's Appeal*, 44 Conn. 37.

Measure of Damages.—So it is error to allow counsel, upon the question of the measure of damages, to read in the presence of the jury, extracts from reported cases in which large damages were held not excessive. *Evansville v. Wilter*, 86 Ind. 414; *Porter v. Choen*, 60 Ind. 338. But such error is cured by a direction of the court to the jury to the effect that the case before them must be determined upon the evidence, uninfluenced by the damages given in other cases. *Evansville v. Wilter*, 86 Ind. 414.

Reasonable Time.—So where the question for decision was whether a draft was presented for payment within a reasonable time, and the court held the question to be one of fact for the jury, it was held error to allow counsel to read to the jury and comment upon cases on this subject in the books of reports. *Phoenix Ins. Co. v. Allen*, 11 Mich. 501.

Evidence.—So in a trial for felony, the counsel for the accused cannot be allowed to read, in his argument to the jury, the statement of facts made up on a former appeal of the same cause, and the decision thereon of the supreme court holding that evidence insufficient,—the purpose of counsel being to deduce therefrom the insufficiency of the evidence brought forward on the present trial. *Dempsey v. State*, 3 Tex. App. 429. Compare *Warren v. Wallis*, 42 Tex. 472.

1. 1 Thomp. Tr., § 951; *U. S. v. Morris*, 1 Curt. (U. S.) 23; *Com. v. Zimmerman*, 1 Cranch (C. C.) 47; *U. S. v. Watkins*, 3 Cranch (C. C.) 443;

U. S. v. Columbus, 5 Cranch (C. C.) 304; *U. S. v. Riley*, 5 Blatchf. (U. S.) 204; *Edwards v. State*, 22 Ark. 253; *Smith v. Morrison*, 3 A. K. Marsh. (Ky.) 81; *Harrison v. Park*, 1 J. J. Marsh. (Ky.) 170; *Sowerwein v. Jones*, 7 Gill & J. (Md.) 335; *Bell v. State*, 57 Md. 108; *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32; *Davenport v. Com.*, 1 Leigh (Va.) 585; *Delaplane v. Crenshaw*, 15 Gratt. (Va.) 457; *Dejarnette v. Com.*, 75 Va. 867.

In *Sowerwein v. Jones*, 7 Gill & J. (Md.) 335, the court by Chambers, J., said: "It is the province of the court, whenever called on by plaintiff or defendant, to inform the jury what are the principles of law applicable to the case under trial, which should control and regulate their verdict. When the law is declared by the court, the jury are expected to govern themselves by it, and the counsel will not be permitted to claim their verdict, upon any principles at variance with the positions advanced by the court. If the court be wrong, the remedy is by appeal, and a reversal of the erroneous opinion."

In *Bell v. State*, 57 Md. 108, 120, the court by Grason, J., said: "Whatever powers the constitution may have conferred upon juries in criminal cases, it has conferred none upon counsel. They are still officers of the court, and under its proper control, and if the court expresses an opinion on a question of law, upon which it has a right to express it, and a party considers himself aggrieved by it, he has his remedy, either by petition in the nature of a writ of error, or by a bill of exception. But counsel have no right, and ought not to be permitted, to argue against it before the jury in order to induce them to disregard it."

The case of *Com. v. Porter*, 10 Met. (Mass.) 263, in which it was held to be error for the trial court to interrupt

to be rightfully considered judges of the law.¹ In such cases, counsel should be confined in their argument to the legal premises embodied in the instructions of the court; and they cannot be allowed to read books of the law to the jury, particularly if the design in doing so should be to influence the jury to take the law from the books rather than from the court.²

But according to many excellent authorities, the whole question of the right to argue questions of law to the jury, and to read to them out of law books, is properly committed to the sound discretion of the trial court, subject, when it has been clearly abused to the prejudice of either party, to the corrective revision of the appellate courts.³ Thus, the court may curtail the right to read the law

counsel and prevent him from expressing to the jury views of the law contrary to those of the court, seems, nevertheless, not to be counter to the statement in the text; for the counsel in that case was not arguing against any instruction or ruling previously laid down by the court.

In *Virginia*, it seems that great latitude of discussion is allowed in criminal cases, even against the instructions of the court. 4 Minor's Inst. (2d ed.) *747, citing Garth's Case, 3 Leigh (Va.) 770; Blunt's Case, 4 Leigh (Va.) 691; Gwatkin's Case, 9 Leigh (Va.) 681.

1. 1 Thomp. Tr., § 944, where the author says: "It is held in the Federal and in most of the State jurisdictions that counsel have no right to argue to the jury propositions of law contrary to those which have been laid down by the court. The courts which so hold, proceed upon the view that to permit this to be done, would be contrary to the respect which the court owes to itself, and that it would be a perversion of the law to allow an appeal from the court to the jury for the purpose of correcting the errors of law committed by the court, instead of correcting them by an appeal to the proper appellate tribunal provided by the constitution and the laws for that purpose."

In a State where the instructions of the court precede the argument, the judge in a criminal case failed to instruct the jury upon a material point, and the prosecuting attorney in his closing argument undertook to supply the omission, and in doing so, stated the law in a manner prejudicial to the prisoner. *Held*, that the judgment must be reversed. *State v. Reed*, 71 Mo. 200. But it is not error for the prosecuting attorney to state to the

jury in argument a proposition of law which, though erroneous, has no bearing upon the guilt or innocence of the accused. *State v. Dibble*, 6 Mo. App. 584.

2. 1 Thomp. Tr., § 951; *People v. Anderson*, 44 Cal. 65.

3. *Winkler v. State*, 32 Ark. 539; *Curtis v. State*, 36 Ark. 284; *People v. Anderson*, 44 Cal. 65, 70; *People v. Treadwell*, 69 Cal. 226; *Sullivan v. Royer*, 72 Cal. 248; *Sprague v. Craig*, 51 Ill. 288; *Murphy v. State*, 6 Ind. 490; *Lynch v. State*, 9 Ind. 541; *Heagy v. State*, 85 Ind. 260; *Com. v. Austin*, 7 Gray (Mass.) 51; *Good v. Mylin*, 13 Pa. St. 538; *Dempsey v. State*, 3 Tex. App. 429; *Hines v. State*, 3 Tex. App. 483; *Hudson v. State*, 6 Tex. App. 565; *Harrison v. State*, 8 Tex. App. 183; *Foster v. State*, 8 Tex. App. 248; *Cross v. State*, 11 Tex. App. 84; *Lott v. State*, 18 Tex. App. 627; *Smith v. State*, 21 Tex. App. 278; *Wade v. De Witt*, 20 Tex. 398; *Mayfield v. Cotton*, 37 Tex. 229.

In the last case, the court by Walker, J., said: "The rule of practice is well established which allows attorneys to read the law authorities to the court, in the presence of the jury, during the progress of a trial. The court in its discretion may forbid any abuse of this privilege; the jury is to receive the law from the court, and upon plain principles of law, the court would have a right to forbid tedious and unnecessary reading or discussion. The authorities in this case which the plaintiff proposes to read may have been so well understood by the court that it was deemed unnecessary that they should be read and discussed, to the hindrance of the trial, for the enlightenment of the court. In matters of this kind, no positive inflexible rule can well be laid

to the jury within reasonable limits,¹ and may refuse to allow the reading of law which has no application to the facts of the case.² Nor is the court obliged to allow the reading of numerous authorities to the jury, or the unnecessary consumption of public time in discussing such authorities, especially when the court is familiar with them, and is prepared to instruct the jury upon the law contained in them, so far as applicable to the case.³

II. QUESTIONS OF FACT—1. Pure Questions of Fact for the Jury.—As already stated, it is the function of the jury, with the few exceptions given in the next section, to decide all questions of fact whatsoever, that are put in issue in a trial.

2. Power of Judge to Decide Certain Questions of Fact—*a*. PRELIMINARY QUESTIONS TOUCHING THE ADMISSIBILITY OF EVIDENCE.—It is the exclusive province and duty of the judge to decide all questions touching the admission or exclusion of evidence.⁴ Where this involves preliminary questions of fact, such,

down. The court should be allowed, however, to protect the interests of litigants and the public against any unnecessary consumption of time in the discussion of law authorities in the presence of juries, and in the progress of jury trials. The court should understand the law well enough to give it to the jury, unassisted by counsel; yet, a courtesy due from the bench to the bar at all times, and the frequent necessity of the court availing itself of every source of information, should regulate this matter."

In *People v. Anderson*, 44 Cal. 65, the practice of reading from law books in an argument to the jury, was considered as improper; but it was held not to be a reversible error, because it was a matter within the discretion of the trial court, and unreviewable by the appellate court, except for an apparent abuse of discretion. "As a general rule," said the court by Crockett, J., "the practice of allowing counsel in either a civil or criminal action, to read law to the jury, is objectionable, and ought not to be tolerated. Its usual effect is to confuse rather than to enlighten the jury. There are cases, however, in which it is permissible for counsel, by way of illustration, to read to the jury reported cases, or extracts from text-books, subject to the sound discretion of the court, whose duty it is to check promptly any effort on the part of counsel to induce the jury to disregard the instructions, or to take the law of the case from the books rather than from the court."

19 C. of L.—40

1. 1 Thomp. Tr., § 946; *Winkler v. State*, 32 Ark. 539; *Curtis v. State*, 36 Ark. 284; *People v. Anderson*, 44 Cal. 65; *Murphy v. State*, 6 Ind. 490; *Com. v. Austin*, 7 Gray (Mass.) 51; *Com. v. Murphy*, 10 Gray (Mass.) 1; *Mayfield v. Cotton*, 37 Tex. 229. Thus the trial judge may refuse to allow counsel to read to the jury an adjudication of the highest court of another State that a statute, like that upon which the prosecution is founded, is contrary to the constitution of that State. *Com. v. Murphy*, 10 Gray (Mass.) 1.

2. *Curtis v. State*, 36 Ark. 284; *Winkler v. State*, 32 Ark. 539.

And so the trial court may refuse to allow the defendant's counsel in a criminal case, to read to the jury the whole of the statute, upon one section of which the prosecution is founded, if he is allowed to read all those parts which he contends affect the construction of that section, and to comment to the jury upon the whole of the statute. *Com. v. Austin*, 7 Gray (Mass.) 51.

3. 1 Thomp. Tr., § 946; *Mayfield v. Cotton*, 37 Tex. 229; *Hudson v. State*, 6 Tex. App. 565.

4. 1 Greenl. Ev. (14th ed.), § 49; 1 Taylor's Ev. (8th ed.), § 23; Best's Ev. (Am. ed.), § 82; *Company of Carpenters v. Hayward*, 1 Doug. 374, per Buller, J.; *Doe v. Davies*, 10 Q. B. 314; 59 E. C. L. 314; *Rex v. Atwood*, 2 Leach C. C. 522; *Rex v. Smith, L. & C.* 607; *Lewis v. Marshall*, 7 M. & G. 729; 49 E. C. L. 729; *Chandler v. Van Roeder*, 24 How. (U. S.) 227; *Cliaquot's*

for example, as the fact of interest or of the execution of a deed, these, no matter how intricate, are to be determined by the judge,¹

Champagne, 3 Wall. (U. S.) 114; Scott v. Cox, 20 Ala. 294; Campbell v. State, 23 Ala. 45; Robinson v. Ferry, 11 Conn. 460; Townsend v. State, 2 Blackf. (Ind.) 151; Carrico v. McGee, 1 Dana (Ky.) 6; Gorton v. Hadsell, 9 Cush. (Mass.) 508; Chouteau v. Searcy, 8 Mo. 733; Witowsky v. Wasson, 71 N. Car. 451; De France v. De France, 34 Pa. St. 385; Claytor v. Anthony, 6 Rand. (Va.) 285. And compare Merrill v. Berkshire, 11 Pick. (Mass.) 269.

In *De France v. De France*, 34 Pa. St. 385, the court by Lowrie, C. J., said: "There is scarcely any case that does not abound with facts which are totally inadmissible as evidence, in any proper treatment of the question. These are excluded by the court, especially if there is any danger that the jury may attach importance to them. This is a mode in which the judge is continually taking facts from the jury, and thus really weighing the importance of them, in the performance of his legitimate and undisputed functions. In the present case, the judge discussed the facts, and decided their inadequacy, as a ground for an equitable exception to the general rules of law; and yet, in doing so, he was simply performing his own functions. No judge ever assigns reasons for overruling an offer of evidence, without discussing the facts involved in it, in order to show that they have no weight or importance in the investigation. The preliminary operation for all the final reasonings on a case, is to get clear of all such facts as ought not to influence the conclusion. No philosopher ever attempts the solution of a case of natural science without having first eliminated all the facts that are unimportant, or that would tend only to embarrass or mislead. In a judicial case, this preliminary operation is performed by the judge, and in performing it, he is of course dealing with facts, and deciding how far they are proper elements of the case. He performs the same operation in a case stated, when he first sifts out all the irrelevant and immaterial facts, before he begins to reason upon the essential residue. In the early stages of juridical science, this function would, of course, be very rudely performed.

Centuries of observation and practice have been constantly improving our skill and science in this respect. The time was when many facts were admitted as important in given investigations, which are now admitted to be not so, and time may yet work other modifications of our ideas. A fact alleged contrary to the well known laws of cause and effect in nature and society, is not to be proved by the ordinary evidence that is proper for ordinary facts. The judge weighs all the evidence offered of the fact, and decides upon its competency or adequacy. If the fact really conflicts with a natural law that is not well known, then the law itself becomes matter of evidence by means of experts, or men of skill and science on the given subject. In matters of civil law, the judge is the expert. The facts being given, he declares the law and result of them. The jury find the disputed and disputable facts for him; but he excludes from their inquiry all testimony about facts which judicial logic regards as immaterial or misleading."

1. *Dennison v. Jewison*, 12 Jur. 485; *Doe v. Davies*, 10 Q. B. 314; 59 E. C. L. 314; *Corfield v. Parsons*, 1 C. & M. 730; *Welstead v. Levy*, 1 M. & R. 138; *Boyle v. Wiseman*, 11 Exch. 360; *Davis v. Charles River Branch R. Co.*, 11 Cush. (Mass.) 506; *Kendall v. May*, 10 Allen (Mass.) 59; *Harris v. Wilson*, 7 Wend. (N. Y.) 57. And see authorities in note 2, p. 628.

In *Doe v. Davies*, 10 Q. B. 314; 59 E. C. L. 314; the court by Denman, C. J., said: "There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus, an oath, or its equivalent, and competency, are conditions precedent to admitting *viva voce* evidence; and apprehension of immediate death to admitting evidence of dying declarations; and search to secondary evidence of lost writings; and stamp to certain written instruments; and so is consanguinity or affinity in the declarant to declarations of deceased relatives. The judge alone has to decide whether the condition has been fulfilled. If the proof is by witnesses, he must decide on their credibility. If counter-evidence is offered, he must receive it before he decides;

and cannot, according to the better opinion, be submitted to the jury.¹ Where, however, the decision of the preliminary question of fact would decide the main issue, it seems that the judge should not decide the matter, but should admit the evidence provisionally, and leave the main question to the jury.² In determining preliminary questions of fact relating to the admissibility of evidence, the rule as to the weight of the testimony is the same as in case of issues tried by a jury; it is not sufficient that there be evidence tending to establish the particular fact, but the judge

and he has no right to ask the opinion of the jury on the fact as a condition precedent."

1. 1 *Thomp. Tr.*, §§ 321, 1025; *Bartlett v. Smith*, 11 M. & W. 483; *Doe v. Davies*, 10 Q. B. 314; 59 E. C. L. 314; *Stowe v. Querner*, L. R. 5 Ex. 155; 39 L. J. Ex. 60; *Degraffenreid v. Thomas*, 14 Ala. 681; *Thomason v. Odum*, 31 Ala. 103; *Robinson v. Ferry*, 11 Conn. 460; *Chouteau v. Searcy*, 8 Mo. 733; *Ratliff v. Huntly*, 5 Fred. (N. Car.) 545. *Contra*, 1 *Phil. Ev.* (8th. ed.) 2, note; 1 *Greenl. Ev.* (14th. ed.), §§ 49, 425; *Egan v. Larkin*, Arm. M. & O. 403; *Scott v. Cox*, 20 Ala. 294; *Spencer v. Trafford*, 42 Md. 1; *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Bartlett v. Hoyt*, 33 N. H. 151; *State v. Squires*, 48 N. H. 364; *Hart v. Hellner*, 3 Rawle (Pa.) 407; *Gordon v. Bowers*, 16 Pa. St. 226; *Haynes v. Hunsicker*, 26 Pa. St. 58. In regard to these contrary opinions Judge Thompson says: "We may venture to question the soundness of these views. Experience proves that juries are scarcely capable of deciding properly those questions which the law has clearly committed to them. It will still more embarrass them to compel them to shoulder a part of the burden which properly belongs to the judge." 1 *Thomp. Tr.*, § 1025.

If, after such examination of the facts, the court decides to admit the evidence, it is for the jury to consider, weigh and apply it; but if it be rejected, the jury has no legal right even to know that it was ever offered. *Robinson v. Ferry*, 11 Conn. 460.

And where the evidence has been admitted by the court, the jury are bound to review it, and are confined to the consideration of its credibility and effect. If, in view of all the facts and circumstances, it is in their opinion unworthy of credit, they may disbelieve it, and disregard it in their decision of the case; but they cannot reject it as incompetent. *Com. v. Knapp*, 10 Pick.

(Mass.) 477; *Rex v. Atwood*, 2 Leach C. C. 322.

2. *Stowe v. Querner*, L. R. 5 Ex. 155; 39 L. J. Ex. 60; *Hitchins v. Eardley*, L. R. 2 P. & M. 248; 40 L. J. Pr. & Mat. 70. *Contra*, *Doe v. Davies*, 10 Q. B. 314; 59 E. C. L. 314, following *Bartlett v. Smith*, 11 M. & W. 483. In *Stowe v. Querner*, L. R. 5 Ex. 155; 39 L. J. Ex. 60; which was an action on a policy of insurance, in which the existence of the policy was in issue, the defendant refused, after notice to produce, to bring in the original policy. The plaintiffs thereupon attempted to put in an alleged copy of the policy. The defendant objected, and requested the judge to hear evidence that no original policy had ever existed. This being the main issue of the action, the judge refused to pass upon it, and allowed the alleged copy to go to the jury, leaving it for them to say whether or not there had been a duly stamped policy executed by the defendant. And this was held to be proper. "If," said Bramwell, B., "the objection on the part of the defendant had been that there was a policy, but that it was not stamped, it would, perhaps, have been well founded. But here it was objected that there was no policy executed at all, an objection which goes to the entire ground of action, and one which, if it had prevailed, might have left the jury nothing to decide. For, suppose the judge had ruled that the copy was inadmissible on the ground that there was no original ever in existence, the plaintiffs would in fact have had no case left, and the judge would himself have decided the whole of it. . . . But an illustration analogous to the present. Suppose an action to be brought for libel, and a copy of a letter which is destroyed, but which contained the libel complained of, is produced and tendered in evidence. Could the defendant say, 'Stop, I will show you that no letter was in point of fact ever written, and I call upon you, the

must be satisfied of it by competent proof.¹ Where the judge passes upon such preliminary facts, his decision is conclusive; but his ruling as matter of law that such facts render the evidence competent or incompetent, is subject to revision.²

Of the above principles numerous illustrations may be given.

Thus, whether a person is qualified to be sworn as a witness, is a question exclusively for the court, it being the province of the jury to determine the credibility of his testimony;³ hence the judge decides whether a witness is incompetent for defects in religious belief,⁴ or deficiency in understanding.⁵ And so whether or not a witness is an expert, so as to render him competent to

judge, to hear evidence upon this point, and if I satisfy you that no such letter ever existed, you ought not to admit the copy?" Surely not; for that would be getting the judge to decide what is peculiarly within the province of the jury. The distinction is really this: where the objection to the reading of a copy conceives that there was primary evidence of some sort in existence, but defective in some collateral matter, as, for instance, where the objection is a purely stamp objection, the judge must, before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to show that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter, but receive the copy and leave the main question to the jury."

In *Hitchins v. Eardley*, L. R. 2 P. & M. 248; 40 L. J. Pr. & Mat. 70; the only question at issue before the jury was whether M. D., through whom the defendants claimed, was legitimate. The defendants, after producing *prima facie* evidence of the legitimacy of M. D., tendered his declarations in evidence. Since these, admissible only as matters of pedigree, could not be received unless M. D. were legitimate, the question of the admission of this evidence was the same as the principal question at issue. The court, upon the *prima facie* showing, admitted the evidence, but cautioned the jury that this ruling was a preliminary ruling upon imperfect evidence, and was not in the least degree to influence their verdict.

See generally EVIDENCE, vol. 7, p. 88.

1. 1 Thomp. Tr., § 322, citing *Degraffenreid v. Thomas*, 14 Ala. 681.

2. *Bartlett v. Smith*, 11 M. & W. 485; *Cleave v. Jones*, 7 Exch. 421; *Campbell v. State*, 23 Ala. 45; *Foster v. Mackay*, 7 Met. (Mass.) 531; *Dole v. Thurlow*, 12 Met. (Mass.) 157; *Odiorne*

v. Bacon, 6 Cush. (Mass.) 185; *Gorton v. Hadsell*, 9 Cush. (Mass.) 508; *Com. v. Hills*, 10 Cush. (Mass.) 530; *Com. v. Mullins*, 2 Allen (Mass.) 295; *Com. v. Morrell*, 99 Mass. 542; *O'Connor v. Hallinan*, 103 Mass. 547; *Walker v. Curtis*, 116 Mass. 98; *Com. v. Gray*, 129 Mass. 474.

3. *Rex v. Hill*, 5 Cox C. C. 259; *Cook v. Mix*, 11 Conn. 432; *Nave v. Williams*, 22 Ind. 368; *Kendall v. May*, 10 Allen (Mass.) 64; *Com. v. Lynes*, 142 Mass. 577; *Den v. Vancleve*, 5 N. J. L. 589; *Reynolds v. Lounsbury*, 6 Hill (N. Y.) 534; *Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94.

See generally WITNESS.

4. *Wakefield v. Ross*, 5 Mason (U. S.) 16; *Com. v. Hills*, 10 Cush. (Mass.) 530; *Jackson v. Gridley*, 18 Johns. (N. Y.) 98; *People v. Matteson*, 2 Cow. (N. Y.) 432, note a; *Smith v. Coffin*, 18 Me. 157.

5. *Reg. v. Hill*, 2 Den. C. C. 259; 5 Cox C. C. 470; 20 L. J. M. C. 222; 5 Eng. L. & Eq. 547; *Campbell v. State*, 23 Ala. 44; *Holcomb v. Holcomb*, 28 Conn. 177; *Com. v. Mullins*, 2 Allen (Mass.) 295; *Kendall v. May*, 10 Allen (Mass.) 64; *Com. v. Lynes*, 142 Mass. 577.

Where the competency of a witness is attacked on the ground of insanity, if the court has decided in favor of his sanity, the evidence adduced to the court cannot be submitted to the jury to affect his credibility. *Campbell v. State*, 23 Ala. 45.

It has been held that the question whether a witness, sane at the time he testifies, was insane at the time of the transaction concerning which he testifies, is a question for the jury, since it goes to his credibility, and not to his competency, and the opposing party may adduce such testimony with his other evidence. *Holcomb v. Holcomb*, 28 Conn. 177.

express an opinion upon the question in issue, is a question for the judge.¹

In like manner, it is the province of the court to decide all questions as to the admissibility of writings offered in evidence;² and hence, to decide whether a document offered in evidence has come from the proper custody or not;³ and whether an instrument has been lost or destroyed so as to render secondary evidence of its contents admissible.⁴ It is for the court to determine whether a communication, oral or written, is a privileged one,⁵ and whether what are offered as dying declarations are admissible.⁶

And so whether there is sufficient proof of agency to warrant the admission of the acts and declarations of the agent in evidence, is a preliminary question for the court to determine.⁷ The question whether a confession is voluntary, or is to be excluded by reason of having been obtained through the influence of hope or of fear, cannot be referred to the jury, but is to be decided by the judge alone, whose determination of the facts is conclusive.⁸

1. *Fairbank v. Hughson*, 58 Cal. 314; *Ives v. Leonard*, 50 Mich. 296; *Jones v. Tucker*, 41 N. H. 546; *Flynt v. Bodenhamer*, 80 N. Car. 205; *State v. Sanders*, 84 N. Car. 728; *State v. Efler*, 85 N. Car. 585; *State v. Burgwyn*, 87 N. Car. 572; *State v. Cole*, 94 N. Car. 959.

See EXPERT AND OPINION EVIDENCE, vol. 7, p. 514, note 4.

2. *Bartlett v. Smith*, 11 M. & W. 483; *Dumsford v. Curlewis*, 1 F. & F. 702; *Carrico v. McGee*, 1 Dana (Ky.) 6; *Hamilton v. Taylor*, Litt. Sel. Cas. (Ky.) 444.

See generally WRITTEN INSTRUMENTS.

3. *Rees v. Walters*, 3 M. & W. 527, per Parke, B.; *Doe v. Keeling*, 11 Q. B. 884, per Denman, C. J.; 63 E. C. L. 884; *Doe v. Phillips*, 8 Q. B. 158; 55 E. C. L. 158; *Bishop of Meath v. Marquess of Winchester*, 3 Bing. N. Cas. 183; 32 E. C. L. 90, per Tindall, C. J.

An appellate court will not interfere, with the decision of the judge, unless it appear to be clearly wrong. Same authorities as above.

4. *Reg. v. Kenilworth*, 7 Q. B. 642; 53 E. C. L. 642; *Taylor v. Riggs*, 1 Pet. (U. S.) 591; *Witter v. Latham*, 12 Conn. 392; overruling *Coleman v. Wolcott*, 4 Day (Conn.) 6; *Dormady v. State Bank*, 3 Ill. 236; *Loewe v. Reismann*, 8 Ill. 525; *Donelson v. Taylor*, 8 Pick. (Mass.) 390; *Ratliff v. Huntly*, 5 Ired. (N. Car.) 545; *Graff v. Pittsburgh, etc., R. Co.*, 31 Pa. St. 489.

See generally LOST PAPERS, vol. 13, p. 1059.

In *Witter v. Latham*, 12 Conn. 392, the court, by Waite, J., said: "It is the peculiar province of the court to decide upon the admissibility of evidence; and it is for the jury to weigh and consider that evidence when received. But the court cannot legally admit secondary evidence of the contents of a written instrument in consequence of the loss of that instrument, until it has found the fact of the loss. The court must, in the first place, decide that question; and having decided it, there is a manifest impropriety in referring the same question again to the jury, and in suffering them to review a decision which the court has been by law required to make."

5. *Hull v. Lyon*, 27 Mo. 570; *Cleave v. Jones*, 7 Exch. 421.

See PRIVILEGED COMMUNICATIONS.

6. See a remark of Lord Ellenborough, *Rex v. Hucks*, 1 Stark. 521; 2 E. C. L. 199; *State v. Elliott*, 45 Iowa 486; 2 Am. Cr. Rep. 322; *State v. Molisse*, 36 La. Ann. 920. *Contra*, *Rex v. Woodcock*, 2 Leach C. C. 563, where Eyre, C. B., left the question to the jury. But this case, according to Mr. Taylor, is virtually overruled. 1 Taylor's Ev. (8th ed.), § 23, note.

See DYING DECLARATIONS, vol. 6, p. 128.

7. *Cliquot's Champagne*, 3 Wall. (U. S.) 114, 140; *Clayton v. Anthony*, 6 Rand. (Va.) 285.

8. See CONFESSIONS, vol. 3, p. 465; 1 Greenl. Ev. (14th ed.), § 219; 1 Tay-

lor's Ev. (8th ed.), § 872; Whart. Cr. Ev. (9th ed.), § 689; 1 Thomp. Tr., § 328; Rex v. Garner, 1 Den. C. C. 329; 2 Car. & K. 920; 61 E. C. L. 920; Rex v. Waringham, 2 Den. C. C. 447, note, per Parke, B.; Runnels v. State, 28 Ark. 121; Wallace v. State, 28 Ark. 531; Simon v. State, 5 Fla. 285; Whaley v. State, 11 Ga. 125; Brown v. State, 71 Ind. 470; State v. Fidment, 30 Iowa 541; Hector v. State, 2 Mo. 166; State v. Squires, 48 N. H. 364; State v. Vann, 82 N. Car. 631; State v. Efler, 85 N. Car. 585; State v. Burgwyn, 87 N. Car. 572; Ruffer v. State, 25 Ohio St. 464; Fife v. Com., 29 Pa. St. 429; Boyd v. State, 2 Humph. (Tenn.) 39; Carter v. State, 37 Tex. 362. *Contra*, Garrard v. State, 50 Miss. 147, holding that where there is a conflict of testimony as to whether a confession was voluntary, it is a question of fact for the jury to determine.

In several *Massachusetts* cases the question of the inducement of the confession was left to the jury. Com. v. Cuffee, 108 Mass. 285; Com. v. Cullen, 111 Mass. 435; Com. v. Smith, 119 Mass. 305; Com. v. Piper, 120 Mass. 185. But in the latest as well as in several early cases, the question was properly decided by the court. Com. v. Chabcock, 1 Mass. 144; Com. v. Taylor, 5 Cush. (Mass.) 605; Com. v. Tuckerman, 10 Gray (Mass.) 173; Com. v. Morey, 1 Gray (Mass.) 461; Com. v. Morrell, 99 Mass. 542; Com. v. Culver, 126 Mass. 464. Thus in the last case the court by Lord, J., said: "We are aware that it is not an uncommon practice in the trial of criminal causes, when confessions of a defendant are offered in evidence and objected to upon the ground that they were improperly obtained, for the presiding judge to allow the confessions, and all the evidence bearing upon the manner in which they were obtained to be submitted to the jury either to be rejected by the jury wholly, or to be allowed such weight as under all the circumstances the jury deem it proper to give them. This, however, as we understand it, is rather by consent than otherwise, neither party desiring to take the decision of the presiding judge upon the question of competency. There may be, however, and commonly are, two questions: first, the competency of the evidence, and, secondly, the weight of the evidence; the former is always a question of law, and the latter is always a question of fact. The prisoner has always the right to require of

the judge a decision of the competency of the evidence, and even after the judge has decided the evidence to be competent, the prisoner has the right to ask of the jury to disregard it, and to give no weight to it because of the circumstances under which the confessions were obtained. In the case at bar, however, the counsel for the prisoner insisted upon their right to have the judge decide upon the competency of the evidence, and tendered evidence of its incompetency; this evidence it was the duty of the presiding judge to hear. The evidence having been tendered at a stage of the case in which it was the duty of the defendants to offer it, and the presiding judge having refused to hear it at that time, the exception to his refusal to hear it must be sustained."

In *Brown v. State*, 71 Ind. 470, the court by Worden, J., said: "It is a general if not a universal rule of law that it is for the court to determine the competency of evidence. And the competency should be determined before the evidence goes to the jury, because, if incompetent, it should not go to the jury at all. When the competency of evidence depends upon extrinsic facts, as in this case upon the question whether the confessions were made under the influence of fear produced by threats, how can the court determine the question of competency without hearing the evidence offered on that subject? Doubtless, confessions of the defendants are *prima facie* competent; but when objection is made by the defendant to their competency, and evidence is offered by him in support of the objection, the court cannot determine the question without hearing the evidence; nor can it relegate the question to the jury, for it is the first duty of the court to pass upon it in the first instance, before the evidence can legally go to the jury. It seems to us to be clear, on principle as well as authority, that the court erred in refusing to hear the evidence offered by the defendant to show that the confessions were made under the influence of fear produced by threats."

In *Simon v. State*, 5 Fla. 285, the court by Semmes, J., said: "The second assignment of error is, that the court below left it to the jury to determine whether the confession of the accused was voluntary or not. It was undoubtedly the province of the court to determine in the first instance as to the admissibility of these confessions. There is a manifest distinction be-

tween the questions, whether a confession be voluntary or not, and the credit and weight to be given the evidence establishing the confessions. The one is as exclusively a question for the court as the other is for the jury, for it is only when the confession is voluntary that it becomes legal evidence, and can be submitted to the consideration of the jury. It oftentimes may become a question of no little embarrassment to determine whether the confession is voluntary or not, but still the law has proposed the exercise of this power in the court, and it cannot be delegated to the jury. Their province is widely different; they are not concluded by the confessions when submitted to them, for they are to determine not only the weight and credit to be given the testimony of the witnesses who depose as to the confessions, but the credit to be given to the confessions themselves. We do not consider this to be an open question. There is no conflict of authorities on the subject, and the doctrine is universally acquiesced in by the English and American courts."

In regard to the finality of the judge's decision on the facts relating to a confession, the court in *Fife v. Com.*, 20 Pa. St., 429, 437, observed by Lewis, C. J.: "In 1792, when Chief Justice McKean was presiding, the Supreme Court of this State declared that 'the true point for consideration is whether the prisoner has falsely declared himself guilty of a capital crime.' In deciding this point, the chief question is whether the inducement held out was calculated to make the confession an untrue one. If not, it will be admissible. This is a question of fact to be determined, in the first instance, by the court. In the great variety of circumstances existing in the numerous cases reported, it is natural that there should be some diversity in the decisions upon them. But the principle is well settled that where the admissibility of evidence depends upon a preliminary question of fact to be tried by the court, its decision is not to be reversed unless in a case of clear and manifest error. The court that sees and hears the witnesses must be presumed to have better means of judging on a question of fact than the appellate tribunal, where the witnesses are neither seen nor heard, and where it often happens that their testimony is very imperfectly reported." But it is submitted that the true rule is that laid down in the text above, and *ante*,

p. 628, n. 2, viz., that the judge's determination of the facts is not reviewable at all. And see accordingly *State v. Squires*, 48 N. H. 364, where the court by Bellows, J., said: "If then the judge who tried the cause, in view of all the circumstances disclosed, with the witness before him, found that these confessions were not made under the influence of a promise or holding out of favor, we should not be justified in disturbing the verdict on that account. This question was one of fact to be determined by the court which tried the cause. . . . In deciding it, the court will take into consideration the age, character, and situation of the prisoner at the time the confession was made; whether he was under arrest for the alleged offence or not; and generally will consider all the circumstances bearing upon the question, whether his confessions were made under the influence of fear or the hope of favor. It is obvious also that what might affect one person greatly, might have no effect whatever upon another. So in weighing the evidence on this point, much may depend upon the appearance of the witness who is to testify to the confessions, and his manner of stating what inducements were held out, if any; and from the nature of the case the decision of the court may in many cases be greatly and properly influenced by circumstances in the appearance of the witness or the respondent, that could not be reported for the consideration of the whole court. We are, therefore, of the opinion that the decision of the court who tried the cause ought not to be reversed, unless a case of clear and manifest error is made out. . . . The case here stands much like the finding of a jury on a question of fact; and we are not aware of any reason why it should not be so. Whether the confession of the prisoner was voluntary or not, is purely a question of fact; as much so as the question whether a witness offered to testify was interested or not, or whether a witness was qualified to testify as an expert, or whether the loss of a paper has been shown so as to allow the introduction of secondary evidence of its contents. In this and the like cases, the judge who tries the cause must decide, although in some instances he may submit the question of fact to the jury. In either case, whether the decision be by the judge alone, or it be also passed upon by the jury, no exception lies so far as the question

But the facts being settled, whether they amount to such threats or promises as will exclude the confession, is a question of law, which, on exception, may be reviewed by an appellate court.¹ So where evidence is offered of acts done in places other than the place in dispute, it is for the judge to decide in the first instance whether there is such a unity of character in the different parts as to render evidence affecting a part not in dispute admissible with reference to the part in dispute, and whether the acts relied on amount to evidence of ownership.² And, finally, the judge must determine the facts which form the necessary basis for admitting or excluding leading questions.³

b. OTHER MATTERS OF FACT.—Facts shown by the records of the court are ascertained by the judge upon an inspection of the records, and are not submitted to the jury, the reason being that the judge is more familiar with the court records, and more competent to judge of their meaning than the jury can be.⁴ But

is one of fact. If, however, upon the evidence reported by the judge, it clearly appears that there was error in his finding upon the matter of fact, it may be corrected as in other cases where the verdict is against evidence."

1. 1 Thomp. Tr., § 328, citing *State v. Andrew*, Phil. (N. Car.) 205; *State v. Burgwyn*, 87 N. Car. 572.

2. *Doe v. Kemp*, 7 Bing. 332; 20 E. C. L. 150, per Bosanquet, J.

3. *Bundy v. Hyde*, 50 N. H. 116, where the court by Foster, J., said: "The discretion to admit leading questions can only be exercised in a proper case, that is, a case falling within the exceptions to the general rule excluding such questions. Those exceptions are numerous, but so well defined that there can be little danger of error in the recognition of them. . . . And notwithstanding these exceptions or conditions thus prescribed by law are requisite to the admissibility of a leading question, still it is for the presiding judge, at the trial of the cause, to find, as matter of fact, whether, in a given case, the condition prescribed by the law is fulfilled; and from his decision, unless the question of discretion be expressly reserved, there can be no appeal. By discretion—*judicial discretion*—we mean the exercise of final judgment by the court in the decision of such questions of fact as, from their nature and the circumstances of the case, come peculiarly within the province of the presiding judge to determine, without the intervention and to the exclusion of the functions of a jury."

4. *Records*.—1 Thomp. Tr., § 1029;

Rex v. Hucks, 1 Stark. 521; 2 E. C. L. 198; *Lewis v. Armstrong*, 64 Ga. 645.

Thus, a plea of *nul tiel record* is always tried by the court, and not by the jury. 4 Minor's Inst. (2d ed.) *68, *922; *Boteler v. State*, 8 Gill & J. (Md.) 359; *Hall v. Williams*, 6 Pick. (Mass.) 232; *Ridley v. Buchanan*, 2 Swan (Tenn.) 555.

So, dates fixed by the records of the court may be stated to the jury as facts. *Andrews v. Graves*, 1 Dill. (U. S.) 108.

So, when the law authorizes a tender to be made by paying money into court, the judge will inform himself whether the money has been paid in, and need not submit that question to the jury. *Newton v. Allis*, 16 Wis. 197.

So, upon the hearing of a motion to enter an order *nunc pro tunc*, the court is to decide whether the order was in fact made, though not entered of record at the time claimed, and is not to submit the question to a jury. *Lewis v. Armstrong*, 64 Ga. 645.

In *Rex v. Hucks*, 1 Stark. 521; 2 E. C. L. 198, which was a trial for perjury, the question arose whether a word in a record produced, which was written above an erasure, was *meeting* or *mutiny*. Lord Ellenborough ruled that it was not a question for the jury, the inspection of a record being within the peculiar province of the court. But since the deciphering of illegible words in writings falls properly within the province of the jury (*infra*, p. 655, n. 1), the above decision may be questioned. "We apprehend," says Judge Thompson (1 Thomp. Tr., §1001), "that this last decision is unsound in principle; for the

where the record in a former lawsuit between two parties was introduced as a bar to a subsequent action, and extrinsic evidence was necessary in order to ascertain what issues were actually tried and determined, it was held that such evidence must go to the jury.¹

c. JUDGE CHARGING JURY AS TO FACTS.—Since, as we have seen, it is the exclusive province of the jury to determine all questions of fact, it will be error for the judge to charge the jury upon the facts.²

III. MIXED QUESTIONS OF LAW AND FACT.—The courts frequently speak of a given question as being “a mixed question of law and fact,” or as being “for the jury under the instructions of the court.” These expressions, when used alone, seem inadequate, in that they do not mark out the limits of the respective provinces of the court and jury in respect of the matter in controversy,—failing in the one case to indicate how much of the question is for the court and how much for the jury, and in the other leaving the functions of the court and jury equally unsettled by omitting to discriminate the nature of the instructions that should be given. It is the endeavor of the present article to avoid, in some measure, the ambiguity mentioned above.

By “a mixed question of law and fact,” it is meant that the controversy involves undetermined points of both fact and law, and not merely that it consists of law and fact mingled together; for, according to the view elsewhere taken, all questions that arise in courts are composed of law and fact commingled, and whether the facts, or the law, or both, are undetermined, is immaterial. If both are in dispute, furnishing a so-called mixed question of law and fact, either the jury must determine the facts in a special verdict, upon which the court determines the law that governs the facts; or what is more usual, the court, by means of instructions, determines the law applicable to the various groups of facts presented by the evidence, and the jury, ascertaining which of the supposed groups exists, embody categorically in their verdict the hypothetical conclusion of law previously pronounced by the judge.³

reading of a word in a writing is matter of fact, and not matter of law; and although it may properly be committed to the judge in civil cases, yet in a criminal case, where the essential question of *criminal intent* may depend upon it, and consequently where the whole question of guilt or innocence may turn upon it, it is manifestly an invasion of the province of the jury for the judge to withdraw its decision from them.”

1. *Foye v. Patch*, 132 Mass. 105. Compare *Burten v. Shannon*, 14 Gray (Mass.) 433, 438-9.

2. See INSTRUCTIONS, vol. 11, p. 236.

3. 1 Thomp. Tr., § 1031; Fourth Nat.

Bank v. Heuschen, 52 Mo. 207; *Marshall v. Schricker*, 63 Mo. 308, 311.

In Fourth Nat. *Bank v. Heuschen*, 52 Mo. 207, 209, the court by Adams, J., said: “Where the facts are agreed on, due diligence in making a demand is a question of law; but when the facts are not agreed on, the question of due diligence becomes a mixed question of law and fact. That is, the jury are to find the facts, and the court is to pronounce the law upon the facts as they may be found by the jury. The usual way is to state in the instruction hypothetically the facts to be found from the evidence by the jury, and to pronounce upon those facts so to be found, the conclusion of law resulting therefrom.”

And the jury have no power to do otherwise, either in civil or in criminal cases.¹

IV. VARIOUS CLASSES OF QUESTIONS—1. Existence—*a.* OF FACTS.—To determine the existence of facts is the essential function of juries. No authorities are necessary.²

b. OF LAWS AND ORDINANCES.—Whether a law exists or not is a question for the court; and hence whether an act of the legislature was duly passed with the concurrence of the requisite majority of the members of both houses, and in conformity with all other requirements of the Constitution of the State, so as to become a valid enactment, is a question of law for the court, and not a question of fact for the jury; and in determining the question, the judge may, according to the weight of authority, resort to the written records of the legislature, so far as they disclose the steps which took place in the passage of the statute in question,³ or to any other source of information which, in its nature, is capable of answering such question clearly and satisfactorily.⁴ So also

1. See *supra* the title, *Jury as Judges of the Law*.

2. One or two examples may be given:—

Whether a contingency, upon the happening of which the payment of a draft is conditioned, has occurred, is a question for the jury. *Nagle v. Homer*, 8 Cal. 353.

Whether a husband carrying on a farm owned by his wife and held by her to her own use, occupying with her the dwelling house thereon, taking the crops annually, and having the general management of the premises, is a tenant or servant of the wife, is a question of fact. *State v. Hayes*, 59 N. H. 450; *Albin v. Lord*, 39 N. H. 196. Compare *Bickford v. Dane*, 58 N. H. 185.

The question which of two instruments was first executed, when one of them is not dated, and they do not refer to each other, is a question of fact. *Coons v. Chambers*, 1 Abb. App. Dec. (N. Y.) 439.

Whether a contract has been performed, or its performance waived, will be, in most cases, for the jury, under instructions as to whether specific acts, brought out in evidence, do or do not constitute a performance or waiver. 1 *Thomp. Tr.*, § 1141; *Spalding v. Hallenbeck*, 39 Barb. (N. Y.) 80.

In a contest touching the title to a chattel, whether it was given or loaned to one of the parties, is a question of fact for a jury; and in such case the

gift, if it took place, having been by parol, the court should instruct the jury as to what, in law, is necessary to the parol gift of a chattel. *Respass v. Young*, 11 Ga. 114.

Where an intestate promised to pay the plaintiff, who was his sister, after his death, a certain sum per year, for the time during which she should live with him and keep house for him, and the consideration was understood by the parties to be in part for the services to be rendered by her, and in part a desire to make her a mortuary gift from motives of affection, it was held that it was a question for the jury what portion of the stipulated sum was to be paid in consideration of her services, and what portion as a mere gratuity; that she was entitled to recover the former, but not the latter, since the right to the former rested upon a good consideration, but the recovery of the latter would contravene the policy of the Statute of Wills; and that the jury should have been specifically instructed to this effect." *Frost v. Frost*, 33 Vt. 639.

Whether a right of way has been acquired or not by an uninterrupted user for twenty-one years, is a question for the jury. *Steffy v. Carpenter*, 37 Pa. St. 41.

3. See CONSTITUTIONAL LAW, vol. 3, p. 675; JUDICIAL NOTICE, vol. 12, p. 159, note 2; 1 *Thomp. Tr.*, § 1053; *Cool. Const. Lim.* (6th ed.) 162-3; 37 *Alb. L. J.* 428-33, 449-55.

4. *Gardner v. Collector*, 6 Wall. (U. S.) 499, 511, per Miller, J.

the existence of a city ordinance is to be proved by evidence addressed to the court, and not to the jury.¹

c. OF FOREIGN LAWS.—Whether the existence of a foreign law is a question for the court, or is to be proved to the jury as a fact, is a point on which there is conflict of opinion, the better view apparently being that it is a question for the jury.² If, however, there are statutes allowing courts to take judicial notice of foreign laws, and providing that foreign law books may be received as evidence of such laws, the question of the existence of foreign law falls within the province of the court, and not of the jury.³

d. OF CUSTOMS.—The existence of a legal custom or usage, and the extent to which it prevails, are questions of fact for the jury, provided the custom is not of a character so general as to be a matter of common knowledge, and subject to judicial notice.⁴

e. OF CONTRACTS—(1) *Express Contracts*.—Where a contract is wholly in writing, it is the function of the court, in declaring the effect of the instrument, to say whether or not it amounts to a con-

1. *Roulo v. Valcour*, 58 N. H. 347.

2. FOREIGN LAWS, vol. 8, p. 438; 1 Whart. Ev. (3d ed.), § 303.

Supporting the view that foreign laws are to be proved to the jury as other facts, are the following authorities: 1 Taylor Ev. (8th ed.), §§ 5, 48; Best's Ev. (Am. ed.), § 33; Millar v. Heinrick, 4 Camp. 155; Consequa v. Willing, 1 Pet. (C. C.) 225; Brackett v. Norton, 4 Conn. 517, 521; Dyer v. Smith, 12 Conn. 384; Kilgore v. Bulkley, 14 Conn. 362, 387; Hale v. New Jersey Steam Nav. Co., 15 Conn. 539; De Sobry v. De Laistre, 2 Har. & J. (Md.) 191, 219; Trasher v. Everhart, 3 Gill & J. (Md.) 234; Cecil Bank v. Barry, 20 Md. 287; Baltimore & Ohio R. Co. v. Glenn, 28 Md. 287, 323; Zimmerman v. Helser, 32 Md. 274; Holman v. King, 7 Met. (Mass.) 384; Kline v. Baker, 99 Mass. 253; Hazelton v. Valentine, 113 Mass. 472, 478; Ely v. James, 123 Mass. 36, 44; Charlotte v. Chouteau, 33 Mo. 194; Cobb v. Griffith, etc., Co., 87 Mo. 90, 94; Francis v. Ocean Ins. Co., 6 Cow. (N. Y.) 404, 429; State v. Jackson, 2 Dev. (N. Car.) 566; Moore v. Gwynn, 5 Ired. (N. Car.) 187; Hooper v. Moore, 5 Jones (N. Car.) 130; Ingraham v. Hart, 11 Ohio 255. *Contra*, holding that the proof must be made to the court, 1 Greenl. Ev. (14th ed.), § 486; Story's Conf. Laws, § 638; Charlotte v. Chouteau, 25 Mo. 465, 474; Pickard v. Bailey, 6 Post. (N. H.) 152; Ferguson v. Clifford, 37 N. H. 86; Hall v. Cos-

tello, 48 N. H. 176, 179; 2 Am. Rep. 207; Bock v. Lauman, 24 Pa. St. 435.

When the existence of a foreign law is necessary to be determined in order to the admission or exclusion of evidence, the question becomes one for the court. See *supra* the title, *Preliminary Questions Touching Admissibility of Evidence*; Trasher v. Everhart, 3 Gill & J. (Md.) 234; Wilson v. Carson, 12 Md. 54, 75.

3. Woodstock v. Hooker, 6 Conn. 35; Hale v. New Jersey Steam Nav. Co., 15 Conn. 539; Lockwood v. Crawford, 18 Conn. 361. Compare FOREIGN LAWS, vol. 8, p. 437, note 4. And see Owings v. Hull, 9 Pet. (U. S.) 607.

4. 1 Thomp. Tr., § 1058; Parker v. Ibbetson, 4 C. B. N. S. 346; 93 E. C. L. 345; The Cadmus v. Matthews, 2 Paine (U. S.) 229; Colman v. Clements, 23 Cal. 245; Branch v. Palmer, 65 Ga. 210; Chicago Packing, etc., Co. v. Tilton, 87 Ill. 547; Grove v. Brien, 1 Md. 438; Burroughs v. Langley, 10 Md. 248; Chesapeake Bank v. Swain, 29 Md. 483; Steamboat General Worth v. Hopkins, 30 Miss. 703; Kuhtman v. Brown, 4 Rich. (S. Car.) 479; Steamboat Sultana v. Chapman, 5 Wis. 454.

But if the custom in question would, if established, be unreasonable, the court will refuse to submit the question of its existence to the jury. 2 Thomp. Tr., § 1570, citing *Bourke v. James*, 4 Mich. 336.

See generally USAGES AND CUSTOMS.

tract.¹ But whether or not a given contract exists, in cases where it is attempted to be made out wholly or in part by oral evidence, is a question for the jury,—the court informing them as to the legal nature of a contract.² Where, however, the alleged agreement is in writing and is admitted to have been made by the parties, it is for the court to declare whether in effect it amounts to a contract or not.³ And so, although the question whether a partnership exists, is sometimes said to be a question for the jury,⁴ the true rule is that the jury ascertain only the facts, including the relation of the parties to the alleged contract, and it is for the court to say of any given state of facts whether in effect they amount to the legal relation defined in law as a partnership.⁵ The decision of the court is generally given, as so frequently in other cases, through instructions.⁶

(a) *Date*.—The date at which a deed is delivered, which is only *prima facie* the time when it bears date, is, of course, to be determined by the jury.⁷

1. *Goddard v. Foster*, 17 Wall. (U. S.) 123.

2. *Bolckow v. Seymour*, 17 C. B. N. S. 107; 112 E. C. L. 106; *Haney v. Caldwell*, 35 Ark. 156; *Walthelm v. Artz*, 70 Iowa 609; *Farwell v. Tillson*, 76 Me. 227; *Globe Works v. Wright*, 106 Mass. 207, 216; *Cunningham v. Cambridge Sav. Bank*, 138 Mass. 480; *Sines v. Superintendents of Poor*, 55 Mich. 383; *Farley v. Pettes*, 5 Mo. App. 262; *DeRidder v. McKnight*, 13 Johns. (N. Y.) 204; *Smalley v. Hendrickson*, 29 N. J. L. 371; *Stokes v. Burrill*, 3 Grant's Cas. (Pa.) 241; *Russell v. Arthur*, 17 S. Car. 477.

Whether an alleged written contract was entered into by a party or not, is a question for the jury. *Illinois Cent. R. Co. v. Cassell*, 17 Ill. 394; *Sigsworth v. McIntyre*, 18 Ill. 128; *May v. Burk*, 80 Mo. 680.

Where the whole evidence in a case presents a disputed question of fact, whether the contract was parol or in writing, evidence may be received both as to that precise question, and as to the verbal declarations and acts of the parties which are claimed to have constituted the alleged parol contract, and also as to the contents of the alleged written instrument; and then it may be left to the jury to say whether the contract was written or parol, with instructions that if they first find that it was reduced to writing, they must afterwards, in determining the terms of the contract, consider only that part of the evidence which tends to show the con-

tents of such writing. *Jenness v. Berry*, 17 N. H. 549.

When an obligation appearing upon its face to be independent, is sought, by facts connected with the transaction, to be made dependent on the performance of another contract, such facts should be averred and proved; and it will be for the jury to determine whether the contracts of the parties were dependent. *Younger v. Welch*, 22 Tex. 417.

Whether a novation of a contract has taken place or not, is a question for the jury. See *NOVATION*, vol. 16, pp. 873, 897, 906; *Brown v. Kirk*, 20 Mo. App. 524.

3. See *infra* the title, *Interpretation and Construction*; *Eyser v. Weissgerber*, 2 Iowa 463.

4. *McMullan v. Mackenzie*, 2 Greene (Iowa) 368; *McDonald v. Matney*, 82 Mo. 358. And see *Kahn v. Central Smelting Co.*, 2 Utah 371.

5. *Doggett v. Jordan*, 2 Fla. 541, 549; *Cumpston v. McNair*, 1 Wend. (N. Y.) 457, 463; *Dulany v. Elford*, 22 S. Car. 304, 308.

6. *Doggett v. Jordan*, 2 Fla. 541, 549; *Dulany v. Elford*, 22 S. Car. 304, 308.

7. See *DATE*, vol. 5, p. 78; *Barry v. Hoffman*, 6 Md. 78; *Genter v. Morrisson*, 31 Barb. (N. Y.) 155.

As to the date at which a deed is recorded, see *Budd v. Brooke*, 3 Gill (Md.) 198, 231, where the court by Dorsey, J., said: "The time of recording of a deed is sometimes a matter to be determined by the court, and sometimes a question to be submitted to the finding

(b) *Consideration*.—Whether a consideration has been satisfactorily proved, is for the jury to decide.¹ When the illegality of consideration of a contract is apparent on its face, it is the province of the court to exclude it from evidence;² or if the facts in regard to the consideration are undisputed, it is for the court to say whether the instrument is valid or not.³ If, however, the facts are contested, the question must go to the jury, under proper instructions as to the conclusions of law arising out of the facts.⁴

(c) *Signature*.—The genuineness of a signature is a question for the jury.⁵

(d) *Seal*.—Whether an instrument be under seal or not, is a question for the judge.⁶

(e) *Delivery*.—As a deed is not operative until delivered, the question of delivery is to be settled in order to determine whether the contract exists. Whether a deed has been delivered, has been variously said to be a question of law,⁷ a question of fact,⁸ and a

of a jury. If it plainly appears, from indorsements officially made upon a deed, or its exemplification, that it has not been recorded within the time prescribed by law, and there is no admissible evidence in contravention of such indorsements, then the admissibility of a deed or its exemplification, in evidence, is determined by the court without any reference on the subject to the jury. But if there be such admissible contravening testimony, as to the time of the recording of the deed, legally sufficient to be left to the jury, to warrant them in finding that the deed was recorded in due time, then is the question, as to the time of recording of the deed, to be submitted, with a hypothetical instruction from the court, to the jury."

1. *Western Massachusetts Ins. Co. v. Duffy*, 2 Kan. 347; *Swain v. Etting*, 32 Pa. St. 486.

And so it has been held that in order to render binding a promise (made in consideration of forbearance) to pay the debt of another, it must be proved that the promise was made for the purpose of obtaining time, that time was actually given, and that the indulgence thus accorded was in pursuance of the request implied by the promise,—and that all of these are questions of fact. And so whether actual forbearance, following a promise in consideration thereof, is an acceptance of the promise, is a question for the jury. *Edgerton v. Weaver*, 105 Ill. 43, 46.

2. *Craig v. Andrews*, 7 Iowa 17, 22; *Danforth v. Evans*, 16 Vt. 538.

3. *Porter v. Havens*, 37 Barb. (N. Y.) 343.

4. 1 *Thomp. Tr.*, § 1138; *Craig v. Andrews*, 7 Iowa 17, 23.

5. *Magee v. Osborn*, 32 N. Y. 669. And see 1 *Greenl. Ev.* (14th ed.), § 577; *Garrells v. Alexander*, 4 Esp. 37; *Eagleton v. Kingston*, 8 Ves. 464, 473; *State v. Scott*, 45 Mo. 305; *State v. Clinton*, 67 Mo. 384; *Utica Ins. Co. v. Badger*, 3 *Wend.* (N. Y.) 162.

See generally SIGNATURE.

6. *Schwarz v. Herrenkind*, 26 Ill. 208.

But whether the seal is that of a particular party, as of a corporation, is a question for the jury. *Crossman v. Hilltown Turnpike Co.*, 3 *Grant's Cas.* (Pa.) 225.

And on the question as to the alteration of an instrument by affixing a seal, the jury may decide. *Schwarz v. Herrenkind*, 26 Ill. 208.

See generally SEAL.

7. See generally DEEDS, vol. 5, p. 445, *et seq.*; *Rogers v. Carey*, 47 Mo. 232. But in this case the facts were undisputed. "Where the facts are undisputed," said the court by Bliss, J., "their legal effect is a question of law, upon which the court may be required to pass."

8. *Garnons v. Knight*, 8 B. & R. 348; 5 B. & C. 471; *Bensley v. Atwill*, 12 Cal. 232; *Hibberd v. Smith*, 67 Cal. 547; *Dearmond v. Dearmond*, 10 Ind. 191, 194; *O'Kelly v. O'Kelly*, 8 Met. (Mass.) 436, 439; *Parker v. Dustin*, 2 *Fost.* (N. H.) 424; *Lawton v. Sager*, 11

mixed question of law and fact.¹ The true rule seems to be that the jury are to ascertain the facts alleged to constitute the delivery, together with the intent underlying them, and the court is to declare, generally by instructions, whether such facts amount, in effect, to a legal delivery of the deed.² In practice, however, the question generally requires no more than a determination of the facts;³ and this seems to be the meaning of the cases which hold that the question of delivery is for the jury.⁴ Whether a deed, or

Barb. (N. Y.) 351; Crain v. Wright, 36 Hun (N. Y.) 77; Floyd v. Taylor, 12 Ired. (N. Car.) 47; Hannah v. Swarner, 8 Watts (Pa.) 9; 34 Am. Dec. 442; Van Hook v. Walton, 28 Tex. 59.

In Hibbard v. Smith, 67 Cal. 547, 551, the court by Thornton, J., said: "The act, solemn and authentic, done in writing in form apt for the conveyance of land, with signature and seal, does not take effect as a deed until delivery with intent that it shall so operate. The elements going to make up such a paper all constitute an act, *factum*, or deed, but not complete until the paper has been delivered with the intent above mentioned. The intent with which it is delivered is all-important. This restricts or enlarges the effect of the instrument. It may be delivered to another person as a mere custodian, or to such person to be kept by him and delivered to a third person on a condition performed, or the happening of a certain event, or it may be delivered that it may have full operation as the deed of the party delivering it. This may be done in various modes. It is impossible to state *a priori* in exact terms what shall or shall not constitute a delivery, that the paper may have its full operation as a deed. It is to a great extent a matter of fact depending upon intent, and under such circumstances the intent as evidencing what the maker of the instrument meant to do, must be found from the circumstances of the transaction, the *res gestæ*, and while some general rules may be and are laid down in regard to it to ascertain such intent, the intent must be found as a fact, and cannot always be determined as matter of law. There are some cases in which the intent is so plainly indicated by the *res gestæ* that but one conclusion can be deduced. Take the case of the delivery of such an instrument to a third person as a mere custodian for the party giving it, its solution is plain that there is no de-

livery of the paper to make it operative as a deed. Take another case of such a paper handed by the grantor to the grantee, with the declaration, this is my act and deed, a delivery would be so plainly intended that no other conclusion could be reached. A third case of the delivery of such an instrument by the maker to a third person with directions to keep it and hand it to a person named as grantee in it, on the payment by him of a sum of money, the payment of the sum of money and the tradition of the paper as directed having been made, no other result could be reached than that the paper became by such delivery an operative conveyance. These cases are simple, but in other cases where the intent is to be inferred from circumstances in their very nature equivocal, the solution as to delivery or not becomes one of difficulty, and depends so much on the subjective state of the mind of person or persons trying the issue produced by the evidence of the attending circumstances, that the law can lay down no certain rule on the subject. It then becomes a question of fact, and if there is evidence tending to sustain the finding of the court *a qua*, this court will not disturb it. This is settled, that delivery is not complete until the person delivering (grantor) has so dealt with the instrument delivered as to lose all control over it. And whether he has so dealt with the instrument depends upon the intent to be deduced from all the surrounding circumstances, the *res gestæ*."

1. Burke v. Adams, 80 Mo. 504; 50 Am. Rep. 510; Hurlburt v. Wheeler, 40 N. H. 73.

2. Earle v. Earle, 20 N. J. L. 347; Hannah v. Swarner, 8 Watts (Pa.) 9; 34 Am. Dec. 442; Lindsay v. Lindsay, 11 Vt. 621. And compare Rogers v. Carey, 47 Mo. 232.

3. Hurlburt v. Wheeler, 40 N. H. 73.

4. See note 8, p. 637.

other instrument, was delivered as an escrow, is generally a question of fact for the jury.¹

(f) *Acceptance*.—In respect to the acceptance of a deed, the doctrine is the same as in reference to the delivery.²

(2) *Implied Contracts*.—Whether a promise, under any given circumstances, is implied by the law, is a question for the court.³ When the law does not imply a promise, the question whether the parties intended that compensation should be given, so as to justify a recovery upon a *quantum meruit*, is for the jury to answer.⁴

2. Constitutionality, Legality, Validity.—The constitutionality of laws or ordinances is a question exclusively for the court.⁵ The validity of the regulations and by-laws of a corporation is to be determined by the court,⁶ and to submit such a question to the jury is improper.⁷ Moreover, whether a given custom is valid or invalid, is always a question of law for the court, and should not be left to the jury.⁸ So it is for the judge to pass upon the validity of a judicial record,⁹ and of an assignment,¹⁰ and to determine whether a contract is invalid as being against public policy,¹¹

1. *Ricketts v. Pendleton*, 14 Md. 329; *Jaquith v. Hudson*, 5 Mich. 123; *Scott v. Pentz*, 5 Sandf. (N. Y.) 572.

Thus, where a contract in duplicate was left by parties with a third person, and the evidence as to the arrangement for its subsequent delivery, and the terms upon which it was to become operative, was conflicting, it was held that the question of the terms and conditions upon which the contract was to become operative, was one of fact for the jury, depending upon the intention of the parties to be gathered from the whole transaction. *Jaquith v. Hudson*, 5 Mich. 123.

See generally, *ESCROW*, vol. 6, p. 857.

2. See *Bensley v. Atwill*, 12 Cal. 232; *Earle v. Earle*, 20 N. J. L. 347.

See generally *DEEDS*, vol. 5, p. 445.

3. *Prickett v. Badger*, 1 C. B. N. S. 296; 87 E. C. L. 295; commenting upon *De Bernardy v. Harding*, 8 Exch. 822; 22 L. J. Exch. 340. Compare *Pitts v. Pitts*, 21 Ind. 309; *Smith v. Denman*, 48 Ind. 65; *Hilbish v. Hilbish*, 71 Ind. 27; *Boyer v. Riley*, 41 Iowa 13; *Ayres v. Hull*, 5 Kan. 419; *Greenwell v. Greenwell*, 28 Kan. 678; *Gordner v. Hefley*, 49 Pa. St. 163.

4. 1 Thomp. Tr., § 1154; *Le Sage v. Coussmaker*, 3 Esp. 187; *Osborne v. Governors of Guy's Hospital*, 2 Str. 728; *Myers v. Malcom*, 20 Ill. 621; *Guild v. Guild*, 15 Pick. (Mass.) 129; *Strong v. Saunders*, 15 Mich. 339; *In re Young*, 39 Mich. 429; *Bickford v. Dane*, 58 N. H. 185; *Jacobson v. La Grange*, 3 Johns. (N. Y.) 199; *Quackenbush v.*

Ehle, 5 Barb. (N. Y.) 469; *Robinson v. Raynor*, 28 N. Y. 497; 36 Barb. (N. Y.) 131.

Thus, where parents lived with a step-son, it is proper for a jury to decide, upon all the facts, whether it was the intention of the parties that the parents should pay board, or whether they lived upon the hospitality of their relative. *Myers v. Malcom*, 20 Ill. 621.

See generally, *QUANTUM MERUIT*.

5. See *supra* p. 620, n. 2; *Peoria v. Calhoun*, 29 Ill. 317; *Maltus v. Shields*, 2 Metc. (Ky.) 553.

6. 1 Thomp. Tr., § 1057; *St. Louis v. St. Louis R. Co.*, 14 Mo. App. 221; *St. Louis v. Weber*, 44 Mo. 547; *State v. Overton*, 24 N. J. L. 435, 440; *Morris*, etc., R. Co. *ads. Ayres*, 29 N. J. L. 353.

In *Chicago*, etc., R. Co. *v. McLallen*, 84 Ill. 109, 116, the court by Dickey, J., said: "Whether any given rule be reasonable, and therefore within the power of the corporation, or whether it be unreasonable, and therefore *ultra vires*, is a question of law for the courts. But whether such rules are adequate for the safety of the management of trains, is a question of fact, and was properly left to the jury."

See *BY-LAWS*, vol. 2, p. 708, note 1.

7. *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 25.

8. *Chicago Packing, etc., Co. v. Tilton*, 87 Ill. 547.

9. *Sims v. Boynton*, 32 Ala. 352, 360.

10. *Snyder v. Kurtz*, 61 Iowa 593.

11. *Tallis v. Tallis*, 1 E. & B. 391, 413; 72 E. C. L. 390, 413; *Pierce v. Ran-*

and whether a will is invalid by reason of not having been executed with the proper formalities.¹ When the question is whether an instrument has upon its face been duly executed, the decision will, upon an inspection of the document, be made by the judge.² But where the validity of an instrument depends upon an extrinsic fact which is doubtful or disputed, as, whether a party to a contract was so intoxicated at the time of making it as to be entitled to rescind it after becoming sober, the question of validity is for the jury.³

3. Reasonableness—*a.* REASONABLE TIME.—It seems impossible, amid the large number of conflicting decisions, to lay down a general rule as to when the question of reasonable time is for the court and when for the jury. In many of the cases, it is said that where the facts are not in dispute, the question is purely one of law.⁴ Other authorities maintain that it is a question of

dolph, 12 Tex. 290, 295, in which case the court by Hemphill, J., said: "It seems a new rule has been discovered (i. e., in the lower court) by which to test the validity of contracts, and that is, the belief of the jury with regard to their tendency to immorality and breaches of the peace, and this even where such contracts have been declared by the court of last resort to be valid in law, and to have all the force and efficacy which the law can impart to any contract. No doctrine more subversive of law and of private and public rights could have been devised. In fact it sets them afloat upon public sentiment, to fluctuate and rise and fall with the ebbs and flows of public opinion, and when brought to trial, to succeed or fail, not according to established rules of law, but upon the belief, the private opinions, or, in other words, the whims and caprices of the jury before whom they are presented. The most sacred rights, those most cherished by the law, may be frustrated and defeated, if, without any regard to the law, a justice of the peace with his jury might deem them against morals, good order, or public policy. Under this doctrine, not only would contracts for the sale of spirituous liquors, for public barbecues, or secular exhibitions of any kind, which would attract masses of people together, most likely be deemed nullities, but the regular physician might fail to recover for his rights and his services, if his rights were submitted to a jury of hydropathists, who might believe them to be dangerous to the health and life of the patient. The rights to lands, however clear, under

patents and deeds, might suddenly be lost under the operation of agrarian principles by which the jury or some of them might be infected, and who, in their conscience, might believe that one hundred and sixty or three hundred and twenty acres were the extreme limit which should be allowed to any single individual, and to suffer more to be recovered or enjoyed would be destructive of the equal rights of others, and at war with sound public policy. But it is useless to multiply instances of the danger of such a doctrine. They will readily suggest themselves to any reflecting mind."

1. *Riley v. Riley*, 36 Ala. 496; *Roe v. Tayler*, 45 Ill. 485; *Garner v. Lansford*, 12 Smed. & M. (Miss.) 558, 561. *Contra* *Watford v. Forester*, 66 Ga. 738, holding that whether a will is signed and attested as required by law, is a question for the jury. This decision is characterized by Judge Thompson (1 Thomp. Tr. 829, note 1) as "an obvious judicial aberration."

2. Thus, whether a mortgage has been properly executed and acknowledged, is a question of law to be passed upon by the court, and it is error to leave such a question to the jury. *Bullock v. Marrott*, 49 Ill. 62.

3. *Cummings v. Henry*, 10 Ind. 109; *Hanna v. Phillips*, 1 Grant's Cas. (Pa.) 253; *Reynolds v. Dechaums*, 24 Tex. 174.

See INTOXICATION AS A DEFENSE TO CONTRACTS, vol. 11, p. 776.

4. See generally REASONABLE; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129; *Nunez v. Dautel*, 19 Wall. (U. S.) 560; *Chicago, etc., R. Co. v. Boyce*, 73 Ill.

fact,¹ and still others, with convenient vagueness, characterize the question of reasonable time as "a mixed question of law and fact,"² or as "a question for the jury under the instructions of the court."³ On principle it would appear that if a statute or any positive rule of law prescribes the doing of an act within a reasonable time, it is the province of the court, in construing such law, to declare whether a given time is, within the intent or meaning of the law, a reasonable time.⁴ So, in the interpretation of a written

510; *Gatling v. Newell*, 8 Ind. 572, 577; *Attwood v. Clark*, 2 Me. 249; *Kingsley v. Wallis*, 14 Me. 57; *Greene v. Dingley*, 24 Me. 131; *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Holbrook v. Burt*, 22 Pick. (Mass.) 546, 555; *Derosia v. Winona, etc.*, R. Co., 18 Minn. 133; *Bottom v. Moore*, 13 Daly (N. Y.) 464; *Sice v. Cunningham*, 1 Cow. (N. Y.) 397; *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304; *Roth v. Buffalo, etc.*, R. Co., 34 N. Y. 548; 90 Am. Dec. 734; *Hedges v. Hudson River R. Co.*, 49 N. Y. 225; *Bennett v. Lycoming Mut. Ins. Co.*, 67 N. Y. 274; *Bryden v. Bryden*, 11 Johns. (N. Y.) 187; *Breuzer v. Wightman*, 7 W. & S. (Pa.) 264; *Lancaster Bank v. Woodward*, 18 Pa. St. 357, 362; *Nudd v. Wells*, 11 Wis. 407, 519.

1. *Joy v. Sears*, 9 Pick. (Mass.) 4; *Derosia v. Winona, etc.*, R. Co., 18 Minn. 133; *Johnson v. Whitman Agricultural Co.*, 20 Mo. App. 100; *Gilhooly v. New York, etc.*, R. Co., 1 Daly (N. Y.) 197.

2. *Bell v. Wardell*, Willes 202; *Davis v. Capper*, 10 B. & C. 28, per Bayley & Parke, JJ.; 21 E. C. L. 20; 5 M. & R. 53; 4 C. & P. 134; *Chicago, etc.*, R. Co. v. *Boyce*, 73 Ill. 510; *Gatling v. Newell*, 9 Ind. 572, 577; *Derosia v. Winona, etc.*, R. Co., 18 Minn. 133; *Roth v. Buffalo, etc.*, R. Co., 34 N. Y. 548; 90 Am. Dec. 734; *Chamberlain v. Fuller*, 59 Vt. 247.

3. *Field v. Nickerson*, 13 Mass. 131, 137; *Roth v. Buffalo, etc.*, R. Co., 34 N. Y. 548; 90 Am. Dec. 734.

4. *Stodden v. Harvey*, Cro. Jac. 204; Co. Litt. 56, b; *Benton v. Sutton*, 1 B. & P. 24, 28; *Sheibel v. Fairbain*, 1 B. & P. 388; *Tindal v. Brown*, 1 T. R. 167; 2 T. R. 186; *Doe v. Smith*, 2 T. R. 436; *Hunt v. Royal Exchange Assurance Co.*, 5 M. & S. 47; *Hurst v. Ray*, 5 M. & C. 47; *Startup v. Macdonald*, 6 M. & G. 593, 623; 46 E. C. L. 591, 623; *Standard Oil Co. v. Van Etten*, 107 U. S. 325; *Attwood v. Clark*, 2 Me. 249; *Kingsley v. Wallis*, 14 Me.

57; *Howe v. Huntingdon*, 15 Me. 350, 354; *Howe v. Nickels*, 22 Me. 175; *Greene v. Dingley*, 24 Me. 131; *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Porter v. Blood*, 5 Pick. (Mass.) 54; *Hussey v. Freeman*, 10 Mass. 84; *Bryden v. Bryden*, 11 Johns. (N. Y.) 187; *Hughes v. Pipkin*, Phil. (N. Car.) 4. And compare *Scranton v. Stewart*, 52 Ind. 68, 93; *Hartman v. Kendall*, 4 Ind. 403.

In *Howe v. Huntingdon*, 15 Me. 350, 354, the court by Shepley, J., said: "Where the law does not by the operation of any principle or established rule decide upon the legal quality of the simple facts, it is for the jury to draw the general inference of reasonable or unreasonable [time]. 1 Stark. Ev. 455. It is obvious that many of the cases would not be found to conform strictly to this rule. Its effect would be in some measure to relieve the court, while it would hardly carry out the design of Lord Mansfield in having rules established in all practicable cases by the court, for the purpose of affording settled views by which to be governed. It has evidently been the desire of the courts to decide themselves, where they could do so upon any rule which might become certain, and furnish a precedent for future cases. And it is in this way that the law in relation to demand and notice upon bills and promissory notes has become so well defined and exact. Where there is no certain time limited within which or from which the act is to be done, but it is to be accommodated in some degree to the interests of the party and the course of trade, as in the case of bills at sight and notes on demand; or where it may, in some measure, depend upon the state of the weather, as in the case of removal of goods distrained, or the tithe crop, it has been left to the jury to decide upon each case as it arises. Where there is a certain epoch, after which the act is to be performed as soon as it may be conveniently, without regard to one's interest, or to

instrument specifying a reasonable time, the question what is such time, is one for the court to answer, after considering the terms of the instrument and the intent of the parties.¹ But an important qualification to both of the above principles is to be noted. If the question as to what is a reasonable time is not resolved expressly or impliedly by the rule of law, or by the writing, which is under consideration, so that the judge, in deciding the question, would have no legal ground, but merely his individual ideas to go upon; and especially if, in addition, the question depends in the individual case upon peculiar, numerous, or complicated circumstances,—the reasonableness of the time becomes a question for the jury, whose province it is, rather than that of the judge, to say, in view of all the facts of the case, whether or not the time in question is reasonable in the sense of being in accordance with the course of business and the ordinary transactions of life.² It has, however,

the course of trade, or to other matters not within the control of human agency, the court may be able to come to a satisfactory conclusion for itself without the assistance of a jury."

Thus, in case of negotiable paper, what is a reasonable time for giving notice of dishonor is fixed by the mercantile law, and is consequently a question for the court. *Tindal v. Brown*, 1 T. R. 167; 2 T. R. 186; *Howe v. Huntingdon*, 15 Me. 350, 353; *Hussey v. Freeman*, 10 Mass. 84; *Whitwell v. Johnson*, 17 Mass. 449, 453; *Bryden v. Bryden*, 11 Johns. (N. Y.) 187; *Lamb v. Camden, etc., R. Co.*, 2 Daly (N. Y.) 454, 473. But see *Hilton v. Shepherd*, 6 East 14, note; *Hopes v. Alder*, 6 East 16.

But what is a reasonable time within which to present a bill for acceptance, or a demand bill or note for payment, depends upon circumstances, and is properly a question for the jury. *Mullman v. D'Eguino*, 2 H. Bl. 565; *Fry v. Hill*, 7 Taunt. 397; *Wallace v. Agry*, 4 Mason (U. S.) 336, 346-7; *Howe v. Huntingdon*, 15 Me. 350, 354; *Wyman v. Adams*, 12 Cush. (Mass.) 210; *Salmon v. Grosvenor*, 66 Barb. (N. Y.) 160; *Lancaster Bank v. Woodward*, 18 Pa. St. 357, 362; *Barbour v. Fullerton*, 36 Pa. St. 105. *Contra*, *Poorman v. Mills*, 39 Cal. 345; *Sice v. Cunningham*, 1 Cow. (N. Y.) 397; *Carll v. Brown*, 2 Mich. 401; *Sylvester v. Crapo*, 15 Pick. (Mass.) 92; *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304 (presentment of check for payment). See note 2 below.

1. *Hill v. Hobart*, 16 Me. 164, 168.

And particularly when the question what is a reasonable time depends upon certain other controverted points, or involves the motives of the parties, must the question be submitted to a jury. *Hill v. Hobart*, 16 Me. 164, 168. And compare *Stark. Ev.* (9th. ed.) 769, where the author says: "The law cannot prescribe in general what shall be reasonable time by any defined combination of facts, so much does the question depend upon the situation of the parties, and the minute and peculiar circumstances incident to each case. If a man has a right, by contract or otherwise, to cut and take crops from the land of another, the law, it is obvious, can lay down no rule as to the precise time when they shall be cut and removed; all that can be done is to direct and imply that this shall be done in a reasonable and convenient time; and this must obviously depend upon the state of the weather and other circumstances which cannot, from their nature, form the basis of any legal rule or definition."

2. This statement is believed to be supported by a general view of the following cases: *Parker v. Palmer*, 4 B. & Ald. 387; 6 E. C. L. 529; *Cave v. Mountain*, 1 M. & G. 257; 39 E. C. L. 432; 1 Scott 132; *Gillman v. Connor*, 3 Jebb & S. 210; *Mount v. Larkins*, 8 Bing. 108; 21 E. C. L. 241; 1 Moo. & Sc. 165; *Fry v. Hill*, 7 Taunt. 397; *Goodwyn v. Cheveley*, 4 H. & N. 631; *Burton v. Griffiths*, 11 M. & W. 817; 824; *Ellis v. Thompson*, 3 M. & W. 445; 1 H. & H. 131; *Facey v. Hurdom*, 3 B. & C. 213; 10 E. C. L. 56; *Pitt v.*

Shew, 4 B. & Ald. 208; 6 E. C. L. 453; *Graham v. Van Diemen's Land Co.*, 11 Exch. 100; 1 Jur. N. S. 806; *Cocker v. Franklin, etc.*, Co., 3 Sumn. (U. S.) 530; *Murrell v. Whiting*, 32 Ala. 55, 65; *Luckhart v. Ogden*, 30 Cal. 548, 558; *Simms v. Clark*, 11 Ill. 137; *Magee v. Carmack*, 13 Ill. 289, 291-2; *Kennedy v. Gibbs*, 15 Ill. 406; *Haywood v. Harmon*, 17 Ill. 477; *Union Nat. Bank v. Baldenwick*, 45 Ill. 375; *Davis v. Kenaga*, 51 Ill. 170; *Wiley v. Wilson*, 77 Ind. 596; *Mote v. Chicago, etc.*, R. Co., 27 Iowa 22; *Minnesota Linseed Oil Co v. Montague*, 59 Iowa 448; *Wilder v. Sprague*, 50 Me. 354; *Joy v. Sears*, 9 Pick. (Mass.) 4; *Bradford v. Drew*, 5 Met. (Mass.) 188; *Peter v. Thickett*, 51 Mich. 589; *Cochran v. Toher*, 14 Minn. 385, 389; *Du Laurans v. St. Paul, etc.*, R. Co., 15 Minn. 49; *Derosia v. Winona, etc.*, R. Co., 18 Minn. 133; *Pinney v. St. Paul, etc.*, R. Co., 19 Minn. 251; *Roberts v. Mazeppa Mill Co.*, 30 Minn. 413; *Boyd v. Mexico Southern Bank*, 67 Mo. 537; *Schwab v. Union Line*, 13 Mo. App. 159; *Kipp v. Wiles*, 3 Sandf. (N. Y.) 585; *Green v. Haines*, 1 Hilt. (N. Y.) 254; *Lamb v. Camden, etc.*, R. Co., 2 Daly (N. Y.) 454, 473; *Parkhill v. Imlay*, 15 Wend. (N. Y.) 431; *Burrill v. Watertown Bank & Loan Co.*, 51 Barb. (N. Y.) 105; *Cross v. Beard*, 26 N. Y. 86, 89; *O'Brien v. Phoenix Ins. Co.*, 76 N. Y. 459; *Acton v. Knowles*, 14 Ohio St. 18; *Porter v. Patterson*, 15 Pa. St. 229; *Hays v. Hays*, 10 Rich. (S. Car.) 419; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Evans v. Harde-man*, 15 Tex. 480.

In *Lamb v. Camden, etc.*, R. Co., 2 Daly (N. Y.) 454, 473, the court by Daly, F. J., said: "What is a reasonable time within which goods deliverable at the warehouse or depot of the carrier must be taken away, is a question more or less dependent upon circumstances, such as the nature of the goods, the mode of doing business, as well as other considerations, upon which men equally intelligent may come to different conclusions; making it especially appropriate that such questions, as a general rule, should be determined by the jury, and not by the court. 'The question,' says Angel, 'of what is requisite to constitute a competent delivery by the carrier, or such a delivery as will determine the transit and dissolve his liability, in a great measure is left to the jury to determine.' Angel on Carriers, § 282. What is a reason-

able length of time in cases of demurrage, is determined upon all the circumstances legitimately bearing upon the case, and is a question for the jury. *Cross v. Beard*, 26 N. Y. 89, 92. A case may arise in which the court can say at once, as matter of law, that more than a reasonable length of time has elapsed, as in *Nudd v. Wells*, 11 Wis. 407, where a package was to be conveyed by a carrier from Boston to Milwaukee, and a year had gone by without his delivering it; but in the great majority of cases, the question should be left to be determined by the jury."

In *Cochran v. Toher*, 14 Minn. 385, 389, the court by McMillan, J., said: "It is a familiar rule that all questions of law are to be determined by the court, and questions of fact are within the exclusive province of the jury. Ordinarily there is but little difficulty in ascertaining what questions are for the court and what for the jury; but there are cases in which it is somewhat difficult to determine whether the conclusion is one of fact or of law. This difficulty frequently arises when the inquiry is as to questions of reasonable time, reasonable cause, due diligence, probable cause, and others of a like character. Abstractly, these are questions of law, just as the terms 'larceny,' 'robbery,' and 'assault and battery' are, for 'it is a question of legal judgment and discretion to pronounce whether the facts, as found by a jury, do or do not satisfy the legal expression.' But the latter terms, and others of the same class, are absolutely defined and determined in the law by general rules applicable to all cases; so that, upon the finding by the jury of the specific facts in each particular case, the law draws the conclusion that they do or do not constitute the particular offence charged. In all such cases, therefore, it is for the court to determine, as a question of law, the sufficiency or insufficiency of the facts to constitute the offence. So, in some cases, the law determines what shall or shall not be reasonable time or cause, and the like. As in the case of a bill of exchange, where the law requires notice of dishonor to be given within a reasonable time, if it appears on the facts proved in evidence that the case is one falling within a rule by which the law itself prescribes and defines what shall be considered to be reasonable time, the question is a mere ques-

been said that the time in question may be so short or so long

tion of law, for the law itself, from the mere *res gestæ*, makes the inference that the time was reasonable. 1 Stark. Ev. 516. But in other instances questions of this character depend on such an infinite variety of circumstances, that, by reason of the impracticability of prescribing any general rule applicable to the facts of each particular case, the inference in law follows the inference in fact, and, in such cases, the time will be reasonable, or the cause probable in point of law, according as the one or the other is reasonable or probable in point of fact. 'Hence it follows that the test for deciding whether such general inference as to reasonable time, probable cause, etc., be one of law or of fact is this: If the court in the particular case can draw the conclusion by the application of any legal rules or principles, the conclusion is a legal one. . . . But if, on the other hand, the circumstances be so numerous and complicated as to exclude the application of any general principle, or definite rule of law, the further inference is necessarily one of mere fact, to be made by the jury. In other words, the rules of ordinary practice and convenience become the legal measure and standard of right.' 1 Stark. Ev. 514, 516, note *i*, 517."

In *Luckhart v. Ogden*, 30 Cal. 548, 558, the court by Currey, C. J., said: "The term reasonable time is a technical and legal expression, which in the abstract involves matter of law as well as matter of fact. Whenever any rule or principle of law applies to the special facts proved in evidence and determines their legal quality, its application is matter of law. But whenever the special facts and circumstances are such that the court cannot, by the aid of any legal rule or principle, decide upon the legal quality of the facts, it is necessary that the jury should draw the inference in fact, with reference to the ordinary course and practice of dealing, and the general principles of morality and utility. Where the law itself prescribes what shall be considered to be reasonable time in respect to a given subject, the question is one of law, and the duty of the jury is confined to finding the simple facts. Where, on the other hand, the law does not by the operation of any principle or established rule decide upon the le-

gal quality of the simple facts, or *res gestæ*, it is for the jury to draw the general inference of reasonable or unreasonable [time] in point of fact. In such cases, the legal conclusion follows the inference of facts; in other words, the question as to reasonable time, etc., is one of fact, and the time is reasonable or unreasonable, in point of law, according to the finding of the jury in point of fact.' Stark. Ev. 774."

In *Magee v. Carmack*, 13 Ill. 289, 291-2, the court by Caton, J., said: "The refusal of the court to give the instruction declaring this principle was attempted to be sustained upon the ground, as it was insisted, that what constitutes a reasonable time is a question of law for the court and not of fact for the jury; and hence that it would have been improper to have submitted that question to them. This position certainly was not well considered. When from the nature of the subject, a general rule can be applied to all cases, then what constitutes reasonable notice may be a question of law for the court, as notice to the indorser of a bill or note. But when, as in this case, the question of what would constitute a reasonable time, must depend upon the peculiar circumstances of each case, and cannot reasonably be subjected to any general rule, then it is a question of fact for the jury, to be determined from all the circumstances."

What is a reasonable time to keep a ticket office open for the purchase of tickets is a question for a jury. *Du Lurans v. St. Paul, etc., R. Co.*, 15 Minn. 49. In this case the court by *McMillan, J.*, said: "If, therefore, the ticket office was not open for such reasonable time previous to the departure of the train as to enable the plaintiff to procure his ticket, the defendant could not demand of him more than the ticket fare, and his expulsion from the train was wrongful. What is a reasonable time for such purpose must depend on circumstances; what would be a reasonable time at a country station might not be sufficient in a large city; what would be reasonable in either depends on the number of passengers usually entering the train there, and other circumstances. What was reasonable time in this instance, therefore, was properly submitted to

that the court will declare it, as matter of law, to be reasonable or unreasonable.¹

b. REASONABLE DOUBT.—See HOMICIDE, vol. 9, p. 737; REASONABLE DOUBT.

c. OTHER CASES.—In all other instances where the question arises whether the court or the jury are to decide as to the reasonableness of any given thing, the same criterion is to be applied as was mentioned above in regard to the question of reasonable time, viz., that if the judge can be certain that there is legal ground, express or attainable by inference, upon which to base a decision of the question, then the question of reasonableness falls within the province of the court; but otherwise it goes to the jury.²

Thus, the reasonableness of the rules of a board of trade,³ or of the rules, regulations, ordinances, or by-laws of a corporation,⁴ is a question for the court. So, whether fines, customs, or services are reasonable or not, is a question for the court to decide.⁵ So, whether a provision in a contract prescribing the time within which suit shall be brought against a carrier, or notice of loss given to a carrier or telegraph company, is reasonable, is a question of law for the court.⁶ So, also, the reasonableness of a restriction in restraint of trade is, according to the better opinion, for the court to determine.⁷ But whether the excuse of a carrier for not delivering goods, founded on the insufficient identification of the person claiming them as consignee, was reasonable or not, is a question for the jury.⁸ So, it is for the jury to decide what is a

the jury under the instructions of the court."

1. *Druse v. Wheeler*, 26 Mich. 189; *Johnson v. Whitman Agricultural Co.*, 20 Mo. App. 100; *Lamb v. Camden*, etc., R. Co., 2 Daly (N. Y.) 454, 474; *Lancaster Bank v. Woodward*, 18 Pa. St. 357, 362; *Nudd v. Wells*, 11 Wis. 407, 419.

2. See *supra*, this title, *Reasonable Time*.

3. *Chicago, etc., v. Tilton*, 87 Ill. 548.

4. *Ang. & Ames on Corp.* (11th ed.), § 357; *Common Council of Alexandria v. Brockett*, 1 Cranch (C. C.) 505; *Illinois Central R. Co. v. Whittemore*, 43 Ill. 420; *Chicago, etc., R. Co. v. McAllen*, 84 Ill. 109, 116; *Com. v. Worcester*, 3 Pick. (Mass.) 462, 473; *St. Louis v. St. Louis R. Co.*, 14 Mo. App. 221; *St. Louis v. Weber*, 44 Mo. 547; *Paxson v. Sweet*, 13 N. J. L. 196; *Vedder v. Fellows*, 20 N. Y. 126.

But in the two following cases, a distinction was taken between by-laws (which bind only the members of the corporation) and regulations which affect third persons; and it was held that whether the by-law of a corporation be void as being in a legal sense unreason-

able, or in conflict with law, or with the charter of the corporation, is a question of law for the court; but that the reasonableness of such regulations as are deemed necessary and conducive to the comfort, convenience, or safety of passengers, or necessary to protect the rights of the company, is purely a question of fact. *State v. Overton*, 24 N. J. L. 435, 440; *Morris, etc., R. Co. ads. Ayres*, 29 N. J. L. 393.

5. 2 *Thomp. Tr.*, § 1570, *citing* *Co. Litt.* 56, b, 59, b; *Bell v. Wardell*, *Willes* 202, 204; *Wilson v. Hoare*, 10 A. & E. 236; 37 E. C. L. 106; *Bourke v. James*, 4 Mich. 336.

6. *Thompson v. Chicago, etc., R. Co.*, 22 Mo. App. 321; *Brown v. Wabash, etc., R. Co.*, 18 Mo. App. 568, 577. *Compare* *Dawson v. St. Louis, etc., R. Co.*, 76 Mo. 514.

See generally CARRIERS OF LIVE STOCK, vol. 3, p. 15; TELEGRAPH COMPANIES.

7. 2 *Thomp. Tr.*, § 1572; *Mallan v. May*, 11 M. & W. 653. But see *Tallis v. Tallis*, 1 E. & B. 391; 72 E. C. L. 390.

See generally ILLEGAL CONTRACTS, vol. 9, p. 884, *et seq.*

8. *McEntee v. New Jersey Steamboat*

reasonable amount of baggage,¹ or of money,² which a passenger may take with him in his trunk, so as to charge the carrier with liability therefor as an insurer. So, whether the claim of a boom company for services is reasonable or not, is a question of fact for the jury.³ So, what is the reasonable value of goods supplied as necessities to a minor,⁴ and what is a reasonable use of a right of way, are questions for the jury.⁵

4. Interpretation and Construction—*a*. WRITTEN LANGUAGE.—

As a rule, questions in regard to the interpretation, construction, or effect of written documents are for the court alone, and for the jury to submit such questions to the jury is error.⁶ This rule ap-

Co., 45 N. Y. 34; 6 Am. Rep. 28. *Compare* CARRIERS OF GOODS, vol. 2, p. 887.

1. New York, etc., R. Co. v. Fraloff, 100 U. S. 24, 29. *Compare* BAGGAGE, vol. 1, p. 1042.

2. Merrill v. Grinnell, 30 N. Y. 594. And *compare* Jordan v. Fall River R. Co., 5 Cush. (Mass.) 69; Johnson v. Stone, 11 Humph. (Tenn.) 419.

3. Hall v. Tittabawassee Boom Co., 51 Mich. 377; Sturgeon River Boom Co. v. Nester, 55 Mich. 113. And *compare* BOOM COMPANIES, vol. 2, p. 469.

4. Garr v. Haskett, 86 Ind. 373. See also INFANTS, vol. 10, p. 665.

5. Hawkins v. Carlines, 3 H. & N. 914.

Right of Way.—So where an administratrix brought an action to recover damages for the obstruction of a way, through the erection of a fence across it, the right of way being claimed as appurtenant to land conveyed to her intestate, it was held that the right of way passed as appurtenant to the land granted, even though no insuperable physical obstacles prevented access by another way, provided such other way could not be made without unreasonable labor and expense, and that of this the jury were to judge. *Pettingill v. Porter*, 8 Allen (Mass.) 1.

6. See INTERPRETATION, vol. 11, p. 518.

"The construction of all written instruments," said Parke, B., in *Neilson v. Harford*, 8 M. & W. 806, 823, "belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words which are to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be as-

certainied; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all, effectually." And in *Hutchinson v. Bowker*, 5 M. & W. 535, the same judge said: "The law I take to be this,—that it is the duty of the court to construe all written instruments; if there are peculiar expressions used in it which have in particular places and trades a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the court to decide what the meaning of the contract was. It was right, therefore, to leave it to the jury to say whether there was a peculiar meaning attached to the word '*fine*' in the corn market; and the jury having found what it was, the question whether there was a complete acceptance by the written documents [of the offer of sale] is a question for the judge." And see *Morrell v. Frith*, 3 M. & W. 406.

In *McKenzie v. Sykes*, 47 Mich. 294, the court by Cooley, J., said: "It is for the court to interpret the written contracts of parties; for when they have assented to definite terms and stipulations, and incorporated them in formal documents, the meaning of these, it is supposed, can always be discovered on inspection; nothing which is within the purview of the contract is left in doubt, and there is, of course, nothing to submit to the jury."

In *Cook v. Carroll*, 6 Md. 104, the court by Le Grand, C. J., said: "It is exclusively the province of the court to interpret all written instruments, and to determine the materiality and force of each and all the facts contained in

plies to all written laws, such as constitutional provisions,¹ statutes,²

them. Were a jury permitted to do this, there would be no certain legal significance assignable to any paper, for it would depend upon the peculiar notions of each particular jury, under whose supervision it might be brought, and thus a recital in a case like the one now before us, might be deemed material by one jury, and by another as wholly immaterial and unimportant."

In *Denison v. Wertz*, 7 S. & R. (Pa.) 372, the court said: "This is a matter of very great importance. The security of property depends upon it; for there is no appeal from the decision of a jury. The injured party may indeed move for a new trial, but the court may grant or refuse, at its discretion. It is the right, therefore, of every suitor to have the opinion of the court on such matters as, by the law of the land, the court is bound to decide; and one of these matters is the construction of written contracts. There may be cases in which extrinsic circumstances are so connected with a writing as to render it necessary to leave the whole to the jury."

1. Constitutional Provisions.—See *supra* p. 620, n. 2. And compare *Mal-tus v. Shields*, 2 Metc. (Ky.) 553; *Ramsey Co. v. Heenan*, 2 Minn. 330.

2. Statutes.—*Inge v. Murphy*, 10 Ala. 897; *Barnes v. Mayor, etc.*, of Mobile, 19 Ala. 707; *Fairbanks v. Woodhouse*, 6 Cal. 433; *Thorp v. Craig*, 10 Iowa 461; *Belt v. Marriott*, 9 Gill (Md.) 331; *Byrne v. Byrne*, 3 Tex. 336; *Large v. Orvis*, 20 Wis. 696.

Hence it is error for the court to submit to the jury the meaning of a material word in a statute. *Goode v. State*, 16 Tex. App. 411. But in *Montgomery v. Townsend* (Ala., 1887), 2 So. Rep. 155, it seems to have been held, contrary, it is believed, to principle and authority, that whether the cutting down of a sidewalk fifteen feet to the level of the street was a "construction" within the meaning of a provision in the State Constitution, was a question of fact for the jury.

Foreign Laws.—The construction and effect of a foreign law, after it has been proved, is a question for the court. *Di Sora v. Phillips*, 10 H. L. Cas. 624; *U. S. v. McRae*, L. R. 3 Ch 79; *Bremer v. Freeman*, 10 Moore P. C. 306; *Consequa v. Willing*, 1 Pet. (C. C.) 229; *Ennis v. Smith*, 14 How. (U.

S.) 400; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191; *Cecil Bank v. Barry*, 20 Md. 287; *Kline v. Baker*, 99 Mass. 253; *Haines v. Hanrahan*, 105 Mass. 480; *Ely v. James*, 123 Mass. 36; *Sherley v. McCormick*, 135 Mass. 126; *Shoe, etc., Nat. Bank v. Wood*, 142 Mass. 563; *Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81; *Charlotte v. Chouteau*, 25 Mo. 465; 33 Mo. 194; *Cobb v. Griffith*, 87 Mo. 90; *State v. Jackson*, 2 Dev. (N. Car.) 563; *Sidwell v. Evans*, 1 P. & W. (Pa.) 383; *Bock v. Lanman*, 24 Pa. St. 435; *Stack v. O'Hara*, 98 Pa. St. 213. *Contra*, *Holman v. King*, 7 Met. (Mass.) 384. Compare FOREIGN LAWS, vol. 8, p. 435.

Sunday Laws.—An exception to the rule assigning to the court the interpretation of statutes, seems to exist in cases arising under Sunday laws, in which it has been held that whether or not an act done on Sunday amounts to a work of necessity or charity within the meaning of the statute, is a question of fact for the jury. *Hooper v. Edwards*, 18 Ala. 280; *Stewart v. Davis*, 31 Ark. 518; *Edgerton v. State*, 67 Ind. 588; *Ungericht v. State*, 119 Ind. 379; *Com. v. Harrison*, 11 Gray (Mass.) 309; *Smith v. Boston, etc., R. Co.*, 120 Mass. 493; *State v. Knight*, 29 W. Va. 340. Compare *Com. v. Sampson*, 97 Mass. 409; *Feital v. Middlesex R. Co.*, 109 Mass. 404. Thus in *Mueller v. State*, 76 Ind. 310, 313, the court by Woods, J., said: "The command of the law in question is that men shall not engage in common labor or in their accustomed pursuits on Sunday, works of charity or necessity excepted. What should be deemed a necessity, the law itself could not well have been made to say, and any attempt of the courts to frame a definition of general application would be more likely to produce confusion than certainty. The question in each case must be decided according to the circumstances, and is, therefore, more a question of fact than of law."

But see *contra*, *Allen v. Duffie*, 43 Mich. 1; *Holcomb v. Danby*, 51 Vt. 435; and the charge of Judge Barker in a case in the Superior Court of Boston, 20 Am. Law Review 755. And compare *Hamilton v. City of Boston*, 14 Allen (Mass.) 484.

In *Smith v. Boston, etc., R. Co.*, 120 Mass. 493, it was said that it is difficult

treaties,¹ municipal ordinances,² and the constitutions, rules, and by-laws of corporations and other voluntary associations.³ It applies to records,⁴ and pleadings,⁵ to contracts,⁶

to define as matter of law what state of facts will make traveling an act of necessity or charity within the legal exception, that the question is to be determined to a great extent by considerations of moral fitness and propriety, and that in most cases it should be submitted to the jury "with proper instructions." *Compare* Hooper v. Edwards, 25 Ala. 528, 532; Sullivan v. Maine Cent. R. Co., 19 Atl. Rep. 169; Johnson v. Irasbaugh, 47 Vt. 32; State v. R. Co., 24 W. Va. 783.

Whether the owner of a carriage had reasonable ground for believing that the purpose for which it was hired of him was one of necessity or charity, is a question for the jury. *Myers v. State*, 1 Conn. 504.

See generally SUNDAY LAWS.

1. **Treaties.** — *Harris v. Doe*, 4 Blackf. (Ind.) 369, 376-7.

2. **Ordinances.** — *Denver, etc., R. Co. v. Olsen*, 4 Colo. 239; *Pennsylvania Co. v. Frana*, 13 Ill. 91. And *compare* *Peoria v. Calhoun*, 29 Ill. 317.

3. **By-Laws.** — *Higgins v. McCrea*, 116 U. S. 671; *Osceola Tribe v. Rost*, 15 Md. 295.

4. **Records.** — *Wyatt v. Steele*, 26 Ala. 639, 649; *Sims v. Boynton*, 32 Ala. 352, 360; *State v. Anderson*, 30 La. Ann., pt. 1, 557; *Adams v. Betz*, 1 Watts (Pa.) 425; *Amory v. Amory*, 26 Wis. 152. See *supra* the heading, *Other Matters of Fact*.

Thus, it has been held that where there is a question as to the meaning of an order of sale of personal property made by an orphan's court, it is not competent to introduce the order book and show similar orders made by the court in the matter of other estates, the construction of the particular order being for the court. *Wyatt v. Steele*, 26 Ala. 639, 649.

So, where, in an action on a contract, the defendant pleads a decree of a chancery court, to show a release by the plaintiff of his cause of action, it is for the court to construe the decree and determine from its face whether it was intended to operate as a release; and a charge which submits this question to the jury is erroneous. *Shook v. Blount*, 67 Ala. 301.

So, whether a certain instrument, for the alteration of which a person has

been indicted, is a public record, is a question of law for the court to determine. *State v. Anderson*, 30 La. Ann. 557.

So, it is the province of the court to settle as a question of law the meaning of the specification of a patent; and, accordingly, in an action on the case for the infringement of a patent, where it was objected upon the face of the specification of the patent, which was for improvements in the mode of propelling wheels, that it was uncertain whether the patentee claimed a wheel constructed spirally or only spiral paddles attached to a wheel, it was held erroneous for the court to instruct the jury that the question whether the specification was ambiguous in the particular charged, was one compounded of law and fact, and that if the jury should find that a spiral wheel and a spiral propeller were the same thing in ordinary acceptation, then the specification was sufficiently certain in that respect. *Emerson v. Hogg*, 2 Blatchf. (U. S.) 1. And see *Washburn v. Gould*, 3 Story (U. S.) 122.

5. **Pleadings.** — Thus, it is the province of the court to construe the pleadings, and to determine from them what allegations are admitted and what denied. 1 *Thomp. Tr.*, § 1027; *McKinney v. Hartman*, 4 Iowa 154; *Potter v. Wooster*, 10 Iowa 334. And hence the court should inform the jury specifically what the issues are, without referring the jury to the pleadings. *Dassler v. Wisley*, 32 Mo. 498; *Missouri Coal, etc., Oil Co. v. Hannibal, etc.*, R. Co., 35 Mo. 84.

To leave the jury to construe and determine the effect of the pleadings is error. *Hall v. Renfro*, 3 Metc. (Ky.) 51.

Whether there is a variance between the pleadings and proof, is also a question of law for the exclusive determination of the court. *Riley v. Dickens*, 19 Ill. 29; *Berry v. Dryden*, 7 Mo. 324; *Birch v. Benton*, 26 Mo. 153. Thus, in an action for slander, the jury ascertain what words were spoken, and the court decides whether there is such an identity between these and the words laid in the declaration, as will support the action. *Berry v. Dryden*, 7 Mo. 324.

6. **Contracts.** — See **CONTRACTS**, vol. 3, p. 867; **INSTRUCTIONS**, vol.

- 11, p. 236; *Edwards v. Bagster*, 2 M. & W. 221; *Hutchin v. Groom*, 5 C. B. 515; 57 E. C. L. 515; *Parker v. Ibbetson*, 4 C. B. N. S. 346; 93 E. C. L. 345; *Begg v. Forbes*, 30 Eng. L. & Eq. 508; *Griffiths v. Rigby*, 25 L. J. Ex. 284; *Bowes v. Shand*, 2 App. Cas. 455; 20 Eng. (Moak's) Rep. 30; *Levy v. Gadsby*, 3 Cranch (U. S.) 180; *Walker v. Bank of Washington*, 3 How. (U. S.) 62; *Goddard v. Foster*, 17 Wall. (U. S.) 123; *Iasigi v. Brown*, 17 How. (U. S.) 183; *Holman v. Crane*, 16 Ala. 570; *Kidd v. Cromwell*, 17 Ala. 648; *Luckhart v. Ogden*, 30 Cal. 547; *Bennett v. Agricultural Ins. Co.*, 51 Conn. 504; *Williams v. Waters*, 36 Ga. 454; *Illinois Cent. R. Co. v. Cassell*, 17 Ill. 389; *Riley v. Dickens*, 119 Ill. 29; *Streeter v. Streeter*, 43 Ill. 155; *Beatty v. Gates*, 4 Ind. 154; *Terry v. Shively*, 64 Ind. 106; *Dixon v. Duke*, 85 Ind. 434; *Lucas v. Snyder*, 2 Greene (Iowa) 499; *Eyser v. Weissgerber*, 2 Iowa 463; *Pickrell v. Carson*, 8 Iowa 544; *Thorp v. Craig*, 10 Iowa 461; *Rohrabacher v. Ware*, 37 Iowa 85; *Warner v. Thompson*, 35 Kan. 27; *Thomas v. Thomas*, 15 B. Mon. (Ky.) 178; *Brown v. Orland*, 36 Me. 376; *Woodman v. Chesly*, 39 Me. 45; *Warren v. Jones*, 51 Me. 146; *Nash v. Drisco*, 51 Me. 417; *Cocheco Bank v. Berry*, 52 Me. 293; *Rice v. Dwight Mfg. Co.*, 2 Cush. (Mass.) 80; *Worcester Medical Institution v. Harding*, 11 Cush. (Mass.) 285; *Eaton v. Smith*, 20 Pick. (Mass.) 150; *Smith v. Faulkner*, 12 Gray (Mass.) 251; *Globe Works v. Wright*, 106 Mass. 207; *Thompson v. Richards*, 14 Mich. 172; *Curtis v. Martz*, 14 Mich. 506; *Lapeer Co. Farmers' Mut. F. Ins. Assoc. v. Doyle*, 30 Mich. 159; *Stadden v. Hazard*, 34 Mich. 76; *Paine v. Ringold*, 43 Mich. 341; *McKenzie v. Sykes*, 47 Mich. 294; *Van Eman v. Stanchfield*, 8 Minn. 518; *Dodge v. Rogers*, 9 Minn. 223; *Donnelly v. Simonton*, 13 Minn. 301; *Spalding v. Taylor*, 1 Mo. App. 34; *Willard v. Sumner*, 7 Mo. App. 577; *State v. Donnelly*, 9 Mo. App. 519; *Brooks v. Standard F. Ins. Co.*, 11 Mo. App. 349; *Brecheisen v. Coffey*, 15 Mo. App. 80; *Michael v. St. Louis Mut. F. Ins. Co.*, 17 Mo. App. 23; *Miller v. Dunlap*, 22 Mo. App. 97; *Falls Wire Mfg. Co. v. Broderick*, 12 Mo. 373; *Caldwell v. Dickon*, 26 Mo. 60; *State v. Lefavre*, 53 Mo. 470; *Blakely v. Bennecke*, 59 Mo. 195; *Burruss v. Blair*, 61 Mo. 133; *Edwards v. Smith*, 63 Mo. 119; *Fruin v. Crystal R. Co.*, 89 Mo. 397; *Drew v. Towle*, 30 N. H. 531; *Rogers v. Colt*, 21 N. J. L. 704; *Smalley v. Hendrickson*, 29 N. J. L. 371; *Gladius v. Black*, 67 N. Y. 563; *Arctic F. Ins. Co. v. Austin*, 69 N. Y. 470, 477; 25 Am. Rep. 221; *First Nat. Bank v. Dana*, 79 N. Y. 108; *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341; *Brady v. Cassidy*, 104 N. Y. 147; *Collins v. Benbury*, 5 Ired. (N. Car.) 118; *Brown v. Hatton*, 9 Ired. (N. Car.) 319; *Sellers v. Johnson*, 65 N. Car. 104; *Welsh v. Duser*, 3 Bin. (Pa.) 337; *Moore v. Miller*, 4 S. & R. (Pa.) 279; *Dennison v. Wertz*, 7 S. & R. (Pa.) 376; *Vincent v. Huff*, 8 S. & R. (Pa.) 381; *Roth v. Miller*, 15 S. & R. (Pa.) 100; *Edelman v. Yeakel*, 27 Pa. St. 30; *Beatty v. Lycoming County Ins. Co.*, 52 Pa. St. 456; *Bryant v. Hagerty*, 87 Pa. St. 261; *Nellis v. Coleman*, 98 Pa. St. 470; *Wheeler v. Schroeder*, 4 R. I. 392; *Russell v. Arthur*, 17 S. Car. 477; *Bedford v. Flowers*, 11 Humph. (Tenn.) 242; *San Antonio v. Lewis*, 9 Tex. 69; *Wason v. Rowe*, 16 Vt. 525; *Rogers v. Bradford*, 1 Pin. (Wis.) 418; *Ranney v. Higby*, 5 Wis. 62; *Mowry v. Wood*, 12 Wis. 413; *Martineau v. Steele*, 14 Wis. 272; *Helmholz v. Everingham*, 24 Wis. 266.
- Thus, for example, the court has the sole power of deciding whether a written contract is usurious. *Walker v. Bank of Washington*, 3 How. (U. S.) 62. Compare *Lomer v. Meeker*, 25 N. Y. 361; and see *infra* the title, *Usury*, p. 658.
- So, whether an agreement between parties amounts to an extension of time for the performance of a prior contract between them, and if so, for how long, are questions of law for the court, and not questions of fact for the jury. *Luckhart v. Ogden*, 30 Cal. 556.
- A written contract should be construed and interpreted by the court upon inspection only, unless there are terms of art or science, or other unusual language employed, or words used in a local sense or out of their ordinary signification, requiring explanation by extrinsic evidence. *Van Eman v. Stanchfield*, 8 Minn. 518. In such case the evidence of experts may be received to aid the court in fixing the meaning of such technical terms. See *PAROL EVIDENCE*, vol. 17, p. 450-1; 1 Greenl. Ev. (14th ed.), § 280; *McAvoy v. Long*, 13 Ill. 147; *Louisville, etc., R. Co. v. McKenna*, 13 Lea (Tenn.) 288; *Sigsworth v. McIntyre*, 18 Ill. 128; *Myers v. Walker*, 24 Ill. 133; *Packard v. Van Schoick*, 58 Ill. 79.

both executed and executory, including bonds,¹ deeds,² and all

In *Myers v. Walker*, 24 Ill. 133, the court by Walker, J., said: "Meaning of terms of art, of science, technical phrases, and words of local meaning, may, undoubtedly, when employed in an agreement, be proved by extrinsic evidence, and, by so doing, the rule is not violated which prohibits the introduction of evidence to alter, vary or explain an agreement, or that a written contract cannot exist partly in parol and partly in writing. By receiving such evidence, the court does no more than when it refers to a lexicon to ascertain the meaning of a word. This has no tendency to vary the contract, but is the only means of ascertaining the intention of the parties when they enter into the agreement, and when this can be ascertained, it must govern. When local terms or phrases are employed where they are in use, the presumption is, that the parties understood their meaning, and employed them according to their local signification. And to give effect to the agreement, the court must know the sense in which they were employed. The word season, as employed in this agreement, must have had reference to the period within which it was customary to purchase corn at that point, on the Illinois River, and the presumption is, that the meaning of the term was well known and understood, in the locality in which the contract was entered into by the parties. The court below, therefore, committed no error in receiving evidence to show the local meaning of this term."

The error in submitting to the jury the construction of a contract will, if they construe it rightly, be immaterial. *Smith v. Faulkner*, 12 Gray (Mass.) 251; *Martineau v. Steele*, 14 Wis. 273.

The meaning which parties have themselves placed upon their contract is a question, not for the court, but for the jury. *Reissner v. Oxley*, 80 Ind. 580.

When a contract is made by correspondence, it is the province of the court to examine the letters, to declare whether they constitute a contract, and if so, to construe the contract; and it is error to submit to the jury the question what the contract so entered into was. *McFeath v. Haldimand*, 1 T. R. 180; *Begg v. Forbes*, 30 Eng. L. & Eq. 508; *Luckhart v. Ogden*, 30 Cal. 547; *Lea v. Henry*, 56 Iowa 662; *Smith v. Faulk-*

ner, 12 Gray (Mass.) 251; *Van Valkenburg v. Rogers*, 18 Mich. 180; *Falls Wire Mfg. Co. v. Broderick*, 12 Mo. App. 385; *Russell v. Arthur*, 17 S. Car. 477; *Ranney v. Higby*, 5 Wis. 62. *Contra*, *Fry v. Franklin Ins. Co.*, 40 Ohio St. 108.

1. Bonds.—*Butler v. State*, 5 Gill & J. (Md.) 511.

2. Deeds.—*McCutchen v. McCutchen*, 9 Port. (Ala.) 650; *Price v. Mazange*, 31 Ala. 709; *Seaward v. Malotte*, 15 Cal. 304; *Stark v. Barrett*, 15 Cal. 362; *Montag v. Linn*, 23 Ill. 551; *Harris v. Doe*, 4 Blackf. (Ind.) 369; *Symmes v. Brown*, 13 Ind. 318; *State v. Delong*, 12 Iowa 453; *Miller v. Shackelford*, 4 Dana (Ky.) 264; *Venable v. McDonald*, 4 Dana (Ky.) 336; *Bonney v. Morrill*, 15 Me. 252; *American Exchange Bank v. Inloes*, 7 Md. 380; *Whiteford v. Monroe*, 17 Md. 135; *Friend v. Friend*, 64 Md. 321; *Fowle v. Bigelow*, 10 Mass. 384; *Eddy v. Chace*, 140 Mass. 471; *Whittlesey v. Kellogg*, 28 Mo. 404; *Dean v. Erskine*, 18 N. H. 81; *Smith v. Clayton*, 29 N. J. L. 357; *St. John v. Bumpstead*, 17 Barb. (N. Y.) 100; *Hurley v. Morgan*, 1 Dev. & B. (N. Car.) 425; *Cox v. Freedly*, 33 Pa. St. 124; *Mowry v. Stogner*, 3 S. Car. 251; *Beale v. Ryan*, 40 Tex. 399; *Hodges v. Strong*, 10 Vt. 247; *Stevens v. Hollister*, 18 Vt. 204; *Morse v. Weymouth*, 28 Vt. 824; *Poage v. Bell*, 3 Rand. (Va.) 586; *Addington v. Etheridge*, 12 Gratt. (Va.) 436.

Thus, whether certain property appurtenant to the engine and machinery of a mill, passed, as after acquired property, to the grantee in a deed of trust, under the terms of the instrument, is a question for the court. *Hancock v. Whybark*, 66 Mo. 672.

Whether a deed of land, or a bill of sale of chattels, absolute on its face, was, nevertheless, intended to be only a mortgage, is, upon a suit in equity to have the instrument declared a mere security, a question of fact. 1 *Thomp. Tr.*, § 1124; *Bishop v. Williams*, 18 Ill. 104. And so also where the question arises in an action at law. *Perkins v. Eckert*, 55 Cal. 404; *Cook v. Lion F. Ins. Co.*, 67 Cal. 368; *Scott v. Pentz*, 5 Sandf. (N. Y.) 572; *McCoy v. Lassiter*, 95 N. Car. 91; *Stevens v. Sherrod*, 6 Tex. 294; *Horne v. Puckett*, 22 Tex. 201; *Bemis v. Phelps*, 41 Vt. 4.

See generally PAROL EVIDENCE.

others, to wills,¹ leases,² appointments,³ receipts,⁴ awards,⁵ and, in a word, to all other writings.⁶ The rule, however, is to be understood with one or two qualifications. Although the meaning of ordinary words and phrases in a written instrument is to be declared by the court and not by the jury, still if it appears doubtful whether they were intended to be understood in their ordinary sense, the question of their meaning should be left to be

When subsequently to the execution of a deed, absolute on its face, an alleged defeasance is executed, it is a question of fact for the jury whether the transaction was intended as a sale or as a security for money. *Reitenbaugh v. Ludwick*, 31 Pa. St. 134; *Wilson v. Shoenberger*, 31 Pa. St. 295. *Compare Kerr v. Gilmore*, 6 Watts (Pa.) 405; *Jaques v. Weeks*, 7 Watts (Pa.) 261; *Rankin v. Mortimere*, 7 Watts (Pa.) 372.

1. **Wills.**—*Downing v. Bain*, 24 Ga. 372; *Willson v. Whitefield*, 38 Ga. 269; *Sartor v. Sartor*, 39 Miss. 760; *Magee v. McNeil*, 41 Miss. 17; *St. Luke's Home v. Association for Indigent Females*, 52 N. Y. 200; *Shepherd v. White*, 11 Tex. 346; *Burke v. Lee*, 76 Va. 386.

In the absence of any latent ambiguity, all questions touching the operation, construction, and effect of wills are for the determination of the court, and not of the jury. *Herbert v. Wise*, 3 Call (Va.) 239; *Burke v. Lee*, 76 Va. 386.

Whether a paper tendered in evidence is testamentary in character, and whether as such it should be submitted to the jury for probate, are questions for the court, they being questions as to the admissibility of evidence. But when the paper is so introduced, the questions as to the testamentary capacity and free volition of the testator are questions of fact for the jury. *Watford v. Forester*, 66 Ga. 738.

Where it is doubtful whether a writing was intended to operate as a will or as an instrument of another kind, for example, a deed, it is for the jury to decide, on the facts touching its execution and delivery, the declarations of the maker, and the other circumstances, how it was intended to operate. *King's Proctor v. Daims*, 3 Hagg. 218; *Wareham v. Sellers*, 9 Gill & J. (Md.) 98; *Herrington v. Bradford*, Walk. (Miss.) 520; *Jones v. Kea*, 4 Dev. (N. Car.) 301; *Wigle v. Wigle*, 6 Watts (Pa.) 522; *Lyles v. Lyles*, 2 Nott & M. (S. Car.) 531; *Witherspoon v. Witherspoon*, 2 McCord (S. Car.) 520; *Ferguson v. Ferguson*, 27 Tex. 344.

In case of a will purporting on its face to dispose of both real and personal estate, but not attested so as to pass the former, whether the testator intended, in case the will could not take effect as to the realty, that it should operate as to the personalty, is a question of fact for the jury. *Fatheree v. Lawrence*, 33 Miss. 628; *Jones v. Kea*, 4 Dev. (N. Car.) 301.

2. **Leases.**—*Dumn v. Rothermel*, 112 Pa. St. 272.

3. **Appointments.**—*Perth Amboy Mfg. Co. v. Condit*, 21 N. J. L. 659.

4. **Receipts.**—*Union Bank v. Heyward*, 15 S. Car. 296.

5. **Awards.**—1 Thomp. Tr., § 1071; *Kanouse v. Kanouse*, 36 Ill. 439.

And so whether the arbitrators had authority to act in reference to any particular subject-matter, or whether their award conforms to the direction and powers given them by the submission, must be determined by the court as a question of law upon a consideration of the terms of the submission. *Squires v. Anderson*, 54 Mo. 197.

6. **Miscellaneous Writings.**—*Smith v. Thompson*, 8 C. B. 44; 65 E. C. L. 42; *Cahoon v. Ring*, 1 Cliff. (U. S.) 592; *Etting v. Bank of U. S.*, 11 Wheat. (U. S.) 59; *Turner v. Yates*, 16 How. (U. S.) 14; *Brown v. Huger*, 21 How. (U. S.) 305; *Bliven v. New England Screw Co.*, 23 How. (U. S.) 432; *West v. Smith*, 101 U. S. 263; *Earbee v. Craig*, 1 Ala. 607; *Holman v. Crane*, 16 Ala. 570; *Kidd v. Cromwell*, 17 Ala. 648; *Moore v. Leseur*, 18 Ala. 606; *Long v. Rodgers*, 19 Ala. 321; *Carpentier v. Thirston*, 24 Cal. 268; *Sullivan v. Honacker*, 6 Fla. 372; *Richmond Trading, etc., Co. v. Farquar*, 8 Blackf. (Ind.) 89; *Leviston v. Junction R. Co.*, 7 Ind. 597; *Cook v. Carroll*, 6 Md. 111; *Wilmarth v. Knight*, 7 Gray (Mass.) 294; *Battershall v. Stephens*, 34 Mich. 68; *Rapp v. Rapp*, 6 Pa. St. 45; *Miller v. Fichthorn*, 31 Pa. St. 252; *Heath v. Page*, 48 Pa. St. 143; *Esser v. Linderman*, 71 Pa. St. 76; *Louisville, etc., R. Co. v.*

decided upon evidence by the jury;¹ or, more particularly, if the writing contains technical (other than legal) terms, abbreviations or phrases used in particular trades and branches of business, or ambiguous expressions, the meaning of such terms and expressions is to be determined by the jury.² But after the jury have declared the meaning of the doubtful or technical word, having ascertained the surrounding circumstances, if any, necessary to explain it, the interpretation and effect of the instrument are to be declared by the court.³ If, however, the meaning of the instrument depends not merely on its construction and language, but on collateral facts

McKenna, 13 Lea (Tenn.) 288; Swift v. Herrera, 9 Tex. 263.

1. Lucas v. Groning, 7 Taunt. 164; Rees v. Warwick, 2 B. & Ald. 113; Macbeath v. Haldemand, 1 T. R. 172; Morrell v. Frith, 3 M. & W. 402; Hutchinson v. Bowker, 5 M. & W. 535; Simpson v. Margitson, 11 Q. B. 23; 63 E. C. L. 21; Law v. Cross, 1 Black (U. S.) 533; Brown v. McGran, 14 Pet. (U. S.) 493; Prather v. Ross, 17 Ind. 499; Darling v. Dodge, 36 Me. 370; Eaton v. Smith, 20 Pick. (Mass.) 150; Brown v. Brown, 8 Met. (Mass.) 576; Van Eman v. Stanchfield, 8 Minn. 518; Fagin v. Connolly, 25 Mo. 94; Bunce v. Beck, 43 Mo. 280; Edwards v. Smith, 63 Mo. 127; McNichol v. Pacific Express Co., 12 Mo. App. 407; Weil v. Schwartz, 21 Mo. App. 381; Edelman v. Yeakel, 27 Pa. St. 26; Ward v. Lat-timer, 2 Tex. 248. In Brown v. Brown, 8 Met. (Mass.) 576, the court by Shaw, C. J., said: "We think the general rule of law is that the construction of every written instrument is matter of law; and, as a necessary consequence, that courts must, in the first instance, judge of the meaning, force, and effect of language. The meaning of words and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are *prima facie* matter of law, to be construed and passed upon by the court. But language may be ambiguous and used in different senses; or general words, in particular trades and branches of business—as among merchants, for instance—may be used in a new, peculiar or technical sense; and therefore, in a few instances, evidence may be received from those who are conversant with such branches of business, and such technical or peculiar use of language, to explain and illustrate it."

In Brown v. McGran, 14 Pet. (U.

S.) 493, the court by Story, J., said: "It is certainly true as a general rule, that the interpretation of written instruments properly belongs to the court, and not to the jury. But there certainly are cases in which, from the different senses of the words used or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects and intentions and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed."

In Prather v. Ross, 17 Ind. 499, the court by Davison, J., said: "If the question arises from the obscurity of the writing itself, it is determined by the court alone; but questions of custom, usage, and actual intention and meaning derived therefrom, are for the jury," quoting 2 Phil. Ev., § 280.

2. McNichol v. Pacific Express Co., 12 Mo. App. 407.

Thus, where one merchant instructed another to purchase for him two cargoes of coal "afloat," and testimony was given as to the meaning of this term among merchants, it was held that the court properly submitted the question of its meaning to the jury. Law v. Cross, 1 Black (U. S.) 538.

C. O. D.—So, where the question was as to the meaning of the abbreviation "C. O. D.," it was held proper to submit it to the jury. McNichol v. Pacific Express Co., 12 Mo. App. 401. See also C. O. D., vol. 3, p. 289.

3. Hutchinson v. Bowker, 5 M. & W. 535; Neilson v. Harford, 8 M. & W. 806; Eaton v. Smith, 20 Pick. (Mass.) 156; Edwards v. Smith, 63 Mo. 127; Fruin v. Crystal R. Co., 89 Mo. 404.

or extrinsic circumstances, the necessity of introducing parol evidence to ascertain the meaning draws the whole question of the interpretation to the jury,¹ who, however, are, as above, to receive such instructions upon the legal effect of the instrument

In *Neilson v. Harford*, 8 M. & W. 823, the court by Parke, B., observed: "The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court,—either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained, or conditionally, when those words or circumstances are necessarily referred to them; unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all, effectually."

It seems that the jury should interpret the doubtful words or phrases in a special verdict; or else that hypothetical instructions should be given them, applicable to the various meanings of which the disputed words are capable. 1 *Thomp. Tr.*, § 1079; *Hutchinson v. Bowker*, 5 M. & W. 535; *Eaton v. Smith*, 20 Pick. (Mass.) 150; *Smith v. Faulkner*, 12 Gray (Mass.) 256

Thus in *Smith v. Faulkner*, 12 Gray (Mass.) 256, the court by Thomas, J., said: "If the use of the word in commerce or art, or the usage, is settled or agreed upon, the question of the interpretation of the contract is still exclusively with the court. But where the meaning of the word as used in commerce or art is matter of controversy, that meaning is to be found and settled as matter of fact by the jury. It may be found by special verdict, and then in the light of such finding, the court interprets the contract; or the case may go to the jury as a mixed question of law and fact, under instructions from the court, that if they find the meaning of the word to be so and so, then the construction and effect of the contract are one way, if otherwise, another; that is to say, the

fact being found by the jury, the court instructs the jury as to the legal result which flows from it." And in *Eaton v. Smith*, 20 Pick. (Mass.) 156, the court by Shaw, C. J., said: "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage, to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will then be, to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word, modified or explained by the usage."

1. *Bolckow v. Seymour*, 17 C. B. N. S. 107; 112 E. C. L. 106; *Etting v. Bank of U. S.*, 11 Wheat. (U. S.) 75; *Turner v. Yates*, 16 How. (U. S.) 14; *Iasigi v. Brown*, 17 How. (U. S.) 183; *Barreda v. Silsbee*, 21 How. (U. S.) 146; *Sewall v. Henry*, 9 Ala. 124; *Holman v. Crane*, 16 Ala. 580; *Haney v. Caldwell*, 35 Ark. 156; *Jennings v. Sherwood*, 8 Conn. 122; *School District v. Lynch*, 33 Conn. 330; *Philibert v. Burch*, 4 Mo. App. 470; *Tansill v. Brinkman*, 16 Mo. App. 557; *Bell v. Woodward*, 46 N. H. 332; *Gardner v. Clark*, 17 Barb. (N. Y.) 551; *First Nat. Bank v. Dana*, 79 N. Y. 116; *Blair v. Lynch*, 105 N. Y. 636; *Vernor v. Henry*, 3 Watts (Pa.) 392; *Overton v. Tracey*, 14 S. & R. (Pa.) 131; *Edwards v. Goldsmith*, 16 Pa. St. 48; *Edelman v. Yeakel*, 17 Pa. St. 26; *Foster v. Berg*, 104 Pa. St. 324; *McKean v. Wagenblast*, 2 Grant's Cas. (Pa.) 462; *Bradford v. South Carolina R. Co.*, 5 Rich. (S. Car.) 214; *Ganson v. Madigan*, 15 Wis. 144; *Merriam v. Field*, 29 Wis. 592; *Bedard v. Bonville*, 57 Wis. 270.

In *Hopson v. Brunwankel*, 24 Tex. 607, suit was brought on the following instrument:—

"There is a balance due the bearer, four hundred and seventy-five dollars.

"C. R. HOPSON.

"To H. L. KINNEY.

"Aug. 15, 1852."

"We are of opinion," said the court by Bell, J., "that the instrument upon

as will meet the various phases presented by the extrinsic evidence.¹ Moreover, if written instruments are adduced as containing evidence of collateral facts, the jury are authorized to draw such inferences from them as they may deem warranted.²

which this suit is founded, is not a contract for the payment of money. If the writing were not addressed to a third person, it would be regarded as an acknowledgment that the sum of money mentioned in the writing, was due from the maker of the instrument to the bearer, and the law would imply a promise by the maker of the instrument to pay the money. But the writing, being addressed to a third person, can only be regarded as a memorandum of a fact, or as conveying information of a fact, without legal significance, until explained. The instrument, therefore, being necessarily open to explanation, it was for the jury to find what the fact was, of which the writing was a memorandum, or of which the writing was intended to convey information, or of which it was an acknowledgment, as the case might be."

Whether a contract is an original undertaking, or a collateral promise to answer for the debt, default, or miscarriage of another, has been held, in case of a written contract competent to be explained by parol evidence of the circumstances under which it was made, to be a question for the jury. *Philibert v. Burch*, 4 Mo. App. 470; *Hueske v. Broussard*, 55 Tex. 201. Where the contract is oral, the question whether it is a guaranty or an independent promise, would be in all cases for the jury. *Flanders v. Crolins*, 1 Duer (N. Y.) 206; *Sinclair v. Richardson*, 12 Vt. 33. See *infra* the title, *Spoken Language*.

1. *Taylor v. McNutt*, 58 Tex. 71; *Williams v. Woods*, 16 Md. 220; *Fowle v. Bigelow*, 10 Mass. 379.

In the case of *Williams v. Woods*, 16 Md. 221, the court by Eccleston, J., said: "Whilst . . . in a mercantile transaction, when the terms of a written instrument are technical, or equivocal on its face, or are made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade, is admissible to explain their meaning, the principle applicable to such a case is, that the evidence of usage, and the surrounding circumstances in explanation and illustration, is for the consideration of the jury, the prov-

ince of the court being to instruct them conditionally or hypothetically what should be the proper construction or interpretation of the written instrument, as they may find the evidence either to support or not to sustain the purpose for which it has been offered."

In *March v. Allabough*, 103 Pa. St. 335, the court by Clark, J., said: "Evidence *extra* the contract may in some cases . . . be required to explain the subject-matter and exhibit the surroundings, and in the investigation of the transaction in its various phases, the testimony of witnesses may be admitted for other purposes affecting the inquiries already stated; the truth of the facts thus shown is for the jury, but their effect is for the court. Thus, the construction of an agreement is, in all cases, a matter of law for the court; the truth of the facts bearing on that construction is for the jury, whilst the force and effect of those facts upon the construction, are for the court in their instruction to the jury." And so the court held that the question whether a sum stipulated for in a written contract, to be paid on its breach, was a penalty or liquidated damages, was a question for the court, to be determined by the intention of the parties as drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings. Compare *Bigony v. Tyson*, 75 Pa. St. 157.

2. *Primm v. Haren*, 27 Mo. 211; *Wilson v. Board of Education*, 63 Mo. 142; *McNichol v. Pacific Express Co.*, 12 Mo. App. 407; *Reynolds v. Richards*, 14 Pa. St. 205; *McKean v. Wagenblast*, 2 Grant's Cas. (Pa.) 462. And see *Barreda v. Silsbee*, 21 How. (U. S.) 168.

In *Primm v. Haren*, 27 Mo. 211, the court by Scott, J., said: "The jury were the proper judges of the inferences of fact to be drawn from the papers. The legal effect of papers is to be determined by the court, but when documents are offered in evidence as the foundation of an inference of fact, whether such inference can be drawn from them, is a question for the jury. The most authentic documents, when offered for such a purpose, become no

Whether an illegible writing is to be deciphered by the court or by the jury, is a matter on which there is conflict of opinion. On principle, it would seem to be a fact for the jury to pass upon,¹ and especially so in criminal cases;² and so the weight of authority inclines. So, where there are blanks in an instrument or words left out, it is for the jury to say what was the intention of the parties as to such omissions.³

more than mere letters or a written correspondence, which, when offered in evidence to prove a fact, are always to be interpreted by the jury. When documents are offered for such a purpose, they, like a written correspondence, may be explained by extrinsic evidence."

Reynolds had an article of agreement with the commissioners of C county for two in-lots. He agreed, in consideration of \$50 cash and \$50 in carpenter work (the latter evidenced by a promissory note), to sell Richards his equitable title to one of the lots, and to procure the legal title to be made to him when the work should be done. Years afterwards, Reynolds indorsed on the article, a direction to convey the title to Richards, which was done. "Now, though this direction and the deed which followed it, were strong evidence of payment, it was open to contradiction, and ought to have been submitted to the jury as such. It followed not that because the evidence was written, its effect was to be determined by the court. To interpret the meaning of a writing unaffected by parol evidence, is doubtless the province of the judge; but the question below was not on the interpretation of the written direction, but on its effect as evidence of a collateral fact. It was certainly presumptive evidence of payment; but the conclusion from it was not to be drawn by the court." *Reynolds v. Richards*, 14 Pa. St. 205.

1. *Norman v. Morrell*, 4 Ves. 769; *Jefferson Co. v. Savory*, 2 Greene (Iowa) 238; *Haven v. Brown*, 7 Me. 421; *Fenderson v. Owen*, 54 Me. 372; *Burnham v. Allen*, 1 Gray (Mass.) 496; *Paine v. Ringold*, 43 Mich. 341; *Arthur v. Roberts*, 60 Barb. (N. Y.) 580; *Sheldon v. Benham*, 4 Hill (N. Y.) 129; *Jackson v. Ransom*, 18 Johns. (N. Y.) 107; *Armstrong v. Burrows*, 6 Watts (Pa.) 266; *Cabarga v. Seeger*, 17 Pa. St. 519. Thus, in *Armstrong v. Burrows*, 6 Watts (Pa.) 266, the court by Gibson, C. J., said: "A writing is

read before it is expounded, and the ascertainment of the words is finished before the business of exposition begins. If the reading of a judge were not matter of fact, witnesses would not be heard in construction of it; and though he is supposed to have peculiar skill in the meaning and construction of language, neither his business nor learning is supposed to give him a superior knowledge of figures or letters. His right to interpret a paper written in Coptic characters would be the same that it is to interpret an English writing; yet the words would be approached only through a translation. The jury were, therefore, not only legally competent to read the disputed word, but bound to ascertain what it was meant to represent."

But see *contra*, to the effect that illegible writings are to be deciphered by the court, *Remon v. Hayward*, 2 A. & E. 666; 29 E. C. L. 173; *Rex v. Hucks*, 1 Stark. 521; 2 E. C. L. 198; *Riley v. Dickens*, 19 Ill. 29; *Com. v. Rich*, 14 Gray (Mass.) 337; *Lapeer Co. Farmers' Mut. F. Ins. Assoc. v. Doyle*, 30 Mich. 159. And see *Com. v. Davis*, 11 Gray (Mass.) 4.

In *Partridge v. Patterson*, 6 Iowa 514, a third view of the question was taken. The trial court, being unable to determine the date of a promissory note, owing to the peculiar manner in which the figures were made, submitted the question to the jury under proper instructions. It was held on appeal to be within the discretionary power of the court to refer the question to the jury.

2. 1 Thomp. Tr., § 1091. See generally AMBIGUITY, vol. 1, p. 525.

3. *Conner v. Routh*, 7 How. (Miss.) 176; *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93; *Dobson v. Findley*, 8 Jones (N. Car.) 495.

And compare *Chouteaux v. Leech*, 18 Pa. St. 232, in which it was held proper to be decided by a jury whether a clause in a bill of lading limiting the responsibility of a carrier, was not

b. SPOKEN LANGUAGE.—Questions as to what were the spoken words, their meaning, and the understanding and intention of the parties in using them, are for the jury.¹ But where the sense in

inserted by mistake. But, in general, questions of mistake, such as the above, since they are of equity cognizance, do not fall within the province of juries. See *MISTAKE*, vol. 15, p. 626; *Gray v. Hornbeck*, 31 Mo. 400; *Olendorf v. Cook*, 1 Lans. (N. Y.) 37.

1. *Adams v. Davis*, 16 Ala. 748; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514; *Kingsbury v. Buchanan*, 11 Iowa 387; *Carl v. Knott*, 16 Iowa 379; *Copeland v. Hall*, 29 Me. 95; *Herbert v. Ford*, 33 Me. 90; *Brown v. Orland*, 36 Me. 376; *Houghton v. Houghton*, 37 Me. 72; *Bartlett v. Tarbell*, 12 Allen (Mass.) 123; *Cunningham v. Cambridge Sav. Bank*, 138 Mass. 480; *McKenzie v. Sykes*, 47 Mich. 294; *Tallon v. Grand Portage Min. Co.*, 55 Mich. 147; *Sines v. Superintendents of Poor*, 55 Mich. 383; *Murphy v. Bedford*, 18 Mo. App. 279; *Dennis v. Crooks*, 23 Mo. App. 532; *Halbert v. Halbert*, 21 Mo. 284; *Judge v. Leclaire*, 31 Mo. 127; *Belt v. Goode*, 31 Mo. 128; *Deming v. Foster*, 42 N. H. 165; *Folsom v. Plumer*, 43 N. H. 469; *Chapin v. Potter*, 1 Hilt. (N. Y.) 366; *Festerman v. Parker*, 10 Ired. (N. Car.) 474; *Warnick v. Grosholz*, 3 Grant's Cas. (Pa.) 235; *Tobin v. Gregg*, 34 Pa. St. 446; *Brubaker v. Okeson*, 36 Pa. St. 519; *Codding v. Wood*, 112 Pa. St. 371; *Winship v. Buzzard*, 9 Rich. (S. Car.) 103; *Steagall v. McKellar*, 20 Tex. 265. But see *Whitney v. Swett*, 2 Fost. (N. H.) 14.

In *Copeland v. Hall*, 29 Me. 93, the court by Tenny, J., said: "It often happens, in conversation and in parol contracts, that the meaning of the parties may be understood, and is, in fact, intended to be very different from the literal import of the words employed. What may have been said before or after the use of figurative expressions, emphasis upon particular words or sentences, reference to other matters not fully expressed, but well understood by all in hearing, and many other circumstances, are material elements, and often have a controlling influence, in ascertaining the intention of those whose language is reported. Important contracts are made verbally, in terms not well suited to express the design of the parties, if they were used in a written instrument, but are understood by

them and others with the utmost precision. Actions of slander are maintained upon words, which, taken literally, indicate no unworthy motive or conduct. In cases where such evidence is adduced in support of the affirmative or negative of any proposition presented to a jury, it is their province to determine its meaning. To find what the language was, is nothing more than to find the evidence which they adjudge to be true; the result of that as a fact, it is their duty to find, and the court cannot direct what it shall be; and if the jury omit to find the fact which is involved in the issue, the court have no power to infer it."

In *Kun v. Young*, 34 Pa. St. 60, it was held that whether the evidence of a promise to pay the debt of another, which must be clear, explicit, and certain, was so or not, was a question for the jury.

In an action by an executrix to recover for professional services rendered by her testator as general attorney of an estate of which the defendants were the representatives, after the testimony of several witnesses had been received, going to establish that the plaintiff's testator had for several years acted at the instance of the defendants as attorney of the estate, and placing estimates upon those services, it was testified by a witness for the defendants, that the plaintiff had admitted that the testator was employed to collect money due to the estate represented by the defendants, on a considerable number of notes which were placed in his hands, and that one of the defendants agreed to give him ten per cent. on all moneys collected. *Held*, that it should have been left to the jury to determine whether such agreement did not embrace all the notes which the plaintiff's testator had in his possession belonging to the estate, whether collected by means of suit or otherwise. *Broward v. Doggett*, 2 Fla. 49.

It has been held that whether an oral contract was entire, and whether the obligee was to be paid before or after the contract was fully performed, are questions of fact. *Dodge v. Janvrin*, 59 N. H. 16.

Where a proposal for a contract is in writing, it is for the court to construe

which the parties understood the language, is thus ascertained by the jury, it is for the court to declare the legal effect of the words,—a principle which is most frequently illustrated in the case of oral contracts.¹

5. *Intent*.—Intent, purpose, or design, falling, as it does, under the general class of “mental conditions of which a person is conscious,” is a fact;² and as such it is always for the jury.³

it; but if the acceptance which is alleged, is verbal, it is a question for the jury whether the offer has been accepted or not. *Wagner v. Egleston*, 49 Mich. 218.

It has been held a question of fact, to be determined from all the evidence bearing upon the case and the conduct of the parties, whether a subscription to the capital stock of a railway company was made under the provision of the charter of the company, granted by a special act of the legislature, or under a provision of the general law of the State relating to railway companies. *Mastin v. Pacific R. Co.*, 83 Mo. 634.

1. *Estes v. Boothe*, 20 Ark. 583; *Rice v. Dwight Mfg. Co.*, 2 Cush. (Mass.) 80; *Pratt v. Langdon*, 12 Allen (Mass.) 544; *Short v. Woodward*, 13 Gray (Mass.) 86; *Globe Works v. Wright*, 106 Mass. 216; *Judge v. Leclaire*, 31 Mo. 127; *Belt v. Goode*, 31 Mo. 128; *Deming v. Foster*, 42 N. H. 165, 176; *Folsom v. Plumer*, 43 N. H. 469; *Smalley v. Hendrickson*, 29 N. J. L. 371; *Whitney v. Swett*, 22 N. H. 14; *Islay v. Stewart*, 4 Dev. & B. (N. Car.) 160; *Festerman v. Parker*, 10 Ired. (N. Car.) 477; *Rhodes v. Chesson*, Busb. (N. Car.) 336; *Codding v. Wood*, 112 Pa. St. 377; *Warnick v. Grosholz*, 3 Grant's Cas. (Pa.) 235; *Diefenback v. Stark*, 59 Wis. 462.

Thus in *Globe Works v. Wright*, 106 Mass. 216, the court by Gray, J., said: “It was rightly ruled that the construction and effect of the oral contract made by this defendant with Hepworth and Carr, were to be determined by the court. Where a contract is oral, the question what the contract is, must, if controverted, be tried by the jury as a question of fact; but where the terms of a contract are undisputed, its construction and effect, where the contract is oral as well as where it is written, are to be determined by the court.”

2. See *Steph. Dig. Ev.*, art. 1; *EVIDENCE*, vol. 7, p. 45; *INTENT*, vol. 11, p. 366.

3. *Beedy v. Macomber*, 47 Me. 451; *Knight v. New England Worsted Co.*, 2 Cush. (Mass.) 271; *West v. White*, 56 Mich. 126; *Malone v. Doyle*, 56 Mich. 222; *Wilder v. St. Paul*, 12 Minn. 192, 209; *Herrington v. Bradford*, Walk. (Miss.) 520; *Huth v. Carondelet, etc., Co.*, 56 Mo. 202, 206; *Brouwer v. Hill*, 1 Sandf. (N. Y.) 629; *Dolan v. Aetna Ins. Co.*, 22 Hun (N. Y.) 396; *Shillito v. Reineking*, 30 Hun (N. Y.) 345; *Jones v. Jones*, 13 Ired. (N. Car.) 448; *Landis v. Landis*, 1 Grant's Cas. (Pa.) 249; *Jones v. Brownfield*, 2 Pa. St. 55; *Dumn v. Rothermel*, 112 Pa. St. 272, 283; *Shepherd v. Cassiday*, 20 Tex. 26; *McPherson v. Featherstone*, 37 Wis. 632; *Cross v. Barnett*, 65 Wis. 431.

Thus, in *Pennsylvania*, where a purchaser of land at a sale for taxes may after two years consent to receive the redemption money, in which case the transaction will be a redemption and not a purchase, it was held to be a question of fact for the jury whether the transaction was intended to be a purchase or a redemption. *Coxe v. Wolcott*, 27 Pa. St. 154.

So, what amounts to an eviction, depending largely on intent, is, in so far, a question for the jury. *Upton v. Townend*, 17 C. B. 30, 64-5; 84 E. C. L. 29, 63; *Henderson v. Mears*, 1 F. & F. 636; *Lynch v. Baldwin*, 69 Ill. 210.

Whether possession is adverse or not, is a question for the jury. *McPherson v. Featherstone*, 37 Wis. 632; *Allen v. Allen*, 58 Wis. 202.

Whether premises are occupied as a home, so as to be exempt under the homestead laws, is, in most cases, a question for the jury. *Thomp. Homesteads*, § 240, *et seq.*; *Cook v. McChristian*, 4 Cal. 23.

So also whether a homestead has been abandoned, is a question of fact. *Brennan v. Wallace*, 25 Cal. 108; *Potts v. Davenport*, 79 Ill. 455; *Shepherd v. Cassiday*, 20 Tex. 24.

Whether land has been dedicated to the public, is a question for the jury. *Daniels v. People*, 21 Ill. 439;

Thus in questions of domicile,¹ and of the revocation of a will,² it is for the jury to determine the intention of the party as evinced by his acts, conduct, and declarations. In the single instance where the intent can be gathered from the terms of unambiguous writings, as it is here a mere matter of construction, it is, as already explained, to be declared by the judge;³ but when oral evidence is necessary to make out the intent, the general rule applies and the question is for the jury alone.⁴ Another qualification of the rule arises in a few cases, generally criminal cases, in which the law conclusively imputes an intent to the doing of a certain act.⁵

6. Duress.—Whether a contract has been obtained by duress (of threats or of imprisonment), is a question of fact for the jury.⁶

7. Usury.—When the question whether a contract is usurious or not, depends simply upon the terms of the instrument, or when the facts in regard to the transaction are established, it is the province of the court, in declaring the effect of the instrument, to

Wragg v. Penn Township, 94 Ill. 11, 24; Gardiner v. Tisdale, 2 Wis. 153; Connehan v. Ford, 9 Wis. 240, 244; Eastland v. Fogo, 58 Wis. 274.

1. Pennsylvania v. Ravenel, 21 How. (U. S.) 103; Potts v. Davenport, 79 Ill. 455; Tiller v. Abernathy, 37 Mo. 196; Locke v. Rowell, 47 N. H. 46, 51; Foss v. Foss, 58 N. H. 283.

In Pennsylvania v. Ravenel, 21 How. (U. S.) 103, it was said that the question of domicile is a mixed question of law and fact, and that it is for the court to instruct the jury what constitutes domicile, and for the jury to apply the principles of law governing it to the facts as found by them.

See generally, DOMICILE, vol. 5, p. 857.

2. 1 Thomp. Tr., § 1346; Lawyer v. Smith, 8 Mich. 411; Burns v. Burns, 4 S. & R. (Pa.) 295; Smiley v. Gambill, 2 Head (Tenn.) 164. In the last case it is said that "what facts amount to a revocation is, of course, a question of law." By this no more is probably meant than that the court is to declare to the jury that, in order to a revocation, two facts must appear, viz., the fact of intent to revoke, and the fact of cutting, tearing, obliterating, etc., to the extent, however slight, designed by the testator in beginning such act of cancellation.

See LOST PAPERS, vol. 13, p. 1232; WILLS.

3. *Supra* the title, *Interpretation and Construction, Written Language.*

4. Conner v. Routh, 7 How. (Miss.) 176; Boyd v. Brotherson, 10 Wend.

(N. Y.) 92; Shillito v. Reineking, 30 Hun (N. Y.) 345; Winter v. Norton, 1 Oregon 42; Connecticut, etc., R. Co. v. Baxter, 32 Vt. 805, 812.

In Winter v. Norton, 1 Oregon 42, 45, the court by Olney, J., said: "Law and fact are not always readily distinguishable. In respect to written instruments, it is sometimes difficult to say where the office of the court ceases and that of the jury begins. When the intention of the writer is to be judged of by the writing, it is a question for the court; but when the meaning is to be judged of by extrinsic facts, or when the writing forms part of a transaction the rest of which consists of words spoken or acts done, or when, whatever its meaning, it is but a circumstance tending to establish some other fact, it is for the jury to say whether the language was used in the sense imputed; or what is the character of the entire transaction of which the writing forms a part; or what is the truth of the ultimate fact which it tends to prove. In these cases, the writing must go to the jury to be considered with the other evidence."

The purpose for which a deed is given, as whether or not it be intended by way of confirmation of a prior deed, as a matter of fact. Huth v. Carondelet, etc., Co., 56 Mo. 202, 206.

5. See 1 Thomp. Tr., § 1334; 2 Thomp. Tr., §§ 2534, et seq.; INTENT, vol. 11, pp. 377-8.

6. Griffith v. Sitgreaves, 90 Pa. St. 161.

See generally DURESS, vol. 6, p. 57.

decide the question of usury.¹ But in most cases the question will be merely one of intent, whether the amount reserved or agreed to be paid in excess of the legal rate was understood by the parties to be a compensation for the forbearance or use of the money, or whether it was intended as a compensation for some other service; and hence the question is generally for the jury, under instructions from the court as to what is the legal definition of usury.²

8. Other Questions.—For a discussion of the respective provinces of the judge and jury in respect to the other questions, almost infinite in number, which arise in the course of trials, it must suffice to refer to the other titles of this work.³

QUIA TIMET.—See **BILLS QUIA TIMET**, vol. 2, p. 258.

QUICK DISPATCH.—See **DEMURRAGE**, vol. 5, p. 544; **LAY DAYS**, vol. 12, p. 972.

QUICK WITH CHILD.—See **ABORTION**, vol. 1, p. 30; **BIG**, vol. 2, p. 191; **CHILD**, vol. 3, p. 229; **MEDICAL JURISPRUDENCE**, vol. 15, p. 211; **PREGNANT**.

QUIET ENJOYMENT.—See **COVENANT**, vol. 4, p. 463; **IMPLIED COVENANT**, vol. 9, p. 964; **LEASE**, vol. 12, p. 1011; **REAL COVENANTS**.

QUIETING TITLE.—See **BILL TO REMOVE CLOUDS**, vol. 2, p. 298.

1. *Levy v. Gadsby*, 3 Cranch (U. S.) 180.

See generally **USURY**.

2. *Tyler on Usury*, p. 98; *Andrews v. Pond*, 3 Pet. (U. S.) 65, 76; *Cockle v. Flack*, 93 U. S. 344; *Tucker v. Willamouicz*, 8 Ark. 157; *Lloyd v. Keach*, 2 Conn. 187; *Beckwith v. Windsor Mfg. Co.*, 14 Conn. 594, 606; *Belden v. Lamb*, 17 Conn. 453; *Belden v. Gray*, 5 Fla. 509; 3 Fla. 110; *Mix v. Madison Ins. Co.*, 11 Ind. 117; *Williams v. Reynolds*, 10 Md. 57; *Stevens v. Davis*, 3 Met. (Mass.) 211; *Cram v. Hendricks*, 7 Wend. (N. Y.) 569; *Cuyler v. Sanford*, 8 Barb. (N. Y.) 225; *Robbins v. Dillaye*, 33 Barb. (N. Y.) 77; *Ayrault v. Chamberlain*, 33 Barb. (N. Y.) 229; *Horton v. Moot*, 60 Barb. (N. Y.) 27; *Catlin v. Gunter*, 11 N. Y. 368; *Smith v. Marvin*, 27 N. Y. 137; *Thurston v. Cornell*, 38 N. Y. 281; *Thompson v. Nesbit*, 2 Rich. (S. Car.) 75; *Fleming v. Mulligan*, 2 McCord. (S. Car.) 173; *Mitchell v. Napier*, 22 Tex. 120. And see *Scott v. Lloyd*, 9 Pet. (U. S.) 418; *Train v. Collins*, 2 Pick. (Mass.) 145; *Durant v. Banter*, 27 N. J. L. 624; *Dunham v. Dey*, 13 Johns. (N. Y.) 40; *Sumner v. People*, 29 N. Y. 337; *Elwell v. Chamberlin*, 31 N.

Y. 611; *Beals v. Benjamin*, 33 N. Y. 67.

Where a lender knowingly accepted and retained a contract for the payment of unlawful interest, the intent necessary to constitute usury is conclusively established, and should not be submitted to the jury. *Grant v. Merrill*, 36 Wis. 390.

3. See, for instance, **AGENCY**, vol. 1, p. 331; **ALTERATION**, vol. 1, p. 512; **BILLS AND NOTES**, vol. 2, p. 313; **CARRIERS OF GOODS**, vol. 2, p. 770; **CARRIERS OF PASSENGERS**, vol. 2, p. 738; **DAMAGES**, vol. 5, p. 1; **EXECUTORS**, vol. 7, pp. 165, 186; **FRAUDULENT DEBTOR**, vol. 8, pp. 782, 792; **IDENTITY**, vol. 9, p. 867; **INNS AND INNKEEPERS**, vol. 11, p. 19; **INSANITY**, vol. 11, p. 158; **INSURANCE**, vol. 11, p. 278; **LACHES**, vol. 12, p. 562; **LIBEL AND SLANDER**, vol. 13, pp. 292, 378 *et seq.*; **LIMITATION OF ACTIONS**, vol. 13, p. 666; **MALICIOUS PROSECUTION**, vol. 14, p. 16; **MASTER AND SERVANT**, vol. 14, p. 917; **NEGLIGENCE**, vol. 16, p. 386; **NOTICE**, vol. 16, pp. 787, 796; **NUISANCES**, vol. 16, pp. 922, 930, 936; **PARENT AND CHILD**, vol. 17, p. 398; **PAYMENT**; **SALES**; **WAIVER**; **WARRANTY**.

QUI TAM ACTIONS.—See PENALTIES, vol. 18, p. 269.

QUOTA.—The proportion or share of a common burden which belongs to each of several persons or places.¹

QUO WARRANTO.—(See also CORPORATIONS, vol. 4, p. 184; OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 39).

I. Jurisdiction, 660.

1. *Nature and History of the Writ*, 660.
2. *Nature of the Information*, 661.
3. *What Courts Have Jurisdiction*, 664.
4. *How Far Courts Exercise Discretion*, 665.
5. *Limitation; Lapse of Time*, 667.

II. Public Officers, 668.

1. *In the United States*, 668.
2. *In Great Britain*, 670.
3. *Possession and User Necessary*, 672.
4. *Acquiescence a Bar*, 672.
5. *Expiration of Term*, 672.
6. *Canvassers' Returns*, 673.
7. *Proof Necessary*, 673.

III. Private Corporations (See CORPORATIONS, vol. 4, p. 184), 674.

IV. Officers of Private Corporations (See CORPORATIONS, vol. 4, p.

184; OFFICERS OF PRIVATE CORPORATIONS, vol. 17, p. 39.) 674.

V. Municipal Corporations, 674.

VI. Parties, 675.

1. *Attorney-General*, 675.
2. *Private Relator*, 676.
3. *Joinder*, 678.
4. *Miscellaneous*, 678.

VII. Procedure, 678:

1. *The Application*, 678.
 - a. *Petition; Rule to Show Cause*, 678.
 - b. *Affidavit*, 679.
2. *Pleading*, 680.
 - a. *General Principles*, 680.
 - b. *The Information*, 680.
 - c. *The Plea*, 682.
 - d. *The Replication*, 683.
 - e. *Amendments*, 683.
3. *Default*, 683.

VIII. Judgment; Fine; Costs, 683.

1. *Judgment*, 683.
2. *Fine*, 684.
3. *Costs*, 685.

IX. New Trial; Review, 686.

I. JURISDICTION—1. Nature and History of the Writ.—The writ of quo warranto is a very ancient common law, high prerogative writ, in the nature of a writ of right for the crown against the usurper of an office or franchise, whereby the authority of the usurper was inquired into, and the right determined. It commanded the respondent to show by what right—*quo warranto*—he exercised the franchise, not having a grant of it, or having forfeited the right by misuser or non-user.² The earliest instance of its use appearing of record is said to have been in 1198, during the reign

1. *Bridgewater v. Plymouth*, 97 Mass. 390.

2. 3 Bl. Com. 262; Comyn's Dig., title, Quo Warranto.

The ancient writ of quo warranto is the proper remedy to seize into the hands of the State the franchises of a corporation which has forfeited them by misuser or non-user. *State v. Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 109; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351.

Where a franchise has been exercised from very remote times under circum-

stances which make it reasonable to suppose that it emanated from a grant by the crown, and there has at no period been any considerable opposition to it, the court will not allow a quo warranto to try its validity, merely on the ground that it cannot be distinctly traced to a legal origin, especially if the franchise has been partially recognized in any ancient statute. *Reg. v. Archdall*, 3 N. & P. 696; 8 A. & E. 281.

See also *Com. v. Small*, 26 Pa. St. 31; *State v. Ashley*, 1 Ark. 279.

of Richard I.¹ In those days it was a powerful instrument in the hands of the crown to restrain the encroachments of the barons and to strengthen the power of the crown at the expense of the barons.² During the reign of Edward I, two statutes were enacted, having for their object the curtailing of the power of the crown in its relation to the writ of quo warranto, and the shaping and regulating of the remedy.³

2. **Nature of the Information.**—In the course of time the writ fell into disuse in *England*, giving place to the information in the nature of quo warranto,⁴ which is now used exclusively in that country and almost exclusively in the States of the Union for the purpose of correcting the usurpation of a public office or corporate franchise by trying the right and ousting the usurper.⁵ Precisely when the writ was superseded by the information cannot be stated.⁶ The information lies in all cases where formerly the writ would have issued,⁷ and, in the absence of constitutional or statutory provisions, in no other cases.⁸ Before the enactment of the statute 9 Anne, ch. 20, the information was not available as a remedy by an individual seeking to try the title to and gain possession of an office, being confined, in its operation, to cases of encroachments upon the prerogative of the crown. That statute authorized the filing of an information, by leave of court, upon the relation of a private person desirous of prosecuting the information, for usurpation or intrusion into any municipal office or franchise in the kingdom.⁹ So that now, in *England*, informa-

1. *Darley v. Reg.*, 12 C. & F. 520, where Tindal, C. J., says that the writ in the instance referred to was issued against the incumbent of a church.

2. 2 Co. Inst. 280; Crabb's Hist. of Eng. Law 174. And see *People v. Bristol* etc. Turnpike Road, 23 Wend. (N. Y.) 222, for a review by Cowen, J., of the history of the writ in this connection.

3. 6 Edw. I, ch. 2; 18 Edw. I, ch. 2. These statutes may be read in the appendix to High's Extraordinary Remedies.

4. The change is attributed by Blackstone to the length of the procedure on the writ and to the fact that the judgment, the writ being a writ of right, was final and conclusive, even against the crown. 3 Bl. Com. 263; *Rex v. Trinity House*, Sid. 86.

In High Ex. Rem., § 600, it is said that an additional cause for the gradual disuse of the ancient writ may perhaps be found in the fact that it was purely a civil remedy, while the information was at first used both as a civil and criminal process, and resulted in a fine against

the usurper, as well as judgment of ouster or seizure.

5. *State v. Ashley*, 1 Ark. 279; *Lindsey v. Attorney-Gen'l*, 33 Miss. 509; *State v. Paul*, 5 Stew. & P. (Ala.) 40; *Com. v. Murray*, 11 S. & R. (Pa.) 73; 14 Am. Dec. 614; *State v. Portland* etc. R. Co., 58 N. H. 113.

6. The authorities are in accord in fixing the time at the abolition of the circuits of the king's justices in eyre, and the substitution therefor of the justices of assize, but are not in accord as to the time of such abolition and substitution. Coke assigns the time to the reign of Richard II, 2 Inst. 498. See also Crabb's Eng. Law, 277; Opinion of Tindal, C. J., in *Darley v. Reg.*, 12 C. & F. 520; *State v. Stewart*, 32 Mo. 379.

7. *Lindsey v. Atty. Gen'l*, 33 Miss. 509.

8. *Com. v. Murray*, 11 S. & R. (Pa.) 73; 14 Am. Dec. 614; *State v. Ashley*, 1 Ark. 279.

9. See 9 Anne, ch. 20, in appendix to High Ex. Rem. In *Rex v. Williams*, 1 Burr. 402, Lord Mansfield said: "The

tions in the nature of quo warranto are of two kinds, first, those exhibited by and in the name of the attorney-general, *ex officio*, without a relator, without leave of court, and without a recognizance; and, second, those filed in the name of the queen's coroner and attorney, sometimes known as the master of the crown office, upon the relation of a private citizen, by leave of court, and with a recognizance.¹ The proceedings had upon the writ did not contemplate a fine nor punishment, but merely judgment of ouster or seizure of the franchise usurped.²

The provisions of the statute of Anne have been adopted in substance in most of the States of the Union. Theoretically, the information is a criminal, not a civil remedy. Formerly it was so regarded in fact as well as in form, and a fine and imprisonment might be inflicted. Now, however, the criminal aspect of the proceeding is ignored, as a general rule, and it is contemplated as a civil remedy for the trial of a civil right.³ Its purpose is to

act is meant to extend to all officers or corporations as such; and, as far as relates to all the corporate rights of the burgesses and freemen, it is very legally, clearly, and correctly drawn. But it is not within the reason or meaning of the act that it should extend generally to all offices or franchises exercised without authority from the crown, within a corporation. It was meant to be confined to such franchises as were claimed in instances affecting those rights between party and party."

A quo warranto will lie for usurping any office, whether created by charter of the crown alone, or by the crown with the consent of Parliament, provided the office is of a public nature, and a substantive office, and not merely the function or employment of a deputy or a servant, held at the will or pleasure of others. *Darley v. Reg.*, 12 C. & F. 520.

A quo warranto will not lie for usurping an office which is not of a public nature, although such office may have been created by a charter of the crown. *Ex parte Smyth*, 11 W. R. 754; 8 L. T., N. S. 458.

An information in the nature of a quo warranto is a criminal proceeding and can only be resorted to in cases in which the public, in theory at least, have some interest. It is not to be allowed against persons for assuming a franchise of a merely private nature. *People v. Ridgley*, 21 Ill. 65; *Atty-Gen'l v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371.

1. High Ex. Rem., § 608. Mr. High here says that "The most frequent use

to which the information is put in *England* is to determine the right to municipal offices and franchises, and its use as a means of testing the title to the franchises of private corporations in that country is of comparatively rare occurrence."

2. 3 Bl. Com. 263.

3. *State v. Hardie*, 1 Ired. (N. Car.) 42; *State v. Ashley*, 1 Ark. 279; *Lindsey v. Attorney Gen'l*, 33 Miss. 508; *State v. Lingo*, 26 Mo. 496; *State v. Stewart*, 32 Mo. 379; *State v. Lawrence*, 38 Mo. 535; *State v. Kupferle*, 44 Mo. 154; 100 Am. Dec. 265; *Com. v. Birchett*, 2 Va. Cas. 51; *Attorney Gen'l v. Barstow*, 4 Wis. 567; *Com. v. Philadelphia Co.*, 1 S. & R. (Pa.) 382; *Com. v. McCloskey*, 2 Rawle (Pa.) 369; *State v. Price*, 50 Ala. 568; *State v. Degress*, 53 Tex. 387.

The provision in the constitution of *Indiana*, that no person shall be put to answer to any criminal charge, but by presentment, indictment, etc., does not prohibit a quo warranto information. *State Bank v. State*, 1 Blackf. (Ind.) 267; 12 Am. Dec. 234.

In *Illinois* it is otherwise, the information there being deemed a criminal remedy, contemplating punishment as well as ouster, and requiring the application of the rules of criminal pleading. *Donnelly v. People*, 11 Ill. 552; *People v. Mississippi, etc.*, R. Co., 13 Ill. 66; *Wight v. People*, 15 Ill. 417; *People v. Ridgley*, 21 Ill. 65; *Hay v. People*, 59 Ill. 94.

The court, in *People v. Gillespie*, 1 Cal. 342, viewed the proceeding as a mixed one having for its object the

obtain a judicial declaration and enforcement of existing rights, not to create or destroy them. The judgment of ouster which follows a successful prosecution in no way affects the status of the office or franchise, but only that of the incumbent.¹ Its function is not to afford relief for official misconduct nor to raise the question of the legality of official action, and it must not be confounded on the one hand with the remedy which an injunction to restrain illegal action sometimes affords,² nor on the other hand with the remedy of *mandamus*.³ One important analogy

double purpose of vindicating public policy and enforcing a private remedy.

1. *Attorney-Gen'l v. Barstow*, 4 Wis. 567.

2. *Dart v. Houston*, 22 Ga. 506; *People v. Whitcomb*, 55 Ill. 172. In the former case it was held that a proceeding in equity, not one in quo warranto, afforded the appropriate remedy for a breach of trust committed by corporate trustees, and, in the latter case, it was adjudged that quo warranto could not be invoked to raise the question whether municipal officers could extend municipal government into annexed territory.

Equity has not jurisdiction to try the title to a public office. The remedy is by quo warranto. And the *Connecticut* practice act has not changed the rule. *Hinckley v. Breen*, 55 Conn. 119.

Quo warranto is the proper and only mode of questioning the official authority of a person exercising judicial functions. *Grant v. Chambers*, 34 Tex. 573.

So, in *Stultz v. State*, 65 Ind. 492, it was held that quo warranto did not lie against municipal officers to determine the legality of an attempted annexation of territory.

On the other hand, it affords the appropriate means of testing the legality of an election of corporate trustees, and their consequent right to manage the corporate affairs. *Hullman v. Howcomp*, 5 Ohio St. 237. And, in cases like this, the remedy by injunction is not appropriate. *Updegraff v. Crans*, 47 Pa. St. 103.

3. Officers *de jure* cannot ordinarily be ejected by *mandamus*; their rights should be determined by quo warranto. *People v. Matteson*, 17 Ill. 167; *St. Louis Co. Ct. v. Sparks*, 10 Mo. 117; 45 Am. Dec. 355; *Duane v. McDonald*, 41 Conn. 517.

Quo warranto and not *mandamus*, is the proper writ to unseat a member

of a city council. *State v. Camden*, 42 N. J. L. 335.

Where a councilor's name has been expunged from the Burgess roll, a quo warranto is the proper mode to try his title to the office, and not a *mandamus* to the mayor to hold a fresh election. *Reg. v. Ricketts*, 3 N. & P. 151.

If a party has been ousted from an office by the election of another person to that office (the election not being merely colorable), his remedy is not by *mandamus*, but by a quo warranto *Rex v. Oxford* (Mayor) etc., 1 N. & P. 474; 6 A. & E. 349. And see *Reg. v. Chester*, 6 El. & Bl. 531.

On showing cause against a *mandamus* commanding commissioners to administer the oath of office as commissioners to a person, who, it was alleged, had been elected by a majority of votes under a statute, in opposition to another person whom the commissioners had sworn in as having a majority of legal votes, it was held that a *mandamus* would lie, on the ground that it was an office for which a quo warranto would not lie, and, therefore, there was no other remedy. *Reg. v. Keyningham Level Comrs.*, 11 Jur. 58, n.

An information in the nature of a quo warranto is not a proper remedy for the recovery of real estate, except where the real estate has escheated or been forfeited to the State for its use. *State v. Shields*, 56 Ind. 521.

In *Michigan* the constitutionality of a statute may be inquired into by the people in a proceeding in the nature of quo warranto, to try the right of the respondents to exercise the franchise of a corporation, though the respondents justly under such statute. *Attorney Gen'l v. Perkins*, 73 Mich. 303.

An information in the nature of quo warranto lies to test the validity of a dram-shop license, where, as in *Illinois*, the writ lies where one holds or claims any "privilege, exemption, or license"

exists between these three remedies, viz., that, as a general rule, neither is applicable where there is another adequate remedy.¹ Though, in the case of quo warranto, this rule is subject to the qualification that, where a State constitution has conferred the jurisdiction, a mere legislative enactment cannot take it away,² though such enactment confers another remedy.³

3. What Courts Have Jurisdiction.—In many of the States of the Union the courts empowered to entertain quo warranto proceedings are designated by constitutional or statutory provisions. As the jurisdiction is original, and not appellate, it cannot be exercised by a court which, under the constitution, has appellate jurisdiction only.⁴ Sometimes the jurisdiction is vested exclusively in the court of last resort, and sometimes in the various courts of general jurisdiction. In the latter case the Supreme court may decline to act.⁵

improperly issued. *Swarth v. People*, 109 Ill. 621.

Quo warranto does not lie to declare void a license to practice medicine procured by fraud. *State v. Green*, 112 Ind. 462.

1. *People v. Hillsdale etc. Turnpike Co.*, 2 Johns. (N. Y.) 190; *State v. Wadkins*, 1 Rich. (S. Car.) 42; *State v. Marlow*, 15 Ohio St. 114; *State v. Shields*, 56 Ind. 521; *Com. v. Baxter*, 35 Pa. St. 263.

2. *State v. Allen*, 5 Kan. 213; *People v. Boughton*, 5 Colo. 487; *State v. Baker*, 38 Wis. 71.

3. *State v. Messmore*, 14 Wis. 115. In *Kane v. People*, 4 Neb. 509, it was held that a statute creating a mode of contesting elections did not affect the jurisdiction in quo warranto existing under the constitution.

It is no answer to an information in the nature of a quo warranto, that individuals aggrieved can seek their remedy in another manner, unless the remedy by information is taken away. *People v. Bristol etc. Turnpike Road*, 23 Wend. (N. Y.) 222; *People v. Hillsdale etc. Turnpike Road*, 23 Wend. (N. Y.) 254.

4. *Ex parte People*, 1 Cal. 85.

5. *State v. Stewart*, 32 Mo. 379; *State v. Buskirk*, 43 Mo. 111; *State v. Claggett*, 73 Mo. 388; *Coon v. Attorney Gen'l*, 42 Mich. 65.

See, as to the jurisdiction of the Ohio Supreme court, *State v. Baughman*, 38 Ohio St. 455.

The right of the supreme court to issue the writ of quo warranto is recognized, in general terms, by the Vermont statute; the occasions are

left to be determined by common law rules. And, by those rules, it is apparent the writ is the appropriate mode in which to try any alleged usurpation of officers, or franchises, inconsistent with the State sovereignty. *State v. Boston etc. R. Co.*, 25 Vt. 433.

There has been some conflict of authority as to whether the writ and the information were synonymous in so far as that jurisdiction of the information was conferred by a constitutional provision, speaking, not of the information, but of the writ. In *Wisconsin*, power to issue the writ includes power to entertain the information. *State v. West Wisconsin R. Co.*, 34 Wis. 197; 36 Wis. 466. See also *Attorney-Gen'l v. Blossom*, 1 Wis. 317; *Attorney Gen'l v. Barstow*, 4 Wis. 567; *State v. Messmore*, 14 Wis. 115; *State v. Baker*, 38 Wis. 71.

In *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243, a similar doctrine was held. In *Florida* the same rule obtains. *State v. Gleason*, 12 Fla. 190. And so in *Colorado*. *People v. Keeling*, 4 Colo. 129. Formerly it was the same in *Missouri*. *State v. Merry*, 3 Mo. 278. But otherwise, according to the later decisions, which hold that the writ and the information may not be confounded together, and that the writ contemplated by the constitution was the common law writ, issuable as of right, without leave of court. *State v. St. Louis etc. Ins. Co.*, 8 Mo. 330; *State v. Stone*, 25 Mo. 555. And see *State v. Vail*, 53 Mo. 97, as to the jurisdiction of the information.

4. **How Far Courts Exercise Discretion.**—Formerly, in *England*, the court of king's bench granted leave to file the information almost as a matter of course. Finally, however, where the application was at the instance of a private relator, it became the practice to exercise caution in granting leave;¹ and, in the *United States*, this

In *Arkansas* the rule is now the same as it formerly was in *Missouri*, and as it is in *Florida*, *Wisconsin* and *Colorado*. *State v. Latherman*, 38 Ark. 81; though formerly, in *Arkansas*, a contrary rule obtained. *State v. Ashley*, 1 Ark. 279; *State v. Real Estate Bank*, 5 Ark. 595; 141 Am. Dec. 109; *State v. Johnson*, 26 Ark. 281.

In *New York* the civil action has been substituted by the code for both the writ and the information, the relief, however, being the same. *People v. Hall*, 80 N. Y. 117.

Neither the writ nor the information is in force in *Tennessee*, the remedy being under the statute, by suit in chancery. *State v. Turk*, Mart. & Y. (Tenn.) 287; *Attorney Gen'l v. Leaf*, 9 Humph. (Tenn.) 753.

In *Pennsylvania*, the statutory remedy is substantially analogous to that afforded by the ancient writ of quo warranto, though dissimilar in form. *Com. v. Burrell*, 7 Pa. St. 34; *Murphy v. Farmers' Bank*, 20 Pa. St. 415. The writ, however, does not issue as of right, but in the discretion of the court. *Com. v. Jones*, 12 Pa. St. 365; *Com. v. McCarter*, 98 Pa. St. 607.

1. *Rex v. Stacey*, 1 T. R. 1.

It is discretionary in the court to grant or withhold a quo warranto information, even where a good objection to the title is shown. *Rex v. Parry*, 6 A. & E. 810.

A rule for a quo warranto, in respect of an annual office of guardian of the poor, the election to which was on the 14th of May, on the ground that the mode of election adopted was not a proper one, was not applied for till the 13th of January following, and it was then not shown that any rate payer had been prevented from voting, or that the result of the election was affected by the mode adopted. In the exercise of its discretion the court discharged the rule. *Reg. v. Cousins*, 42 L. J., Q. B. 124; 38 L. T., N. S. 116.

The court will not decide on the validity of the election of a corporate officer, if the question is new or doubtful, on a rule for a quo warranto. *Rex v. Godwin*, 1 Doug. 397.

It will be granted where the right depends upon a matter of doubtful law, in order to its being finally determined. *Rex v. Carter*, Cowp. 58; Lofft 516.

Where sufficient appears by the affidavits to draw the merits of an election to a corporate office into question, the court will grant a quo warranto, though the fact of the defendant's usurpation no otherwise appeared than by the deponent's swearing to their information and the belief that the defendant was admitted a freeman, and sworn and enrolled accordingly, the defendant not denying the fact when called upon by a rule to show cause. *Rex v. Harwood*, 2 East 177.

A relator, who has acquiesced in, and himself adopted, the mode of voting he objects to, is disqualified from applying for a rule. *Reg. v. Lofthouse or Lockhouse*, 1 L. R., Q. B. 433; 35 L. J., Q. B. 141; 7 B. & S. 447.

It is a valid objection to a relator applying for a quo warranto information for usurping the office of burgess, that he was formerly present at and concurred in the election of another burgess, when the objection he sought by the application to avail himself of was taken and overruled, and he voted for the party then elected. *Rex v. Parkyn*, 1 B. & Ad. 690.

A town councilor is disqualified to be a relator, to question the validity of the election of another town councilor, he having been cognizant of the objection before the election, been present at the election, and having afterwards administered to him, without protest, the declaration required by 5 & 6 Wm. IV, ch. 76, § 50; *Reg. v. Greene*, 2 G. & D. 24; 2 Q. B. 460.

The court discharged the rule where the relator was the legal adviser of the defendant, and advised him that he had been duly elected. *Rex v. Payne*, 2 Chitty 369.

The court refused to grant a quo warranto, because the party applying for it had agreed not to enforce a by-law, upon which he now grounded his attempt to impeach the defendant's title. *Rex v. Mortlock*, 3 T. R. 300.

On a motion for a quo warranto

is the universal practice where the application is at the instance of a private relator to test the right to an office or franchise.¹

against a capital burgess, on the ground of irregularity in his election, it is no answer that the relator frequently acted with the party against whom he applies in corporation business, during two years following such party's election, the relator not being shown to have concurred in the election, nor is the relator disqualified by the mere circumstance of having formerly taken part in other elections, when the same irregularity existed as that complained of, but was not noticed. *Rex v. Benney*, 1 B. & Ad. 684.

It is no objection to the persons applying for a quo warranto which would operate in its effect to dissolve the corporation, that they attended the meeting at which the mayor was elected, whose election they impeach on the ground that the corporation was then dissolved by the loss of an integral part, and that they voted for another candidate, and afterwards attended other corporate meetings at which such mayor presided. *Rex v. Morris*, 3 East 213.

It is no objection to relators applying against a party for exercising the office of an alderman (his election to which they had opposed), that they afterwards made no opposition to his election to the principal office of magistracy (to which the other was a necessary qualification); or that they afterwards attended at and concurred in corporate meetings whereat he presided or where he attended in his official character, such application being made within the time limited by law, viz., in four years after his election as an alderman. *Rex v. Clarke*, 1 East 38.

The court made a rule absolute, though it was shown that the relator and other persons with whom he acted were influenced by a strong party spirit, and had, during three or four years, withdrawn themselves from corporation business, to the inconvenience of the borough. *Rex v. Benney*, 1 B. & Ad. 684.

It is no objection that the person applying is in low and indigent circumstances, and that there is strong ground of suspicion that he is applying not on his own account, or at his own expense, but in collusion with a stranger. The court, however, in a case of this kind,

will require security for costs. *Rex v. Wakelin*, 1 B. & Ad. 50.

It was no objection to an application for a quo warranto against a mayor for not having taken the sacrament within the proper time before his election, that the relators concurred in his election, because that defect was a latent one, arising from the omission of an act positively required by the legislature. *Rex v. Smith*, 3 T. R. 573.

Renewed applications will be refused, where the effect of granting them would be to raise questions once decided. *Rex v. Orde*, 8 A. & E. 420, n.; *Rex v. Langhorne*, 2 N. & M. 618.

1. *People v. Sweeting*, 2 Johns. (N. Y.) 184; *State v. Lehre*, 7 Rich. (S. Car.) 234; *Com. v. Reigart*, 14 S. & R. (Pa.) 216; *Com. v. Arrison*, 15 S. & R. (Pa.) 127; 16 Am. Dec. 531; *Com. v. Cluley*, 56 Pa. St. 270; 94 Am. Dec. 75; *Guntton v. Ingle*, 4 Cranch (C. C.) 438; *People v. Tibbets*, 4 Cow. (N. Y.) 358; *People v. Kip*, 4 Cow. (N. Y.) 382 n.; *People v. Waite*, 70 Ill. 25; *People v. Moore*, 73 Ill. 132; *People v. Callaghan*, 83 Ill. 128; *People v. North Chicago R. Co.*, 88 Ill. 537; *People v. Keeling*, 4 Colo. 129; *State v. Tolan*, 33 N. J. L. 195; *State v. Schnierle*, 5 Rich. (S. Car.) 290; *State v. Centreville Bridge Co.*, 18 Ala. 678; *State v. Smith*, 48 Vt. 266; *Stone v. Wetmore*, 44 Ga. 495.

The Supreme Court of *New Jersey* will, upon reasonable ground, disclosed by affidavit, allow an information in the nature of a quo warranto to be filed in the name of the attorney general, at the relation of any person or persons desiring to prosecute the same. *Camman v. Bridgewater Copper Min. Co.*, 12 N. J. L. 84.

In *Michigan*, leave to file an information should not be granted, except on a sufficient showing, by the applicant, of facts entitling him to institute the proceedings. *Vrooman v. Michie*, 69 Mich. 42.

The discretionary power of the court over an information to inquire into the title to a public office, relates to allowing the information to be filed, in the name of the State, by a private relator; but when such information has been allowed to be filed, or when filed by the attorney general by virtue of the authority of his office, the court have no

The motive of the relator may be considered;¹ weight will be given to considerations of public convenience² and public expediency;³ it may be ground for refusing leave that the relator participated, without objection, in the election proceedings of which he complains;⁴ that the proceeding is likely to be unavailing may be considered;⁵ or that it will result in no practical benefit.⁶

5. Limitation; Lapse of Time.—In the absence of a statute there is no limitation as to the time within which the attorney-general may file an information on behalf of the people.⁷ And as the remedy, though in form criminal, is in fact civil, a statute of limitations applying to prosecutions under penal laws does not

more power to dispense with the law applicable to the case, upon its trial, or to refuse to enforce the law, on the ground that the proceeding is unimportant or impolitic, than in any other case. *State v. Brown*, 5 R. I. 1.

An information in the name of the circuit attorney, at the relation of a private individual, seeking the determination of a matter of private right between two private persons can be filed in the supreme court only on leave especially granted for that purpose; and leave will not be granted except on an agreed case on the facts, or in an extraordinary case. *State v. Lawrence*, 38 Mo. 535.

1. *State v. Brown*, 5 R. I. 1; *Rex v. Dawes*, 1 W. Bl. 634.

2. *State v. Schnierle*, 5 Rich. (S. Car.) 299.

3. For example, to the fact that municipal government may be suspended.

4. *People v. Waite*, 70 Ill. 25; *People v. Moore*, 73 Ill. 132.

5. *People v. Callaghan*, 83 Ill. 128.

6. A proceeding in the nature of a quo warranto, for trial of a title to office, will not be sustained, where the term of office must necessarily expire before judgment can be rendered. *Morris v. Underwood*, 19 Ga. 559; *People v. Sweeting*, 2 Johns. (N.Y.) 184; *State v. Jacobs*, 17 Ohio 143; though the information will not be dismissed on the ground that the office has expired since the filing of the information. *People v. Hartwell*, 12 Mich. 508; 86 Am. Dec. 70.

The court will not usually interfere to prevent a postmaster, in the employ of the United States, from acting as a justice of the peace, the office being of small importance, for one year only, with no complaint that others are kept from the office by the respondent's exercise of it, and the officer being in no

way, practically, incompatible. *State v. Fisher*, 28 Vt. 714.

And see *State v. Schnierle*, 5 Rich. (S. Car.) 299; *Com. v. Reigart*, 14 S. & R. (Pa.) 216; *State v. Centreville Bridge Co.*, 18 Ala. 678.

In *Stone v. Wetmore*, 44 Ga. 495, it was held that the court was not deprived of its discretion by a statute authorizing the filing of the information "on proper showing made."

7. *State v. Pawtuxet Turnpike Co.*, 8 R. I. 521.

In *State v. Beecher*, 16 Ohio 358, it was held that, under the statute of 1838, a proceeding instituted after three years from the time of the accrual of the cause of ouster was too late.

By 32 Geo. III, ch. 58, if any person or persons against whom any information in the nature of a quo warranto for the exercise of any office or franchise in any city, borough or town corporate shall be exhibited, shall derive title under an election, nomination, swearing into office, or admission by any person or persons, the title of such person or persons shall not be defeated or affected by reason or on account of any defect in the title of such person or persons so electing, nominating, swearing into office, or admitting, in case such person or persons, under whom title shall be derived as aforesaid, was or were in exercise *de facto* of the franchise or office (in virtue of which he or they was or were so elected, nominated, sworn in, or admitted), at a period of six years at least previous to the time of filing such information, and his or their title shall not have been questioned by any legal proceeding carried on with effect. See as to the construction of this statute, *Rex v. Stokes*, 2 M. & S. 71.

A title to one office, which is a qualification to hold another office, is not

embrace the information in the nature of quo warranto.¹ But lapse of time and the length of the period of acquiescence may induce the court, in the exercise of its discretion, in cases where discretion may be exercised, to refuse to entertain the proceeding.²

II. PUBLIC OFFICERS—1. In the United States.—The remedy under discussion is employed in the *United States* for the purpose of testing title to public office more frequently than for other purposes; in *Great Britain*, most frequently, in relation to municipal offices. The cases are sufficiently numerous to have defined, with tolerable precision, the principles governing the exercise of the jurisdiction.³ The public office in question must be a public office, as distinguished, on the one hand, from a mere employment or agency, less than an office, with the right to exercise which, the courts in quo warranto proceedings will not interfere, and, on the other hand, from an office in which the

within the statute aforesaid; and, therefore, although the party had exercised the first for six years, the court made the rule absolute for an information for exercising the second office upon a defect of title to the first. *Rex v. Stokes*, 2 M. & S. 71.

1. *Com. v. Birchett*, 2 Va. Cas. 51.

2. **Lapse of Time.**—Before the enactment of St. 32 Geo. III, ch. 58, the court, in *Rex v. Peacock*, 41 T. R. 684, refused to grant an information to impeach a derivative title where the person claiming the original title had been in the undisturbed possession of his office six years; and, in *Rex v. Dickinson*, 4 T. R. 282, refused an information against a person who had been in the peaceable possession of his franchise six years.

An application for a quo warranto calling on a person to show by what warrant he holds the office of mayor, alderman, councilor or burgess, must be made within twelve months of his becoming disqualified. It is not sufficient that it is within twelve months of notice of his disqualification by his name being struck off the burgess list. *Ex parte Birbeck*, 22 W. R. 229; 9 L. R., Q. B. 256.

Where a party had entered into a continuing contract with the council, and the disqualification continued during the existence of the contract, it was held that a quo warranto might be applied for, notwithstanding more than twelve months had elapsed from the time of the election or from the time when the disqualification first attached. *Reg. v. Francis*, 18 Q. B. 526.

The court will not, in its discretion, grant a quo warranto against a mayor of a borough, where the ground of objection to his title is, that he was unduly elected alderman, such election having taken place more than twelve months before the rule was moved for; there being no special circumstances to induce the court to interfere. *Reg. v. Preece*, D. & M. 156; 5 Q. B. 94.

An application for a quo warranto against a burgess, who became subsequently qualified, for voting without a qualification, being delayed for six months, was dismissed with costs. *In re Dunn*, 10 Jur. 1095. And see *Reg. v. Hodson*, 4 Q. B. 648, n.

3. *High Ex. Rem.*, § 623; *Respublica v. Wray*, 3 Dall. (U. S.) 490.

Quo warranto is the direct proceeding to try title to an office. *People v. Scannell*, 7 Cal. 432; *People v. Forquer*, 1 Ill. 104; *First Parish v. Stearns*, 21 Pick. (Mass.) 148; *Lindsey v. Attorney Gen'l* 33 Miss. 508; *Ex parte Bellows*, 1 Mo. 115; *People v. Van Slyck*, 4 Cow. (N. Y.) 297; *Lewis v. Oliver*, 4 Abb. Pr. (N. Y.) 121; *Mayor etc. of N. Y. v. Conover*, 5 Abb. Pr. (N. Y.) 171; *Com. v. Cullen*, 13 Pa. St. 133; 53 Am. Dec. 450; *Clark v. Com.*, 29 Pa. St. 129.

A quo warranto will be issued on reasonable grounds against one holding office who has not given the proper bond in season. *Respublica v. Wray*, 3 Yeates (Pa.) 429.

Where a person intrudes himself into an office, in consequence of the unlawful decision of a board of canvassers, in *Michigan*, the remedy by motion to the

public have not an interest.¹ It may be legislative, executive, or judicial.² In the *United States* the proceeding has been held available to test the right to a military office;³ the legality of the election of trustees of school lands;⁴ of district school trustees;⁵ of the appointment of a prison inspector;⁶ the right to act as pilot;⁷ or as a recorder;⁸ and the right to preside over the meetings of a city council.⁹ On the other hand, it has been held not available against the chief engineer of a railway company;¹⁰ nor against the managers of a lottery appointed by a corporation having a grant of the lottery;¹¹ nor against the minister of a congregation, at least where the relator and the respondent did not claim under the same charter.¹² Neither can it be used against officers of a railway company, holding under an election by the board of directors.¹³ The governor of a State has been held amenable to this proceeding, when being charged with an unlawful intrusion into the office, and the court being charged by the constitution with jurisdiction to prevent the usurpation of offices.¹⁴ It is otherwise, of course, where, under the constitution, the legislature is vested with power to determine the result of a gubernatorial election.¹⁵

A fortiori, the proceeding may be availed of against an executive officer.¹⁶ It lies, also, to test the title to a judicial

supreme court, for leave to file an information in the nature of a quo warranto, to try the right to such office, is proper, but the court have a discretion as to granting such motions. *People v. Tisdale*, 1 Dougl. (Mich.) 59.

A quo warranto is the proper mode of testing the validity or determining the result of a popular election. *State v. Passaic Co.*, 25 N. J. L. 354.

1. *Com. v. Dearborn*, 15 Mass. 125; *People v. Hills*, 1 Lans. (N. Y.) 202; *State v. Champlin*, 2 Bailey (S. Car.) 220. And from the cases generally this doctrine is deducible.

2. *U. S. v. Lockwood*, 1 Pin. (Wis.) 359; *Com. v. Swasey*, 133 Mass. 538.

3. *Com. v. Small*, 26 Pa. St. 31; *State v. Brown*, 5 R. I. 1; *State v. Utter*, 14 N. J. L. 84. But see *State v. Wadkins*, 1 Rich. (S. Car.) 42, where the information was held not to lie to oust the captain of a beat company, the militia laws of the State having created another remedy.

4. *Moore v. Caldwell*, 1 Freem. (Miss.) 222.

5. *Renwick v. Hall*, 84 Ill. 162. But see *People v. Collins*, 34 How. Pr. (N. Y.) 336, which case, however, went upon the ground that the decision of the superintendent of public instruction was final.

6. *Com. v. Douglass*, 1 Binn. (Pa.)

77.

7. *Palmer v. Woodbury*, 14 Cal. 43.

8. *Reynolds v. Baldwin*, 1 La. Ann. 162; *State v. Ramos*, 10 La. Ann. 420; *State v. Gastinel*, 18 La. Ann. 517; 20 La. Ann. 114; *State v. Bernoudy*, 36 Mo. 279.

9. *Cochran v. McCleary*, 22 Iowa 75.

10. *Eliason v. Coleman*, 86 N. Cal. 225.

11. *Com. v. Dearborn*, 15 Mass. 125.

12. *Com. v. Murray*, 11 S. & R. (Pa.) 73; 14 Am. Dec. 614.

13. *People v. Hills*, 1 Lans. (N. Y.) 202; *State v. Champlin*, 2 Bailey (S. Car.) 220.

14. *Attorney-Gen'l v. Barstow*, 4 Wis. 267. The contention that the court, in entertaining the information, unlawfully interferes with the executive functions, is here examined and decided to be without force.

15. *State v. Baxter*, 28 Ark. 129.

16. *Com. v. Fowler*, 10 Mass. 290; *State v. Dellesseline*, 1 McCord (S. Car.) 52. It has been held otherwise, however, in *Louisiana*. *Terry v. Stauffer*, 17 La. Ann. 306. As to the remedy by quo warranto in the case of an appointive office in *Iowa*, see *State v. Minton*, 49 Iowa 591.

In an information in the nature of a

office,¹ unless, under the constitution, there is no quo warranto jurisdiction in the matter.² The remedy is available to prevent the setting up of a new office without authority,³ but not to try the title to an unauthorized office,⁴ nor to prevent the doing of a particular act; thus, where a special judge is commissioned to try a certain class of cases, the writ will not lie to inquire into his authority to try any one or more particular cases;⁵ nor to determine which of two certain officers should perform a given duty.⁶

2. In Great Britain.—Formerly, in *Great Britain*, crown offices only were deemed within the purview of this remedy, but, at the present day, offices created under charters and acts of Parliament may fall within it.⁷

quo warranto against an officer appointed by the executive, the reasons and motives of the executive in making the appointment cannot be inquired of when the right exists. *State v. Adams*, 2 Stew. (Ala.) 231.

1. A county probate judge for example. *U. S. v. Lockwood*, 1 Pin. (Wis.) 359.

2. As in *Alabama*. *State v. Paul*, 5 Stew. & P. (Ala.) 40.

3. *Rex v. Boyles*, Strange 836.

4. *State v. North*, 42 Conn. 79.

5. *State v. Evans*, 3 Ark. 585; 36 Am. Dec. 468.

6. *State v. Smith*, 55 Tex. 447.

7. *Darley v. Reg.*, 12 C. & F. 520, in which case the authorities are reviewed, and the limits of the jurisdiction exhaustively discussed. It was here held that the office of the treasurer of the county of the city of Dublin was an office for which an information would lie.

When Information Lies in Great Britain.—The information has been granted for exercising the office of justice of the peace. *Rex v. —*, 2 Chitty 368; of constable, *Reg. v. Booth*, 12 Q. B. 884; of town paving commissioners, *Rex v. Badcock*, 6 East. 359; clerk to a board of guardians under a poor law act, *Reg. v. St. Martin's in the Fields*, 17 Q. B. 149; *Hill v. Reg.*, 8 Moore P. C. C. 139; port-revee of a borough, *Rex v. Mein*, 3 T. R. 596; recorder, *Rex v. Colchester*, 2 T. R. 259; coroner, *Reg. v. Grimshaw*, 10 Q. B. 747; bailiff of a borough, *Rex v. Highmore*, 1 D. & R. 438; 5 B. & A. 771; for holding a court-leet after long disuser, without showing a title by the original grant. *Darell v. Bridge*, 1 W. Bl. 46.

In favor of the clerk of a county court improperly removed. *Reg. v. Owen*, 15 Q. B. 476.

For holding a court of record within a charter borough, and presiding therein in the absence of the bailiffs, the defendant not being one of them. *Rex v. Williams*, 1 Burr. 402; 2 Ld. Ken. 68.

The persons declared to be elected as town councilors by the mayor or ward alderman, at a municipal election, and who had accepted office and made the proper declaration, can only be removed from office by a quo warranto information. *Rex v. Winchester*, 2 N. & P. 274; 7 A. & E. 215.

A quo warranto was granted in order to try whether a residence in a borough, previously to an election, which required residence, was *bona fide* or not. *Rex v. Richmond*, 6 T. R. 560.

A person's name was on the Burgess list unobjected to at the revision in October, 1867, and he was elected town councilor on the 1st of November following. His father received parochial relief in December, 1866. Held, that the court would inquire by quo warranto into his title to be on the Burgess list. *Reg. v. Ireland*, 9 B. & S. 19.

A party having a majority of votes for the office of councilor of a borough, and having been declared elected according to the form prescribed by 5 & 6 Wm. IV, ch. 76, § 35, and having also been admitted, the office is full in fact, and the remedy to try whether it is full of right is by quo warranto. *Reg. v. Derby*, 2 N. & P. 589; 7 A. & E. 419.

A local act created a corporation, consisting of sworn commissioners, with summary power of seizure of goods, and imprisonment of the person, and of preventing and removing obstructions and nuisances in the streets; powers of paring, cleansing, and lighting; powers of appointing and paying officers, of determining the number of

watchmen, of regulating them, and dismissing, paying, or pensioning them; of possessing property in materials required under the act, of instituting prosecutions, of imposing rates, of appointing and removing treasurers, to whom penalties, imposed by the act, were to be paid for the purposes of the act; and of hearing appeals by parties complaining of things done under the act. *Held*, that a quo warranto would lie against persons claiming to be commissioners. *Rex v. Beedle*, 3 A. & E. 467.

A quo warranto was granted against a person for exercising an office in a corporation after he had resigned by writing, but without deed. *Rex v. Payne*, 2 Chitty 367.

When a person wrongfully elected to a corporate office and admitted into it resigns, and his resignation is accepted, another candidate who claims to have been duly elected and to be admitted into the office, is entitled to a quo warranto. *Reg. v. Blizard*, 7 B. & S. 922.

A quo warranto lies against a person who had held the incompatible offices of capital Burgess and town clerk, before and since 32 Geo. III, ch. 58, without interruption. *Rex v. Bond*, 6 D. & R. 333.

So, where there is a continuing incompatibility, though the party held the offices of capital Burgess and town clerk for more than six years. *Rex v. Lawrence*, 2 Chitty 371.

A chairman of a local board of health was the returning officer at elections of members of the board, and must personally conduct the election; and where an election was conducted, during the absence of the chairman, by the clerk and secretary of the board, a quo warranto was granted against the members elected. *Reg. v. Backhouse*, 13 W. R. 846. See *Reg. v. Backhouse*, 7 B. & S. 911.

When Information Does Not Lie in Great Britain.—On the other hand, it has been held that quo warranto did not lie for exercising the office of guardian of the poor for a union, under 4 & 5 Wm. IV, ch. 76. *In re Aston Union*, 6 A. & E. 784; W. & D. 329; *nom.* *Rex v. Carpenter*, 1 N. & P. 773. But see *contra* *Reg. v. Hampton*, 6 B. & S. 923.

It has been held that a clerk to justices of a borough, appointed under 5 & 6 Wm. IV, ch. 76, §. 102, holds only during the pleasure of the justices, and therefore a quo warranto will not lie for

his office. *Reg. v. Fox*, 8 El. & Bl. 399.

The office of governor and director of the poor of an incorporated district is not such an office as that for which a quo warranto will lie for an usurpation of it. *Rex v. Ramsden*, 5 N. & M. 325; 3 Ad. & El. 456.

It does not lie against overseers. *Rex v. Danberry*, 1 Bott's P. L. 324.

Nor to inquire into the election of an assistant overseer. *Reg. v. Simpson*, 19 W. R. 73.

Nor to try a question concerning the validity of an election to a fellowship of a college which was disputed by the master. *Rex v. Gregory*, 4 T. R. 240, n.

It does not lie for the office of trustees under a public local act, elected as vacancies occur, by occupiers in the parish, and taking an oath of office, with power to appoint salaried treasurers, collectors, etc., of moneys raised under the act, accountable to themselves; to pass by-laws with penalties; to impose rates in case of certain other functionaries not so doing; to supply omissions in the rates, and to relieve parties aggrieved or incompetent to pay; to appoint salaried watchmen; to purchase, hold, and manage property for the purposes of the act; to contract for the supply of the poor, remove nuisances, and apprehend for certain specified nuisances; to maintain the highways, and prevent encroachments thereon; to superintend the lighting, paving, watching, and cleansing of the streets; to remove dangerous buildings, on complaint upon oath (which they were to administer), and to sue in the name of their clerk or one of themselves. *Rex v. Hanley*, 3 A. & E. 463, n.

A quo warranto will not lie against a county treasurer to show by what authority he holds the office, if he has been *de facto* elected by the justices in quarter sessions. *Rex v. Herefordshire*, 1 Chitty 700.

It will not lie for the office of master of a hospital and free grammar school, established by a royal charter. *Reg. v. Mousley*, 8 Q. B. 946.

For an office of great trust and pre-eminence within the borough, touching the election and return of burgesses to serve in Parliament, it will not lie. *Rex v. M'Kay*, 6 D. & R. 432; 4 B. & C. 351.

Nor for encouraging the exercise of a franchise. *Rex v. Marsden*, 1 W. Bl. 579; 3 Burr. 1812.

Nor for the office of church-warden.

3. Possession and User Necessary.—There must be a possession and user of the office to lay a foundation for the proceeding.¹

4. Acquiescence a Bar.—Long acquiescence on the part of the relators, in the incumbent's claim of title, may constitute a fatal obstacle to the successful prosecution of the information.² So acquiescence in irregularities in the election may have the same effect.³

Where, however, the proceeding is instituted by the State, through its attorney-general, acquiescence on the part of a relator does not operate to estop the State.⁴

5. Expiration of Term.—The courts, as a general rule, refuse leave to file an information to attack the title to an office, the term of which has expired,⁵ or which will expire before the cause

Rex v. Shepherd, 4 T. R. 381; *In re Barlow*, 30 L. J., Q. B. 271; 5 L. T., N. S. 289.

For additional cases, see *Bradley v. Sylvester*, 25 L. T., N. S. 459; *Rex v. Grimshaw*, 5 D. & L. 249; *Reg. v. Morgan*, 26 L. T., N. S. 790; *Reg. v. Ward*, 8 L. R., Q. B. 210; *Reg. v. Diplock*, 4 L. R. 2 B. 549; *Reg. v. M'Carthy*, 10 L. R. 312; *Reg. v. Pepper*, 3 N. & P. 154; 7 Ad. & El. 745; *Rex v. Bedford Level Co.*, 6 East 356.

1. *Rex v. Whitwell*, 5 T. R. 85. The court will not grant a quo warranto against a burgess for being illegally upon the burgess roll, unless it is shown that he has *de facto* exercised the office. *Reg. v. Armstrong*, 2 Jur., N. S. 211.

A quo warranto for usurping the office of free burgess, does not lie against the mere claim of one who, though elected, never was admitted. *Rex v. Ponsonby*, 1 Ves. Jr. 1; 2 Bro. P. C. 311; 1 Ld. Ken. 1. An averment the person elected tendered himself to be sworn in is not enough. *Rex v. Whitwell*, 5 T. R. 85. Though it is sufficient to aver that he acted in the office. *Reg. v. Quayle*, 11 A. & E. 508.

Where it appeared that the defendant had presided at a vestry meeting convened for the purpose of electing a member of a burial board, under 15 & 16 Vict. ch. 85, § 12, that he and others were proposed and seconded; that he declared himself elected; that the clerk wrote to the clerk of the burial board informing him of his election; and that at the next vestry meeting, when he again presided, the minutes of the previous meeting, one of which was a memorandum of his election, were unanimously confirmed; and the defendant stated that he had declined to attend any of

the meetings of the board, and he had not at any time acted or claimed the right to act as a member of the board; it was held that this was not a sufficient user of the office to found an application for a quo warranto. *Reg. v. Jones*, 8 L. T., N. S. 270.

A mere statement in an affidavit for a quo warranto against a town councilor, that he has accepted the office, is insufficient, under 5 & 6 Wm. IV. ch. 76. The acts constituting acceptance should be also stated. *Reg. v. Slatter*, 3 P. & D. 263; 11 A. & E. 505.

To take the official oath has been held an acceptance and user, without a further discharge of the duties of the office. *People v. Callaghan*, 83 Ill. 128. And, in *Rex v. Tate*, 4 East 337, a swearing in, though defective in law, was held a sufficient user, the party claiming the office.

An information may lie where the office is claimed, and its duties have been performed, though the claimant refuses to perform them longer. *State v. Graham*, 13 Kan. 136.

2. *Rex v. Stacy*, 1 T. R. 1. And see *Rex v. Dawes*, 1 W. Bl. 634; *Reg. v. Anderson*, 2 Q. B. 740.

3. *Reg. v. Lockhouse*, 14 L. T., N. S. 359. *People v. Waite*, 70 Ill. 25.

4. *State v. Sharp*, 27 Minn. 38. As to effect of the acquiescence by the people for a long period of time, see *State v. Seay*, 64 Mo. 89.

5. *In re Harris*, 6 A. & E. 475; *Morris v. Underwood*, 19 Ga. 559; *State v. Jacobs*, 17 Ohio 143; *State v. Taylor*, 12 Ohio St. 130.

A writ of quo warranto brought within the term of an office may be tried after the term has expired; but title to a past and defunct office cannot be tried in a proceeding instituted, not

can be determined.¹ The expiration of the term during the pendency of the proceeding will not, however, prevent its being retained for the purpose of the imposition of a fine and costs.²

6. Canvassers' Returns.—In proceedings in the nature of quo warranto the court will go behind the return of the canvassers of the votes cast at an election and treat their return as *prima facie* evidence only in favor of the incumbent of the office.³ So the commission will be treated as *prima facie* evidence only of title to the office.⁴

7. Proof Necessary.—On the respondent rests the burden of showing title to the office claimed by him. The prosecutor is not obliged, as in civil actions generally, to prove his title in order to put the respondent on his defense.⁵ If the respondent fails in his proof, judgment of ouster may follow.⁶ When the proceeding is

against incumbents during its lifetime, but against those succeeding the next year. *Com. v. Smith*, 45 Pa. St. 59.

An information in the nature of a quo warranto may be filed against public officers after the expiration of their office, where their conviction is necessary to invalidate their acts, if said acts are of public concern, and intended to confer rights on others. *Burton v. Patton*, 2 Jones (N. Car.) 124; 62 Am. Dec. 194.

The court will make the rule absolute, although the party has, since the rule obtained, resigned his office, and his resignation has been accepted. *Rex v. Warlow*, 2 M. & S. 75. And see *Reg. v. Blizzard*, L. R., 2 Q. B. 35.

After the death of a mayor, capability to election cannot be disputed. *Rex v. Spearing*, 1 T. R. 4, n.

The court refused a rule for a quo warranto against the town clerk of a borough, which was moved for in order to contest his right to compensation as a displaced officer under § 6 Wm. IV, ch. 76, § 66. *Rex v. Harris*, 1 N. & P. 576; W., W. & D. 237; 6 A. & E. 475.

1. *People v. Sweeting*, 2 Johns. (N. Y.) 184; *Com. v. Reigart*, 14 S. & R. (Pa.) 216; *State v. Schnierle*, 5 Rich. (S. Car.) 299. And see *State v. Fisher*, 28 Vt. 714.

The proceeding does not lie against an officer elected for one year only, because it would be impossible to decide the question until the expiration of the term, when the mischief complained of would be gone. *Com. v. Athearn*, 3 Mass. 285.

2. *People v. Hartwell*, 12 Mich. 508; 86 Am. Dec. 70; *State v. Pierce*, 35 Wis. 93. *Contra*, *State v. Porter*, 58 Iowa 19.

3. *Attorney-Gen'l v. Ely*, 4 Wis. 420; *State v. Norton*, 46 Wis. 332; *People v. Van Slyck*, 4 Cow. (N. Y.) 297; *People v. Thacher*, 55 N. Y. 525; 14 Am. Rep. 312; *People v. Pease*, 30 Barb. (N. Y.) 588; *People v. Cook*, 8 N. Y. 67; 59 Am. Dec. 451; *State v. Steers*, 44 Mo. 223; *Attorney-Gen'l v. Barstow*, 4 Wis. 567; *State v. Buckland*, 23 Kan. 259.

It may be otherwise, however, where the legislative decision, on a contest over the returns of the board of canvassers, appears, by the constitution, to be intended to be conclusive. *People v. Goodwin*, 22 Mich. 496.

4. *State v. Steers*, 44 Mo. 223; *State v. Vail*, 53 Mo. 97; *State v. Townsley*, 56 Mo. 107; *Hardin v. Colquitt*, 63 Ga. 588.

5. *People v. Mayworm*, 5 Mich. 146; *State v. Gleason*, 12 Fla. 265; *Rex v. Leigh*, Burr. 2143; *People v. Thacher*, 55 N. Y. 525; 14 Am. Rep. 312. See also *People v. Niles*, 2 Mich. 348; *Clark v. People*, 15 Ill. 217; *State v. Beecher*, 15 Ohio 723. See, however, *People v. Lacoste*, 37 N. Y. 192. And in *State v. Hunton*, 28 Vt. 594, it was held that the presumption of law was in favor of the right of the respondent in possession, and that the relator had the affirmative of the issue.

A party who applies to the court for relief against one, who, his term having expired, fills the office which the petitioner claims, must show *prima facie*, that a vacancy existed, and that he was chosen to fill it. *Doane v. Scannell*, 7 Cal. 393.

6. *People v. Bartlett*, 6 Wend. (N. Y.) 422; *People v. Pease*, 30 Barb. (N. Y.) 588.

In case of the default of the respondent

instituted by the State the rights of an adverse claimant are not in issue.¹ Nor is the title of the relator material.²

III. PRIVATE CORPORATIONS.—See CORPORATIONS.³

IV. OFFICERS OF PRIVATE CORPORATIONS.—See CORPORATIONS: OFFICERS (PRIVATE CORPORATIONS).⁴

V. MUNICIPAL CORPORATIONS.—As to the existence of this remedy to forfeit the charter and franchises of a municipal corporation, in case of abuse or misuser, there can be no question, though the instances of its successful application are few.⁵ For the misconduct of municipal officers, or for usurpations on their part, or because of contests between them, a forfeiture of the corporate charter has never, in the *United States*, been decreed, the position taken by the courts being that the chartered rights of the community should not be divested by reason of the misconduct of individuals.⁶ The passage of an unauthorized ordinance does

ent, in an information in the nature of a quo warranto to ascertain by what right he holds an office claimed by the relator, the court may, on strict legal principles, oust the respondent, and install the relator; but they will, in the exercise of their discretion, call upon the relator for evidence in support of his claim. *Attorney Gen'l v. Barstow*, 4 Wis. 567.

1. *State v. Townsley*, 56 Mo. 107.

2. *Lake v. State*, 18 Fla. 501; *People v. Thacher*, 55 N. Y. 525; 14 Am. Rep. 312.

3. The application of this remedy against private corporations and their officers is treated under the title CORPORATIONS, vol. 4, pp. 291, *et seq.*, 302, *et seq.*

4. Vol. 17, p. 39.

5. High Ex. Rem. (2nd ed.), § 678; *Dillon Mun. Corp.* (4th ed.), § 720.

A case of political importance at the time was *Rex v. London*, 3 Harg. Stat. Trials 545, where, during the reign of Charles II, the entire franchises of the city of London was declared forfeited and seized into the hands of the crown. This decision was the culmination of a series of similar usurpations of regal power, and resulted in a reversal of the judgment by act of Parliament (2 Wm. & Mary, ch. 8, 9), the act declaring further that the franchises of that city should never again be seized for any misdemeanor or cause of forfeiture.

In *State v. Bradford*, 32 Vt. 50, the court by Redfield, C. J., said: "We are satisfied from the evidence in the case, that there could not have been a legal majority of the voters present at the meeting in favor of accepting the char-

ter, and that it did not therefore, become a binding law. The organization therefore, under it, is a mere usurpation of corporate franchises, without any legal warrant. In such cases the law is well settled in *England*, that upon the information of the attorney-general, the court of King's bench will abate and dissolve the corporation, whether it be a private or public one. When the corporation is of a public character like a town or village, which constitute integral portions of the sovereignty itself, there is more propriety in visiting the usurpation of these important functions of sovereignty with this formal denial of their right to exercise such usurpation, than in the case of a mere private corporation, but the law seems to be the same in either case."

6. *Dillon Mun. Corp.* (4th ed.), § 720. It is here said, "It is believed by the author that such a remedy is not applicable to our corporations, created as they are by statute, for the benefit, not of the officers or a few persons, but of the whole body of the inhabitants residing therein and the public."

The leading case elaborating this principle is *Com. v. Pittsburgh*, 14 Pa. St. 177. Here a dispute arose between the mayor and the council as to which had the power to appoint a night watch and patrol, and an attempt was made to make this dispute the foundation of a quo warranto proceeding. The court held that as the only judgment would be a forfeiture of the franchises and charter, which were given for the benefit of the citizens, and not for the mayor or council, the rule to show cause must be discharged. Here there was no

not afford ground for vacating the municipal charter.¹ Nor can the remedy be invoked to declare void or to annul such an ordinance.² The remedy is not appropriate to compel the performance of a municipal duty nor to punish its neglect or omission.³

An information against a municipal officer will not be permitted where its real purpose is to test the legality of the municipal charter. The corporation itself is an indispensable party in such a case.⁴

Long acquiescence and continued recognition on the part of the State may bar the maintenance of an information having for its object the deprivation of municipal franchises long exercised under a general law."⁵

VI. PARTIES—1. Attorney-General.—At common law the proceedings must be instituted in the name of the State or sovereign, and by the attorney-general or public prosecuting officer; this, on the theory that they are in form criminal, and are designed to redress a public wrong.⁶ And, where this is done, the court does

question but that the power to make the appointment was vested in the corporation. The court by Coulter, J., said: "The law has abundant means and power of settling this dispute between the functionaries, without detriment to the people or corporation. Then why should the people be punished for the wrangling of its officers. . . . The proceeding has worn a grotesque appearance in my judgment from the beginning." The authority of *Rex v. London*, 3 Harg. State Trials 545, was invoked in support of the proceeding, but the court declined to recognize that case as an authority.

1. An ordinance, for example, unlawfully fixing the price of a license for retailing spirituous liquors at \$1,000. *State v. Cahaba*, 30 Ala. 66.

2. *State v. Lyons*, 31 Iowa 432. Here the charge was that the council, without lawful authority, had passed ordinances vacating portions of a street, and praying that the ordinances be declared null and the city prevented from vacating the street. The court declared that the proceeding appeared to be without precedent.

3. *Attorney-Gen'l v. Salem*, 103 Mass. 138.

'Nor to question the validity of a subscription by a municipal corporation to railroad stock confirmed by legislative enactment. *State v. Mayor etc. of Charleston*, 10 Rich. (S. Car.) 491. But in *People v. Board of Ed-*

ucation, 101 Ill. 308; 40 Am. Rep. 196, it was held that, under the *Illinois* statute, authorizing the remedy where any corporation "exercises powers not conferred by law," an information lay against a board of education to correct its illegal action in excluding colored children from the public schools.

4. *Reg. v. Jones*, 8 L. T., N. S. 503.

5. *State v. Leatherman*, 38 Ark. 81.

6. *Lowther's Case*, Ld. Raym. 1409; *Com. v. Lexington etc. Turnpike Road Co.*, 6 B. Mon. (Ky.) 397; *Com. v. Union F. & M. Ins. Co.*, 5 Mass. 230; 4 Am. Dec. 50; *Houston v. Neuse River etc. Co.*, 8 Jones (N. Car.) 476; *Com. v. Burrell*, 7 Pa. St. 34; *Cleary v. Delieesseline*, 1 McCord (S. Car.) 35; *State v. Delieesseline*, 1 McCord (S. Car.) 52; *State v. Schneirle*, 5 Rich. (S. Car.) 299; *Wright v. Allen*, 2 Tex. 158; *Murphy v. Farmers' Bank*, 20 Pa. St. 415; *U. S. v. Lockwood*, 1 Pin. (Wis.) 359; *Lindsey v. Attorney-Gen'l*, 33 Miss. 508; *Harrison v. Greaves*, 59 Miss. 453; *State v. Gleason*, 12 Fla. 190; *Robinson v. Jones*, 14 Fla. 256; *Rice v. National Bank*, 126 Mass. 300; *Barnum v. Gilman*, 27 Minn. 466; 38 Am. Rep. 304; *State v. Stein*, 13 Neb. 529. See also *Bartlett v. State*, 13 Kan. 99; *Saunders v. Gating*, 81 N. Car. 298; *Eaton v. State*, 7 Blackf. (Ind.) 65; *State v. Smith*, 32 Ind. 213; *State v. Moffitt*, 5 Ohio 358; *In re Mount Pleasant Bank*, 5 Ohio 249; *State v. Paterson etc.*

not ask who, in fact, induced the action of the attorney-general, nor will it inquire into the motives, political or other, which may have prompted his action.¹

2. Private Relator.—In *Great Britain*, under the statute of Anne,² and in many of the States of the Union, an information by leave of court may be exhibited at the relation of a person possessed of an interest such as renders his interference not obtrusive. A distinction obtains, however, between encroachments or usurpations which affect the rights of the public at large, and not especially the rights of any individual member of the public, and those which, while incidentally wronging the public at large, primarily and peculiarly affect some particular person—as, for example, the individual deprived of an office by the unlawful holding of the usurper.³ It has been held in *England* that a burgess

Turnpike Co., 21 N. J. L. 9; *State v. Somers' Point*, 49 N. J. L. 515.

The people are necessary parties to an action to try the title to an office, and the rule is the same when the title is to be tried indirectly, as in an action to enjoin the incumbent. *Morris v. Whelan*, 64 How. Pr. (N. Y.) 109; 11 Abb. N. Cas. (N. Y.) 64.

1. *State v. Gleason*, 12 Fla. 190.

If the attorney-general has granted his fiat for a writ of error to issue, the court will not interfere, the fiat being conclusive. *Reg. v. Clarke*, 7 W. R. 601.

Where the attorney-general is the relator, a quo warranto will issue without a rule to show cause. As the law officer of the commonwealth, he is presumed to be impartial. *Com. v. America Bank*, 10 Phila. (Pa.) 156.

Where the attorney-general files the information, it seems to be immaterial whether any person shall be named as relator or not, as the information is that of the attorney-general and not of the relator. *State v. Hardie*, 1 Ired. (N. Car.) 42.

An appeal taken at the instance of the relator in a quo warranto proceeding to dissolve a corporation may be dismissed in the discretion of the district attorney, against the relator's objection. The relator is not a party to the proceeding, and he cannot control it. *State v. Douglas Co. Road Co.*, 10 Oregon 198.

In cases of usurpation by individuals of offices holden of the commonwealth, the attorney or solicitor general may file information against the supposed usurpers, *ex officio*, or at the relation of any person. *Com. v. Fowler*, 10

Mass. 295; *Territory v. Smith*, 3 Minn. 240.

It was held, also, in *Com. v. Fowler*, 10 Mass. 290, that the presumption that the attorney-general filed the information in his official capacity was not rebutted by a recital of a legislative order requesting its filing, as such an order might be deemed surplusage.

2. *9 Anne*, ch. 20.

3. *Com. v. Swank*, 79 Pa. St. 154; *Yonkey v. State*, 27 Ind. 236; *People v. Ryder*, 12 N. Y. 433.

Where, as in *Wisconsin*, it is the duty of the attorney-general to file an information on the relation of one claiming a public office, such an information, filed and then dismissed as to the people, may still be prosecuted by the relator in his own behalf. *Attorney Gen'l v. Barstow*, 4 Wis. 567.

In *Com. v. Cluley*, 56 Pa. St. 270; 94 Am. Dec. 75, it was held that, even under a statute giving the remedy to "any person or persons desiring to prosecute the same," a private relator could not proceed where the right involved was a purely public right, not in any way especially concerning him.

In *Arkansas*, where the writ and not the information is used, the State must move, even though the controversy concerns the title to a public office. *Ramsey v. Carhart*, 27 Ark. 12; *State v. McDiarmid*, 27 Ark. 176.

In *Louisiana*, private citizens of a municipal corporation cannot enjoin officers from the discharge of their duties, nor contest nor inquire into their right to the offices by writ of quo warranto, even though they be taxpayers. *Voisin v. Leche*, 23 La. Ann. 25.

is a good relator in an information against a town councilor¹ or town clerk;² or even an inhabitant of the borough, though not a Burgess;³ or an owner of rated property in the town, not entitled to vote.⁴ In the *United States* a private citizen has been held a competent relator in a proceeding against one claiming the right to act as mayor,⁵ tax collector,⁶ city surveyor,⁷ member of the common council,⁸ street inspector,⁹ or against persons charged with usurping the functions of a board of assessment and revision of city taxes.¹⁰ In the case of a corporation proceeded against the same principle obtains. If there is no especial injury to an individual, the State must move; otherwise, a private relator, whose rights are invaded in a manner not shared by the public generally, will be recognized by the court, in its discretion. If the object of the proceeding is to destroy the corporation, and not merely to correct an abuse, the State, and not a private relator, is the proper moving party.¹¹

And it has been held in that State that in a proceeding under *Louisiana Rev. St.*, §§ 2593, *et seq.*, known as the "intrusion into office" law, at the instance and on the relation of a private individual, the relator, to maintain the proceedings, must show a muniment of title in himself; he cannot otherwise be heard to contest the right of the incumbent. *State v. Miltenberger*, 33 La. Ann. 263. And that, under that statute, the claimant of an office is the necessary plaintiff in such an action, and the officer *de facto* in actual possession the necessary defendant. *Guillotte v. Poincy*, 41 La. Ann. 333.

1. *Reg. v. Parry*, 2 N. & P. 414; 6 A. & E. 810.

2. *Rex v. Davies*, 1 M. & R. 538; and this even though the right of electing to the office of town clerk is in a select body.

3. *Reg. v. Quayle*, 11 A. & E. 508; *Rex v. Hodge*, 2 B. & Ald. 344, n.

4. *Reg. v. Briggs*, 11 L. T., N. S. 372.

In *Rex v. Kemp*, 1 East 38, n., Lord Kenyon said: "If he [the relator] had shown that his own and other persons' privileges had been injured, he would perhaps have had reason for preferring this complaint; but the fact is otherwise. He comes here as a perfect stranger to the corporation, prowling into other men's rights. I do not mean to say that a stranger may not in any case prefer this sort of application; but he ought to come to the court with a very fair case in his hands." And see *Rex v. Stacey*, 1 T. R. 1.

5. *Com. v. Jones*, 12 Pa. St. 365.

6. *Com. v. Philadelphia Co.*, 1 S. & R. (Pa.) 382.

7. *Com. v. Keilly*, 4 Phila. (Pa.) 329.

8. *Com. v. Meeser*, 44 Pa. St. 341. See also *Chicago v. People*, 80 Ill. 496.

9. *State v. Martin*, 46 Conn. 479.

10. *State v. Hammer*, 42 N. J. L. 435. Otherwise, however, in *Kansas*, where it has been adjudged that the interest of a citizen and tax-payer is not sufficient. *Miller v. Palermo*, 12 Kan. 14. And see *People v. Grand River Bridge Co.*, 13 Col. 11.

11. *Com. v. Allegheny Bridge Co.*, 20 Pa. St. 185; *Murphy v. Farmers' Bank*, 20 Pa. St. 415; *Com. v. Philadelphia etc. R. Co.*, 20 Pa. St. 518; *State v. Paterson etc. Turnpike Co.*, 21 N. J. L. 9; *State v. Somers Point*, 49 N. J. L. 515; *People v. North Chicago R. Co.*, 88 Ill. 537.

The fact that the relator owns land which the corporation has appropriated without compensation does not give him such an interest as enables him to maintain the action to dissolve the corporation. His interest is not one in which the public is concerned, being merely a right to sue for damages. *People v. Grand River Bridge Co.*, 13 Colo. 11.

Nor does the fact that the relator is a creditor of the corporation and has an action pending for the recovery of the debt, make him competent. *Com. v. Farmers' Bank*, 2 Grant's (Pa.) Cas. 392.

An information in the name of the attorney-general, brought at the relation of an individual, for the pro-

3. Joinder.—The statute of Anne authorized the exhibition of one information to determine the rights of several persons to offices or franchises, where it should appear to the court that this might properly be done.¹ Therefore, in such a case, the proceedings under several informations may be consolidated.²

It has been held that an information against a corporation may not be joined with one against its officers, prosecuted by private relators.³

In a proceeding against school district directors, it has been adjudged not necessary to join the district, or its inhabitants, or the directors concerning whose rights there was no question.⁴

4. Miscellaneous.—A proceeding to test the title of a territorial judge to office must be in the name of the *United States*, not in the name of the Territory.⁵

VII. PROCEDURE—1. **The Application**—*a. PETITION; RULE TO SHOW CAUSE.*—In those cases where leave on the part of the court to file the information is required, the common practice is to present a petition supported by affidavit. This, in most jurisdictions, is followed by a rule to show cause. If, on the return to the rule, the right of the respondent is not clear beyond dispute, the rule is made absolute, and the information filed.⁶

tection of his private interests against the acts of a corporation, cannot be maintained for the purpose of restraining the corporation from the further use of its corporate powers, and from usurping public franchises to which it is entitled. *Attorney-Gen'l v. Consumers' Gas Co.*, 142 Mass. 417.

An information in the nature of quo warranto under the *Massachusetts* statute, without the intervention of the attorney-general, will not lie against the stockholders of a corporation organized under the general statute, if the forms of law in the organization have been complied with, and the certificate issued by the secretary of the commonwealth, as provided by statute, although the certificate was obtained by fraud. *Rice v. National Bank*, 126 Mass. 300.

In *South Carolina*, an information, in the nature of a quo warranto will lie against a corporation, as a body, at the relation of a private person, in the name of the attorney-general. *State v. City Council*, 1 Mill (S. Car.) 36.

A statute authorizing the attorney-general to proceed at the instance of a private relator does not change the rule. *People v. North Chicago R. Co.*, 88 Ill. 537.

English Rule.—A quo warranto against persons for claiming to act as

a corporation must be filed by and in the name of the attorney-general. It cannot be filed at the instance of an individual, against persons for usurping a franchise of a private nature, not connected with public government. *Rex v. Ogden*, 10 B. & C. 230; and see *Rex v. Trevenen*, 2 B. & A. 479; *Rex v. White*, 5 A. & E. 613; *Rex v. Parry*, 6 Ad. & El. 810.

1. St. 9 Anne, ch. 20. And, at common law, this seems to have been permissible. *High Ex. Rem.* (2nd ed.), § 704; *Symmers v. Reg. Coup.* 508. It is not enough, however, that the duties of the two offices are somewhat similar. *People v. DeMill*, 15 Mich. 164; 93 Am. Dec. 179.

2. *Rex v. Collingwood*, 1 Burr. 573. But not where the several informations are against several persons for distinct offices. *Rex v. Warlow*, 2 M. & S. 75.

3. *State v. Somer's Point*, 49 N. J. L. 515.

4. *State v. Simkins*, 77 Iowa 676.

5. *Territory v. Lockwood*, 3 Wall. (U. S.) 236.

6. *U. S. Lockwood*, 1 Pin. (Wis.) 359; *Com. v. Jones*, 12 Pa. St. 365; *In re Mount Pleasant Bank*, 5 Ohio 249.

English Practice.—This is the English practice, under which, moreover, it is essential to specify in the rule objec-

In some jurisdictions, notice to the respondent of the application for leave to file the information is sufficient, and the rule to show cause is dispensed with.¹

b. AFFIDAVIT.—It may be stated, as a general rule, that the allegations of the affidavit should be positive and should not rest on information and belief.² The strictness of this rule is relaxed, however, as to allegations of usurpation, as distinguished from those of title.³

tions to be urged against the title of the respondent, to which objections the subsequent pleadings are confirmed, unless extended by leave of court. Reg. Gen. Hil. Term, 7 & 8 Geo. IV, See Reg. v. Thomas, 8 Ad. & El. 183; Reg. v. Reece, 5 B. 94.

The rule is applicable to the pleadings only, and does not prevent the relator at the trial of the information going into objections which may not be specified in the rule. Reg. v. Tugwell, 9 B. & S. 367.

By Stat. 6 & 7 Vict., ch. 89, § 5, the procedure was made more summary in the case of corporate offices, short notice to the respondent being substituted for the more formal rule.

The court will not grant a rule in the alternative for a quo warranto or a *mandamus*. Reg. v. Leeds (Mayor), 11 Ad. & El. 512.

It is not sufficient to state in the rule that the defendant was not entitled to be appointed to the office in question, and that the relator was. Reg. v. Eady, 12 Q. B. 936.

If circumstances are very strong in favor of a corporate franchise, and against the application, the rule *nisi* will be discharged with costs. Rex v. Wardroper, 4 Burr. 1963; 1 East 41, n.

For circumstances under which the rule was made absolute, see Reg. v. Earnshaw, 22 L. J. Q. B. 174; Reg. v. Blizard, 7 B. & S. 922; Reg. v. Newcombe, 15 W. R. 198.

1. In *State v. Bennett*, 2 Ala. 140, the latter course was stated to be good practice, sufficient time being allowed to enable the respondent to prepare affidavits in opposition to the case presented.

In *Com. v. Jones*, 12 Pa. St. 365, it was adjudged good ground for a motion to quash that the information was filed on a suggestion, in the absence of a rule to show cause. But, in *Murphy v. Farmers' Bank*, 20 Pa. St. 415, it was held that the rule to show cause was matter of form rather than

of substance, and that, if the respondent had a preliminary hearing, as upon a motion to quash, the omission of the rule was not fatal.

So in *Gilroy v. Com.*, 105 Pa. St. 484, it was declared that a rule to show cause was not indispensable.

In the case of a small annual township office, leave to file an information in the nature of a quo warranto, will be granted in the first instance, the defendant brought in by process, and then ruled to plead. In the case of a corporation or high public officer, a rule to show cause will be first allowed. *State v. Gummersall*, 24 N. J. L. 529; *In re Mount Pleasant Bank*, 5 Ohio 249.

In *Illinois*, a motion supported by affidavit, is presented. Then a rule *nisi* issues, and the respondent may file counter affidavits.

People v. Waite, 70 Ill. 25. The circuit court can acquire jurisdiction to render judgment on an information in the nature of a quo warranto, only by service of a writ under seal of the court, and running in the name of the people, or by voluntary appearance of the defendant—not after a mere notice to the defendant by the attorneys of the relator. *Hambleton v. People*, 44 Ill. 458.

In *Vermont*, the practice is substantially similar to that of *Illinois*. *State v. Smith*, 48 Vt. 14; *State v. Smith*, 48 Vt. 266.

2. *Rex v. Newling*, 3 T. R. 310; *Rex v. Lane*, 5 B. & A. 488.

3. *Rex v. Harwood*, 2 East 177; *Rex v. Slythe*, 6 B. & C. 240.

The rule was dismissed with costs, where the affidavits in support suppressed several material facts. *Rex v. Hughes*, 7 B. & C. 719; 1 M. & R. 625.

The following English cases deal with the requisites of the affidavit: *Reg. v. Hedges*, 11 A. & E. 163; *Rex v. Blame*, 4 A. & E. 664; *Rex v. Headley*, 7 B. & C. 496; *Rex v. Barzey*, 4 M. & S. 353; *In re Bester*, 7 Jur.,

2. Pleading—*a*. GENERAL PRINCIPLES.—At the present day, in most jurisdictions, the pleadings assimilate to those in civil proceedings more nearly than to criminal pleadings.¹ But this, while so generally, is not so universally.²

***b*. THE INFORMATION.**—In considering the requisites of the information, or the pleading corresponding thereto, it is to be borne in mind that, as a general rule, the burden of proof rests with the defendant;³ so that, viewing the proceeding from the civil standpoint, the allegations of the information may be more general than would be the case were the prosecution to prevail only on the strength of the relator's title, where there is a private relator claiming title. In this particular, the proceeding is somewhat anomalous, and the rules of pleading applicable to actions generally bend to conform to the anomaly. Thus, where the usurpation of a public office is charged, the information need not set forth the title of the relator.⁴ It is enough to allege, in general terms, that the incumbent of the office is in possession thereof

N. S. 262; 3 L. T., N. S. 667; Reg. v. Anderson, 2 Q. B. 740; 2 G. & D. 113; Rex v. Rolfe, 1 N. & M. 773.

1. State v. Kupferle, 44 Mo. 154; 100 Am. Dec. 265; State v. Commercial Bank, 10 Ohio, 535; People v. Clark, 4 Cow. (N. Y.) 95; People v. Ryder, 12 N. Y. 433; Territory v. Virginia Road Co., 2 Mont. 96; Attorney-Gen'l v. Mich. State Bank, 2 Doug. (Mich.) 359. See reporter's note to People v. Richardson, 4 Cow. (N. Y.) 97. Under the *New York Code*, the ordinary civil action has taken the place of the information. See People v. Albany etc. R. Co., 1 Lans. (N. Y.) 308; 57 N. Y. 161; People v. Pease, 30 Barb. (N. Y.) 588; People v. Conover, 6 Abb. Pr. (N. Y.) 220.

In *Texas*, the proceeding is declared expressly to be a civil one and the liberal rules of code pleading are applied. East Dallas v. State, 73 Tex. 371.

In *Ohio* it is held that the rules of pleading established by the code are inapplicable, and that the pleadings are still governed by the rules prevailing before the adoption of the code. State v. McDaniel, 22 Ohio St. 354.

2. In *Illinois*, it is held that an information by quo warranto is a criminal proceeding, and the rules of pleading applicable to indictments govern it. Under the constitution all informations of this nature must be carried on "in the name and by the authority of the people of the State of Illinois," and must conclude "against the peace and dignity of the same." Donnelly v. People,

11 Ill. 552; People v. Mississippi etc. R. Co., 13 Ill. 66; Wight v. People, 15 Ill. 417; Hay v. People, 59 Ill. 91.

3. See *supra*, this title, *Public Officers—Proof Necessary*, and cases there cited. See also People v. Ridgley, 21 Ill. 66; People v. Bartlett, 6 Wend. (N. Y.) 422; State v. Ashley, 1 Ark. 513; State v. Harris, 3 Ark. 570; 36 Am. Rep. 460. But see State v. Kupferle, 44 Mo. 154; 100 Am. Dec. 265; Miller v. English, 21 N. J. L. 317.

4. People v. Miles, 2 Mich. 348; People v. Abbott, 16 Cal. 358.

But, where the proceeding is to decide, as between two parties which has the better right to a certain office, the information must show affirmatively that the relator has a title to the office, if the defendant's title be defeated, and therefore must show that the relator possessed all the requisite qualifications for the office. State v. Boal, 46 Mo. 528.

An information alleging facts showing the date of relator's appointment to an office; that there was at the time a vacancy in the office; that relator was eligible, and was duly appointed by the governor; that defendant has usurped and illegally held the office; and making a demand for the office, states facts sufficient to entitle relator to be given possession of the office. State v. Peelle, 121 Ind. 495.

A demand for the office need not be averred or proved. State v. McDiarmid, 27 Ark. 176.

An information, in the nature of a

without lawful authority.¹ Nor, at common law, was it necessary to state whether the office existed under a charter or by prescription, it appearing to be a public office.² The cases cited in the following note bear upon the question of the requisites of the information in quo warranto proceedings generally.³

quo warranto for usurping a franchise, need not show title in the people to the franchise, but it lies with the defendant to show his warrant for exercising it. *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; 8 Am. Dec. 243.

Where the relator joins with the State, and a good cause of action in favor of the State is set forth, it is not ground for demurrer that it does appear that the relator is entitled to the office. *State v. Palmer*, 24 Wis. 63.

1. *People v. Woodbury*, 14 Cal. 43; *People v. Abbott*, 16 Cal. 358. And see *People v. River Raisin etc. R. Co.*, 12 Mich. 389; 86 Am. Dec. 64. In *Ex parte Bellows*, 1 Mo. 115, it was said, however, that mere general allegations that the respondent was not qualified for the office would not suffice but that the particulars relied upon should be set forth.

2. *Rex v. Boyles*, Ld. Raym. 1559.

3. **Public Officers**—It has been declared that facts necessary to be alleged to show a neglect of duty must be set out with all the exactness of pleading required in an action for a penalty. *People v. Kingston etc. Turnpike Road Co.*, 23 Wend. (N. Y.) 193; 35 Am. Dec. 551; *People v. Bristol Turnpike Co.*, 23 Wend. (N. Y.) 223.

And that an averment that the governor, by and with the consent of the senate, appointed another officer, is not equivalent to an averment that the incumbent was removed. *People v. Carrique*, 2 Hill (N. Y.) 93.

Where the act vesting certain powers of appointment by charter in the municipal officers was pleaded by its title, and it was further averred that the mayor and councilmen had been duly elected and the relator duly appointed and qualified, it was held that the allegations were sufficient. *State v. Sherman*, 42 Mo. 210.

An information merely alleged "that for the space of two days last the defendant has usurped," etc., without stating definitely the time when such usurpation commenced. *Held*, that the words "two days last past" referred to the filing of the information, and were

sufficiently certain. *People v. Miller*, 15 Mich. 354.

Corporations.—An information against a corporation, seeking a forfeiture of its franchises for a non-compliance with its charter, must aver the alleged nonfeasance, misfeasance, or malfeasance to have been wilful on the part of the corporation. *State v. Columbia etc. Turnpike Co.*, 2 Sneed (Tenn.) 254.

It was said, in *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351, that great strictness was required in assigning a breach of a condition for the purpose of forfeiting a corporate franchise.

A complaint by quo warranto, against a plank-road company must aver the time of incorporation or the date of organization, that the court may know by what statute the decision is to be governed. *Covington etc. Plank Road Co. v. Van Sickle*, 18 Ind. 244. To the same effect is *Danville etc. Plank Road Co. v. State*, 16 Ind. 456.

Where an information charged certain parties with holding illegally and without proper warrant or authority, the offices of wardens and vestrymen of St Paul's Church, "a corporation created by the authority of the said State," it was held that the information was fatally defective in not showing in what manner the church became a body corporate, as it had no special charter. *People v. DeMill*, 15 Mich. 164; 93 Am. Dec. 179.

An information against a number of persons who claim to be, but are not legally, an incorporated company, must state that they have acted within the State as a corporation. *State v. Kingan*, 51 Ind. 142.

Under the *Pennsylvania* law of 1836, which was said, in 1857, to be still in force, as to pleading in quo warranto, the attorney-general may disclose in his information the specific ground of forfeiture, or merely set forth the franchise illegally exercised, and call on defendant to show by what authority they are held. *Com. v. Commercial Bank*, 28 Pa. St. 383. And such is the rule in *Ohio*. *State v. Commercial Bank*, 10 Ohio 535.

c. THE PLEA.—In most jurisdictions, under the liberal rules governing pleadings in civil actions, the defendant may set up several defenses, if he has them.¹ So he may plead to the merits and, at the same time, may disclaim.² The proper and usual course, however, is to disclaim or to justify.³ A plea merely of not guilty or *non usurpavit* does not satisfy the rule adverted to above, that the burden of proof is on the defendant.⁴

Filing an information in quo warranto against a municipal corporation by its corporate name is an admission of its corporate existence, which the relator cannot afterwards controvert, notwithstanding the very object and purpose of the proceeding are to show that the alleged corporation never had any legal existence. *People v. Spring Valley*, 129 Ill. 169. And see generally *State v. Southern Pac. R. Co.*, 24 Tex. 80.

Miscellaneous Matters Relating to Informations.—Where, in a complaint against a corporation the prosecutor alleged that it had omitted to perform certain acts essential to its existence as a corporation, and had, since it had acted as a corporation, violated its charter, and the defendant demurred to the complaint as containing inconsistent allegations, the court held that the complaint was good, containing but one subject-matter, to wit, the right of the corporation to continue to exercise certain franchises. *People v. Ravenswood etc. Turnpike etc. Co.*, 20 Barb. (N. Y.) 518.

Though the statute seems to contemplate that the petition for leave to file an information in quo warranto and the information itself shall be separate, yet, as the proceeding is expressly declared to be a civil one, the liberal rules of code pleading are to be applied, and it is sufficient if the petition for leave to file be included in and made a part of the information. *East Dallas v. State*, 73 Tex. 371.

An information by the attorney-general in the name of the people of the State does not conflict with the requirement of the constitution that "the style of all process shall be the 'State of Florida.'" *State v. Gleason*, 12 Fla. 190.

The heading to an information "A B, prosecuting attorney," sufficiently complies with a statutory requirement that it must be brought by the district attorney. *Davis v. Best*, 2 Iowa 96.

In *North Carolina* it is no objection

to an information that the full title of the "solicitor for the State" is not given, and that the term "solicitor" only is used. *State v. Hardie*, 1 Ired. (N. Car.) 42.

Under the *Indiana* practice a prayer for relief at the close of an information should be taken distributively; and a prayer at the end of each paragraph is unnecessary. *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405.

1. Under the English practice, this may be done. *Rex v. Autridge*, 8 T. R. 467. And see *Reg. v. Diplock*, 19 L. T. R., N. S. 380.

So in *Ohio*. *State v. McDaniel*, 22 Ohio St. 354.

And in *Michigan*. *Coon v. Plymouth Plank Road Co.*, 31 Mich. 178. And in *California*. *People v. Stratton*, 28 Cal. 382.

See, however, *State v. Roe*, 26 N. J. L. 215; *People v. Jones*, 18 Wend. (N. Y.) 601.

2. *State v. Brown*, 34 Miss. 688.

3. *Larke v. Crawford*, 28 Mich. 88; *State v. Foote*, 11 Wis. 14; *Clark v. People*, 15 Ill. 217; *Illinois etc. R. Co. v. People*, 84 Ill. 426; *Holden v. People*, 90 Ill. 434; *State v. Jones*, 16 Fla. 306; *State v. Olcott*, 6 N. H. 74; *State v. Harris*, 3 Ark. 570; 36 Am. Dec. 460.

4. *Reg. v. Blagden*, 10 Mod. 296; *People v. Mayworm*, 5 Mich. 146; *State v. Foote*, 11 Wis. 14.

And see *Com. v. McWilliams*, 11 Pa. St. 61; *Com. v. Cross Cut R. Co.*, 53 Pa. St. 62.

Miscellaneous Matters Relating to the Plea.—Where the State by quo warranto calls upon an individual to show his title to an office, he must show the continued existence of every qualification necessary to the enjoyment of that office. *People v. Mayworm*, 5 Mich. 146; *State v. Beecher*, 15 Ohio 723.

It is enough to deny the user without denying the claim. *People v. Thompson*, 16 Wend. (N. Y.) 655.

The plea need not adopt the words of

d. THE REPLICATION.—There is little on this head which is peculiar to this proceeding. To the return the State may reply several matters.¹

e. AMENDMENTS.—The liberality governing amendments in civil proceedings generally is exercised in quo warranto proceedings.²

3. Default.—The effect of a default is the same, usually, as in civil actions generally.³

VIII. JUDGMENT; FINE; COSTS—1. Judgment.—The judgment rendered against the respondent, on the information, is of ouster.⁴ On the ancient writ it was the same, except in the case of a franchise of such a nature that it subsisted at the hands of the crown,

any law prescribing the qualification for exercising the office or franchise; but only set up facts sufficient to show clearly the right to exercise the same. *State v. Jones*, 16 Fla. 306.

To a writ of quo warranto against a corporation, the response properly recites the several acts of the legislature constituting the defendants a corporation. *State v. Mississippi etc. R. Co.*, 20 Ark. 495.

It is not enough for the defendant to assert his election. He should set out the particulars thereof. *Com. v. Gill*, 3 Whart. (Pa.) 228.

And see further as to the requisites of the plea under particular circumstances. *State v. Cincinnati*, 23 Ohio St. 445; *Attorney-Gen'l v. Michigan State Bank*, 2 Dougl. (Mich.) 359; *People v. Van Cleve*, 1 Mich. 362; 53 Am. Dec. 69; *Com. v. Central Passenger R. Co.*, 52 Pa. St. 506; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351; *Rex v. Knight*, 4 T. R. 425; *Rex v. Rowland*, 3 B. & A. 130.

If defendant, in proceedings to oust him from office, fails to deny allegations which, although unnecessary, charge him with legal incapacity to hold the office, he admits them in like manner as though they were necessary allegations. *People v. Knox*, 38 Hun (N. Y.) 236.

1. *Reg. v. Diplock*, 10 B. & S. 174.

The statement, in a replication of several distinct facts which are all aimed to make out the one ultimate fact of a violation of corporate duty, relied upon as a ground of forfeiture of the charter of incorporation, affords no ground for charging the replication with duplicity. *Coon v. Plymouth Plank Road Co.*, 31 Mich. 79.

In a quo warranto against a com-

pany formed by consolidation under the laws of Pennsylvania, "*nul tiel record*" is well replied to a plea that the company became a corporation by contract of consolidation. *Com. v. Atlantic etc. R. Co.*, 53 Pa. St. 9.

2. *Com. v. Gill*, 3 Whart. (Pa.) 228; *Com. v. Commercial Bank*, 28 Pa. St. 383; *Poe v. State*, 72 Tex. 625. The information may be amended, *State v. Gleason*, 12 Fla. 190.

The omission to show, in an information, that the offices usurped are corporate offices, may be amended. *Guntton v. Ingle*, 4 Cranch (C. C.) 438.

3. *High Ex. Leg. Rem.* (2nd ed.), § 739. So if the respondent fails to support his answer by testimony, judgment may go against him. *Brown v. Jeffries*, 42 Kan. 605. Where the case is of great public importance, the court, notwithstanding a default, may require evidence. *Attorney-Gen'l v. Barstow*, 4 Wis. 567.

4. *Rex v. Tyrrell*, 11 Mod. 235; *In re Mayor of Penryn*, *Strange* 582; *Rex v. Leigh*, *Burr*. 2143; *State v. Brown*, 5 R. I. 1; *People v. Ryder*, 16 Barb. (N. Y.) 370; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 357; 8 Am. Dec. 243; *People v. Thompson*, 21 Wend. (N. Y.) 235; 23 N. Y. 537; *Campbell v. Talbot*, 132 Mass. 174.

For the form of judgment upon an information in the nature of a quo warranto see *Com. v. Fowler*, 11 Mass. 339; *U. S. v. Addison*, 6 Wall. (U. S.) 291.

Upon an information to determine the right to occupy an office, the court, if it decides in favor of the relator, may order the respondent to vacate the office immediately. *People v. Banvard*, 27 Cal. 470; *People v. Connor*, 13 Mich. 238; *People v. Snedeker*,

when the judgment was of seizure into the king's hands.¹ The judgment rendered in proceedings on the writ was regarded as final and conclusive upon all parties, even the crown.² On the information, the judgment being merely of ouster with, perhaps, a nominal fine, is less decisive, though, unreversed, it effectually concludes the respondent against whom it is rendered.³ The judgment merely declares a right; it does not create one.⁴ Judgment of ouster may be given, though the usurpation ceased before the trial;⁵ or where the term of office has expired.⁶ Neither a judgment of ouster nor of seizure, where the respondent is a corporation, dissolves the corporation.⁷ Nor are the judgments of ouster and of seizure the same thing.⁸

2. **Fine.**—The statute of Anne authorized the imposition of a

3 Abb. Pr. (N. Y.) 233; *Gano v. State*, 10 Ohio St. 237.

1. Com. Dig. Quo Warranto; 3 Bl. Comm. 263.

2. *Rex v. Trinity House*, Sid. 86.

3. *Hart v. Harvey*, 32 Barb. (N. Y.) 55. High on Ex. Leg. Rem. (2nd ed.), § 748; *Rex v. Clark*, 2 East 75.

A judgment, finding that the defendant has usurped and is unlawfully holding a public office, cannot be attacked collaterally; and such judgment cannot be annulled by the subsequent decree of that or of any other court adjudging the non-existence of the office. *Ex parte Henshaw*, 73 Cal. 486.

The effect of the judgment of ouster against a corporation is to exclude it from the right to exercise any of its franchises or privileges, and no grantee or licensee of the corporation thereafter can justify his action under its rights or franchises. *Campbell v. Talbot*, 132 Mass. 174.

The effect of the judgment of ouster against the usurper of an office is to constitute a full and complete amotion, and to render void all pretended official acts of his after the judgment. *Rex v. Serle*, 8 Mod. 332; *Rex v. Hall*, 11 Mod. 390; *Fuigham v. Johnson*, 40 Ga. 164. And the judgment bars proceedings by *mandamus* instituted by him to procure a restoration to the office. *Rex v. Serle*, 8 Mod. 332.

The judgment does not, however, necessarily declare a vacancy in the office, this depending upon the further question whether any one else is entitled to it. *State v. Ralls Co. Ct.*, 45 Mo. 58.

4. *Attorney-Gen'l v. Barstow*, 4 Wis. 567.

5. *Rex v. Williams*, 1 W. Bl. 93. But see *State v. Taylor*, 12 Ohio St. 130.

6. *People v. Loomis*, 8 Wend. (N. Y.) 396; 24 Am. Dec. 33; *Hammer v. State*, 44 L. J. L. 667.

7. *Smith's Case*, 4 Mod. 53; *State Bank v. State*, 1 Blackf. (Ind.) 267; 12 Am. Dec. 234; *People v. Rensselaer etc. R. Co.*, 15 Wend. (N. Y.) 113.

In *State v. Bradford*, 32 Vt. 50, it was held that, where the information was filed to test the right to exercise the franchise of a municipal corporation, and it was determined that the organization of the pretended corporation was a mere usurpation of a corporate franchise, without lawful authority, judgment, dissolving the corporation, might follow.

8. The distinction is thus set forth in *Rex v. London*, 2 T. R. 522: "Where it clearly appears to the court that a liberty is usurped by wrong, and upon no title, judgment only of ouster shall be entered. But when it appears that a liberty has been granted, but has been misused, judgment of seizure into the king's hands shall be given." See *People v. Bartlett*, 6 Wend. (N. Y.) 422; *People v. Rensselaer etc. R. Co.*, 15 Wend. (N. Y.) 113.

As to the effect of a judgment of seizure, see *State Bank v. State*, 1 Blackf. (Ind.) 267; 12 Am. Dec. 234; 2 Kyd. on Corp. 409.

Where the proceeding is against a corporation for usurping corporate franchises, the State may waive a judgment of forfeiture of the charter, and take a judgment excluding the corporation from the use of the particular franchise usurped. *Central etc. R. Co. v. People*, 5 Colo. 39.

fine, as well as a judgment of ouster.¹ Whether a fine shall be imposed, and its amount, are matters of judicial discretion. If there is an absence of improper motive the fine is usually nominal.²

3. Costs.—The statute of Anne authorized the recovery of costs by or against the relator.³ In the *United States* the rule is generally the same.⁴

1. 9 Anne, ch. 20, § 5.

2. *State v. Brown*, 5 R. I. 1.

Even though a fine should have been imposed, the omission is not error of which the respondent can complain.

State Bank v. State, 1 Blackf. (Ind.) 267.

3. 9 Anne, ch. 20, § 5.

On a judgment for the relator, he is entitled to costs. *Rex v. Amery*, 1 Anst. 178.

Where any one of several issues is found for the prosecutor, on which judgment of ouster is given, he is entitled to costs on all the issues. *Rex v. Downes*, 1 T. R. 453.

A private relator, who has obtained judgment in a quo warranto, is entitled as of course to the costs of the prosecution, as well as the costs of an interlocutory motion, in which he failed. *Reg. v. Dudley*, 4 Jur. 915.

A prosecutor shall pay costs where he makes a groundless and frivolous application for a quo warranto, knowing it to be so. *Rex v. Lewis*, 2 Burr. 780; 2 Ld. Ken. 497.

Where the respondent, charged with the usurpation of a municipal office, suffered judgment by default, it was held that, under the statute, the relator was entitled to costs. *Lloyd v. Reg.*, 2 B. & S. 656.

Where the court has discharged the rule, it will, in its discretion, on a subsequent application, order payment of costs by the party who was virtually relator. *Reg. v. Green*, 7 Jur. 440; 12 L. J. Q. B. 239.

Where a rule *nisi* is discharged, and it appears that the party making the affidavit as relator is indigent, and unable to pay costs, and was procured to make the application by another, who is the real prosecutor, the court will order the costs to be paid by the party so promoting the application; and it makes no difference that such party was employed on the motion as an attorney. *Reg. v. Greene*, 4 Q. B. 646. And see *Rogers v. London etc. R. Co.*, 26 W. R. 192.

In *Reg. v. Hartley*, 3 El. & Bl. 143, it was held that though a person whose election to the office of town councilor is void by reason of a mistake of the presiding officer, is willing to disclaim and consents to a rule for a quo warranto being made absolute, the court will not order that the relator should bear the expense of the information and disclaimer. But in *Reg. v. Morton*, 4 Q. B. 146, the court adjudged otherwise. See *Reg. v. May*, 2 L. M. & P. 144, where, in the circumstances, it was held that the respondent's resignation precluded the recovery of costs against him; and see *Reg. v. Sidney*, 2 L. M. & P. 149, where, in the circumstances of that case, costs were adjudged, notwithstanding the resignation.

The court will not stay proceedings until the prosecutor gives security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested. *Rex v. Wynne*, 2 M. & S. 346.

4. When an information is filed on the relation of a private person, the relator must give security for the costs; and if such security is not given before the commencement of the suit, it cannot be afterwards supplied. *Taylor v. State*, 31 Ala. 383.

Where there is no relator, the court cannot adjudge defendant to pay costs, nor order that the prosecutor shall have any part of the fine. *Com. v. Woelper*, 3 S. & R. (Pa.) 52.

Where a corporation was dissolved upon quo warranto, and the officers, who were not shown to have taken part in any improper proceedings in organizing had filed a disclaimer of any purpose to further exercise the functions of their office, it was held that costs against the officers should not be allowed. *State v. Bradford*, 32 Vt. 50.

In *People v. Clute*, 52 N. Y. 576, costs were allowed against the respondent, though the relator failed to establish his own title to the office in question. And so in *State v. Jenkins*,

IX. NEW TRIAL; REVIEW.—As to new trials, the rule applicable to civil actions generally obtains;¹ and so as to reviewing the proceedings.²

RACING.—See GAMING, vol. 8, p. 1038.

RADIUS.—A radius is a straight line drawn from the center of a circle to any point of its circumference. Its length is half the diameter of that circle, or is a space between the center and the circumference.³

RAILROAD COMMISSIONERS—(See also FREIGHT, vol. 8, p. 910; INTERSTATE COMMERCE, vol. 11, p. 539).

I. In General, 686.

II. Appointment, 687.

III. Powers and Duties, 687.

IV. Salary and Expenses, 690.

I. IN GENERAL.—State legislatures have authority to establish reasonable regulations for the control of railway corporations.⁴ To enable them to exercise such authority prudently and intelligently, boards of railroad commissioners frequently are created, charged with the general duty of preventing the exaction of unreasonable or discriminating rates upon transportation within the State, and for the enforcement of reasonable police regulations for the comfort, convenience, and safety of travelers and persons

46 Wis. 616, under the statute of that State.

1. *Rex v. Francis*, 2 T. R. 484; *People v. Sackett*, 14 Mich. 243; *People v. Doesburg*, 17 Mich. 135.

2. *People v. Sackett*, 14 Mich. 243; *People v. Cook*, 8 N. Y. 67.

The reversal of a judgment removing an officer from office, restores him thereto without need of any further order. *Phares v. State*, 3 W. Va. 567; 100 Am. Dec. 777.

3. *State v. Berard*, 40 La. Ann. 172. A Louisiana act prohibits private markets "within a radius of six squares" of any public market. In *State v. Barthe*, 41 La. Ann. 46, it was held that the words "within a radius of six squares" does not import that the distance is to be measured in an air line, but that the words were intended to mean a route or distance of six squares in all directions from a public market such as a human being could use. The court noted the definition of radius as given in *State v. Berard*, 40 La. Ann. 172, and quoted in the text, but held the definition to be *obiter*. From this decision *Bermudez*, C. J., and *Fenner*, J., dissented.

A dentist sold his business, contracting with the purchaser not to practice

dentistry "within a radius of ten miles of L." This was held to be a valid contract not to practice dentistry within ten miles of the center of the village of L. *Cook v. Johnson*, 47 Conn. 175. **ILLEGAL CONTRACTS**, vol. 9, p. 887, *et seq.*

4. *Board of Railroad Commissioners v. Oregon*, R. etc. Co., 7 Oregon 65, 35 Am. & Eng. R. Cas. 542.

It is held in the following cases that statutes providing for boards of railroad commissioners are constitutional; *Stone v. Yazoo etc. R. Co.*, 62 Miss. 607; 21 Am. & Eng. R. Cas. 6; 52 Am. Rep. 193; *Charlotte, etc. R. Co. v. Gibbs*, 27 S. Car. 385; 31 Am. & Eng. R. Cas. 464; *Tilley v. Savannah etc. R. Co.*, 5 Fed. Rep. 641; 1 Am. & Eng. R. Cas. 615; *Stone v. Jackson etc. R. Co.*, 62 Miss. 646; 21 Am. & Eng. R. Cas. 17; *Georgia R. etc. Co. v. Smith*, 70 Ga. 694; 9 Am. & Eng. R. Cas. 386; *Chicago etc. R. Co. v. Dey*, 35 Fed. Rep. 866. See also FREIGHT, vol. 8, p. 910.

Even where the charter of a railroad company gives it the right to regulate its charges, the State may create a commission with power to see that it keeps within its charter limits, to prevent unjust discrimination, and to

doing business with the companies.¹ These boards are required, usually, to make annual reports to the legislature of their doings, including such statements, facts, and inspections as will disclose the actual working of the system of railroad transportation in its bearing upon the business prosperity of the State, and such suggestions as to the general railroad policy, the amendment of the laws, and the condition, affairs, or conduct of any railroad corporations as may seem to them appropriate, and to recommend and draft for the legislature such bills as, in their judgment, will protect the interest of the public.² The authority to create these boards is founded on the principle that railroad corporations enjoy privileges and franchises created for the benefit of the public, and is exercised in order that the public may not fail to receive it.³

II. APPOINTMENT.—In some States railroad commissioners are appointed,⁴ while in others they are elected by the people.⁵

III. POWERS AND DUTIES.—The provisions of the State laws creating railroad commissions are similar as regards the duties imposed but different as to the powers vested in them. Thus, in *New York*, the law gives the board full power of investigation and supervision

enforce such reasonable regulations as the State may deem necessary. *Stone v. Yazoo etc. R. Co.*, 62 Miss. 607; 21 Am. & Eng. R. Cas. 6; 52 Am. Rep. 193. Compare *Stone v. Jackson etc. R. Co.*, 62 Miss. 646.

The constitutions of Nebraska and California provide for such boards. *Nebraska Rev. Sts.*, § 202; *California Code*, 12, 22.

1. *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; 23 Am. & Eng. R. Cas. 577.

2. See the statutes of the various States.

3. *Board of Railroad Com'rs v. Oregon R. etc. Co.*, 7 Oregon 65; 35 Am. & Eng. R. Cas. 542.

If properly constituted, these boards are of great service to State legislatures, whose sessions are short and whose members are often inexperienced in the detail of general legislation requisite for the proper management of railways and unfamiliar with the devices sometimes resorted to for the purpose of gaining unequal and unjust special legislation in behalf of interested individuals or corporations. 2 Redfield on Rys., p. 606.

4. See *Georgia R. etc. Co. v. Smith*, 70 Ga. 694; 9 Am. & Eng. R. Cas. 386; *McWharton v. Pensacola etc. R. Co.*, 24 Fla. 417; 37 Am. & Eng. R. Cas. 566.

In *Massachusetts* they are ap-

pointed by the governor with the advice and consent of the council. *Mass. Pub. St.*, ch. 112.

In *New York*, the commission consists of three persons appointed by the governor by and with the advice and consent of the Senate. One is selected from each of the two political parties casting the greatest number of votes for governor, and the third is selected upon the recommendation of the presidents and executive heads, or a majority of such, of the Chamber of Commerce, the New York Board of Trade and Transportation, and the National Anti-Municipal League, or any two of such organizations so represented in case of disagreement. *New York Rev. Sts.*, p. 2500.

5. Railroad Commissioners in Mississippi.—Under acts 1884, ch. 23, § 5, railroad commissioners were appointed by the governor, by and with the advice and consent of the senate. By acts of 1886, ch. 21, § 1, this was changed, and it was provided that they should be elected by a joint vote of the two houses of the legislature. But the new constitution provides that all State officers shall be elected at the same time, and in the same manner as the governor, *i. e.*, by vote of the qualified electors of the State; and there seems to be no doubt that railroad commissioners are included within the term "all other State

of all railroads and their condition, with reference not only to the security but accommodation of the public; requires them to make annual reports to the legislature disclosing the actual workings of the system of railroad transportation and any suggestions in relation thereto, etc., as to them may seem appropriate; and declares that whenever, in their judgment, it shall appear, among other things, that any addition to or change of stations or station houses is necessary to promote the security, convenience, or accommodation of the public, they shall give notice to the corporation of the improvements and changes which they deem to be proper, and, if they are not made, shall present the facts to the attorney-general for his consideration and action, and also to the legislature. The statute merely recognizes the necessity for such a tribunal to adjust conflicting interests and controversies between the people and the corporation. It has clothed it with judicial power to hear and determine. But it goes no further. Its proceedings and determination, however characterized, amount to nothing more than an inquest for information, and there is no law by which the courts can carry into effect its decisions.¹ But in *Nebraska* and *Oregon*, whenever a railroad company violates, or refuses or neglects to obey any lawful order or requirement of the commission, the commission, or any company or person interested, may enter a complaint in the circuit court of the State in the district in which the violation or disobedience of the order or requirement has arisen, and when it is made to appear to the court on the hearing that the lawful order or requirement of the commission has been violated or disobeyed, the court may issue a writ of injunction or other proper process to distrain the company from further continuing such violation or disobedience.² So in *Georgia*,³ *Florida*⁴ and *Mississippi*⁵ adequate penalties are provided for the enforcement of the rules and orders of the commission, and in *Connecticut* the law is similar.⁶ And in *Minnesota*, it is held that orders of the commission are conclusive and not subject to review

officers." Const. of Mississippi (1890), § 143; Id. p. 74, § 3.

1. *People v. New York etc. R. Co.*, 104 N. Y. 58; 29 Am. & Eng. R. Cas. 480.

2. *Board of Railroad Commissioners v. Oregon R. etc. Co.*, 17 Oregon 65; 35 Am. & Eng. R. Cas. 542; *State v. Fremont etc. R. Co.*, 22 Neb. 313; 32 Am. & Eng. R. Cas. 426.

Where the board of transportation has investigated charges of unjust discrimination against a railroad company, and has found such unjust discrimination to exist, and ordered such railroad company to reduce its rates to conform to a schedule presented by such board, which order the railroad

company has neglected to comply with, *mandamus* is a proper remedy to enforce such order; and the mention of the district court in the statute will not preclude bringing the action in the supreme court, where the latter court has original jurisdiction. *State v. Fremont etc. R. Co.*, 22 Neb. 313; 32 Am. & Eng. R. Cas. 426.

3. *Georgia R. etc. Co. v. Smith*, 70 Ga. 594; 9 Am. & Eng. R. Cas. 387.

4. *McWhorter v. Pensacola etc. R. Co.*, 24 Fla. 417; 37 Am. & Eng. R. Cas. 566.

5. *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; 23 Am. & Eng. R. Cas. 577.

6. *State v. N. Haven etc. R. Co.*,

by the court, upon proceedings taken for their enforcement.¹ The powers conferred by legislatures upon boards of commissioners, will not, however, be extended by implication; and the acts which a board attempts will not be upheld, unless the authority is affirmatively shown to be included in the power conferred.² Railroad commissioners have authority in some States to order companies to provide station accommodations,³ to designate the site or loca-

37 Conn. 153. See also *Woodruff v. New York etc. R. Co.*, 59 Conn. 63.

1. *Railway Transfer Co. v. Railroad Commission*, 39 Minn. 231; *State v. Chicago etc. R. Co.*, 38 Minn. 281.

By section 8, of the railroad and warehouse commission act (*Laws Minnesota, 1887 ch. 10*), the supreme court is vested (concurrently with the district court) with original jurisdiction of all proceedings by *mandamus*, to compel compliance with the regulations of the commission with reference to transportation rates, as provided therein. *State v. Chicago etc. R. Co.*, 38 Minn. 281; *State v. Minneapolis etc. R. Co.*, 40 Minn. 156.

Tennessee act 1883, ch. 199, § 3, was held invalid for leaving it to the commission to determine whether the statute had been violated, and to prosecute suits accordingly, this reversing the presumption of innocence, the court saying that it was against public policy to appoint a commission with such power, as it enabled a political party to bring to its aid the immense railroad property and influence, by action through the commissioners, which might be friendly or unfriendly, as the companies might favor one party or the other. *Louisville etc. R. Co. v. Railroad Commission*, 19 Fed. Rep. 679.

2. Where the legislature created a board of railroad commissioners, empowering it to examine into the affairs of railroad corporations doing business within the State, and required it to make a biennial report, with such suggestions "as to what changes in the classification of freights, or what change in the rate of freights or fares are advisable for the public welfare," but conferred no express authority upon the board to regulate the price of freight, or to determine when freight charges were unreasonable, it was held that the board had no jurisdiction to require a railroad company to refund to a shipper a sum of money alleged to have been exacted from him

in excess of a reasonable charge for the shipment. *Board of Railroad Com'rs v. Oregon R. etc. Co.*, 17 Oregon 65; 35 Am. & Eng. R. Cas. 542.

The New Hampshire statute of 1883, ch. 401, requiring the railroad commissioners to fix tables of maximum charges, is not to be extended by construction to authorize the fixing of such charges to points beyond the limits of the State. *Merrill v. Boston & Lowell R. Co.*, 63 N. H. 259.

No right of action being conferred by the statute on the railroad commissioners, when a company fails to erect a stationhouse when directed by the commissioners, none exists, the remedy being a suit by the State for the penalty. *Railroad Comm'rs v. Spartanburg Union etc. R. Co.*, 26 S. Car 352.

State railroad commissioners will be enjoined from enforcing a schedule of rates so low as to preclude all profit to the company. *Chicago etc. R. Co. v. Dey*, 35 Fed. Rep. 866; *Chicago etc. R. Co. v. Becker*, 35 Fed. Rep. 883.

3. Where one requires the change, addition, or erection of a station, and the railroad commission has general supervision of railroads, and is required by the statute, upon a proper complaint being filed, to investigate the necessity for an addition to or change of stations, the party desiring the change must secure the action of the commission before *mandamus* will be granted to compel its location. *State v. Chicago M. & Cent. R. Co.*, 19 Neb. 476.

So where the statute allows railroad companies to discontinue a station, if the approval of the railroad commissioners is obtained, and a company, acting under this law, discontinues two of its stations, with the approval of the commissioners on certain conditions which are complied with, and the general assembly subsequently amends the charter, re-establishing one of the stations, the assent of the commissioners does not constitute a contract.

tion of depot buildings,¹ to condemn lands for depot purposes,² to determine the manner and conditions of making crossings³ before a court may assume any power to make them even after condemnation, to regulate the keeping of flagmen at crossings,⁴ and to apportion and regulate the fencing of railroads.⁵

In *England*, it is held under a statute which provides that railroad companies shall, according to their respective powers, "offer all reasonable facilities for the receiving and forwarding and delivering of traffic upon and over the several railways," etc., that a railway commission has jurisdiction to require a railway company to resume passenger traffic on a part of its line upon which such traffic has been discontinued.⁶

IV. SALARY AND EXPENSES.—An act requiring all the railroad companies in the State to contribute to the salary and expenses of the State railroad commissioners has been held not to be invalid as contravening a constitutional requirement that all taxation shall be uniform.⁷ So under a statute providing that the salaries and expenses of the board of railroad commissioners shall be apportioned among the several railroad companies partly in

on the part of the State with the railroad, and the act of assembly is valid. *New Haven etc. Co. v. Hamersley*, 104 U. S. 1; 2 Am. & Eng. R. Cas. 418.

Under a statute providing for the establishment of a passenger station for the use of several railroad corporations entering the city, authorizing them to extend their tracks to the station, and giving the board of railroad commissioners power to order such changes in the location and arrangements of tracks in the vicinity of a station as the safety and convenience of the public may require, the board has the power, in authorizing one corporation to take a portion of the location of another corporation, to annex the condition that the latter corporation shall have the right to use a track of the former, subject to reasonable regulations to be established by the board. *Providence etc. R. Co. v. Norwich etc. R. Co.*, 138 Mass. 277; 22 Am. & Eng. R. Cas. 493.

In *New York*, railroad commissioners have no authority, which can be enforced by the courts, to require a railroad company to provide station accommodations. *People v. New York etc. R. Co.*, 104 N. Y. 58, 29 Am. & Eng. R. Cas. 480.

1. *State v. Alabama R. Co.*, 67 Miss. 647; 42 Am. & Eng. R. Cas. 681.

2. *Jager v. Day*, 80 Iowa 23; 42 Am. & Eng. R. Cas. 683.

3. *Detroit etc. R. Co. v. Probate Court*, 63 Mich. 676; 28 Am. & Eng. R. Cas. 285.

Abolishing Railway Crossing.—Resolutions of the *Connecticut* legislature, by which commissioners are appointed to abolish a grade railway crossing, and which give them power to require any or all tracks within one-half mile of each side of the street where the crossing exists to be taken up and removed, give the commissioners power to compel the removal of tracks within such limits, although not within the bounds of the street on which the crossing exists, when the commissioners deem that the public convenience and necessity so require. *Woodruff v. New York etc. R. Co.*, 59 Conn. 63.

4. *Guggenheim v. Lake Shore etc. R. Co.*, 66 Mich. 150; 32 Am. & Eng. R. Cas. 89.

5. *Davidson v. Michigan Cent. R. Co.*, 49 Mich. 428; 13 Am. & Eng. R. Cas. 650.

Costs of Unsuccessful Applicant.—In *England*, railroad commissioners have no jurisdiction, under the statute, to order a company to pay the costs of an unsuccessful application. *Foster v. Great Western R. Co.*, L. R., 8 Q. B. D. 515; 6 Am. & Eng. R. Cas. 595.

6. *Winsford Local Board v. Cheshire Lines Com.*, L. R., 24 Q. B. D. 456; 44 Am. & Eng. R. Cas. 274.

7. *Charlotte etc. R. Co. v. Gibbs*,

proportion to net income and partly "in proportion to the length of the main track or tracks of the road," "the length," where several tracks are laid between the same points and parallel with each other, is held to be not the number of miles of rail laid, but the distance between the terminal points.¹ So where a statute which creates a railroad commission provides that each commissioner shall receive a certain salary "unless restrained by law from the performance of their duties," salaries do not cease upon the suing out by several railroads of temporary injunctions against the performance of the functions of the commission so far as these roads are concerned, which injunctions the court, upon motion and argument, declines to dissolve but has not made perpetual by final decrees.²

RAILROAD POOLS.—(See also RAILROADS; TRUSTS, *Corporate*.)

I. Definition, 691.

II. Legality, 691.

III. Equitable Relief, 693.

I. DEFINITION.—Railroad pools are contracts between rival railway companies whereby, in order to prevent competition, their business is united in one common total, from which the business or the money received therefor is divided among the combining companies in fixed percentages.³ They are of two kinds—traffic pools and money pools. A traffic pool is an agreement allotting a certain percentage of the total traffic to each road and providing that if any road exceeds its share of the business, freight shall be diverted from it to the other roads until the agreed proportion is restored. A money pool is an agreement whereby the money received by all the combining roads for transportation is brought together into one total and divided among the roads in certain fixed percentages, which do not necessarily correspond to the proportion of the freight actually carried by each road.⁴

II. LEGALITY.—In *England* pools are legal and their provisions binding.⁵ In the *United States* the authorities are not harmoni-

27 S. Car. 385; 31 Am. & Eng. R. Cas. 464. Section four of chapter one hundred and twenty-four of the laws of *Kansas* of 1883, which provides for raising a fund for the payment of the salaries and current expenses of the board of railroad commissioners and its secretary, by the taxation of the property of railroad companies only, was however held unconstitutional and void, being in contravention of section 1 of article 11 of the State constitution, which provides that "the legislature shall provide for a uniform and equal rate of assessment and taxation." *Atchison etc. R. Co. v. Howe*, 32 Kan. 377.

1. *People v. Chapin*, 106 N. Y. 265; 34 Am. & Eng. R. Cas. 136.

2. *Savage v. Pickard*, 14 Lea (Tenn.) 46; 22 Am. & Eng. R. Cas. 490.

3. *Hudson, The Railways and the Republic*, 196.

4. *Hudson, The Railways and the Republic* 197.

5. *Hare v. London & Northwestern R. Co.*, 2 Johns. & H. 80; 30 Law J. Ch. 817; *Shrewsbury & Birmingham R. Co. v. London & Northwestern R. Co.*, 17 Q. B. 652; 9 Eng. L. & E. 394; *Wood on Railroads* 590.

The above decisions in effect hold that an arrangement for a division of

ous.¹ A pooling arrangement which amounts to a virtual amalgamation of the combining companies, so that the entire management of one company would be conducted by the other, is clearly illegal, unless expressly authorized by statute.² And even in *England* a railway company cannot legally make a pooling contract in regard to traffic over a line not yet built.³ In interstate

freight money between competing roads based on a past experience of the business of the roads, and providing for making up differences from time to time, as the actual should differ from the estimated proportion of business, and making distribution by way of evening up so as to accord with the estimated rather than the actual business, is not illegal necessarily; when preventive of a competition which would end in the survival of the stronger, leaving the community, ultimately, dependent upon a monopoly, it would not be illegal. But it is said by Sir William Hodges, that agreements to divide the profits arising from any particular traffic in fixed proportions without reference to the question by whose trains it has been carried are now considered unsafe. Hodges, *Law of Railways* (7th ed.) 58.

1. In *1 Redfield on Railways* (6th ed.), § 146, it is said that there is no principle of public policy which renders void a traffic arrangement between two lines of railway for the purpose of avoiding competition.

It was said in *Manchester & Lowell R. Co. v. Concord R. Co.*, 20 Atl. Rep. 383; 8 Ry. & Corp. Law Jour. 443, that, in the absence of any statutory prohibition, a pooling agreement is valid; while in *Central Trust Co. v. Ohio Cent. R. Co.*, 23 Fed. Rep. 306; 23 Am. & Eng. R. Cas. 666, the terms of a pooling contract were held to be specifically enforceable in equity. And see *Ex parte Koehler*, 21 Am. & Eng. R. Cas. 57, where it was held by the U. S. Circuit Court for Oregon that interchange of freight was not of itself a pooling contract, and where the court inclined to take a favorable view of the validity of pooling contracts.

In *New Jersey* the courts have recognized the validity of such contracts. See *Sussex R. Co. v. Morris & Essex R. Co.*, 19 N. J. Eq. 13; on appeal: 20 N. J. Eq. 542; *Elkins v. Camden & Atlantic R. Co.*, 36 N. J. Eq. 246, 11 Am. & Eng. R. Cas. 579.

But in *Louisiana* it has been recently held that pools are contrary to public

policy, and therefore not enforceable. *Texas & Pac. Ry. Co. v. Southern Pac. Ry. Co.*, 41 La. Ann. 970; 40 Am. & Eng. R. Cas. 475. And in New York pooling contracts between canal boats have been repeatedly declared illegal. *Stanton v. Allen*, 5 Den. (N. Y.) 434; *Hooker v. Vandewater*, 4 Den. (N. Y.) 349; though a more recent decision in that State holds that a pooling combination for dividing certain territory between parallel railroad lines is not contrary to public policy. *Ives v. Smith*, 3 N. Y. Supp. 645, affirmed in 55 Hun (N. Y.) 606. And see *Hartford etc., R. Co. v. New York etc., R. Co.*, 3 Rob. (N. Y.) 1865. The New York railroad commission has declared a pooling contract invalid. See 1 N. Y. R. R. Commission Rep., 1885, p. 77.

In *Morris Run. R. Co. v. Barclay Coal Co.*, 68 Pa. St. 173, a "pool" formed for the division of a coal district, whereby the committee were to fix prices of coal, rates of freight, the quantities each coal company could sell, etc., was held to be both against the statute of New York—in which State the contract was made—making conspiracies against trade or commerce misdemeanors, and also to be against the public policy of the State of Pennsylvania, wherein the coal district was situated.

In *Indiana* the rule is that a combination between common carriers in order to prevent competition is *prima facie* illegal, and that in order to establish the legality of any pool the burden is on the carrier to show that the pool was formed to prevent ruinous competition, and that it does not establish unreasonable rates, unjust discriminations, or oppressive regulations. *Cleveland, etc. R. Co. v. Closser*, 126 Ind. 348; 45 Am. & Eng. R. Cas. 275. See *Denver etc. R. Co. v. Atchison etc. R. Co.*, 110 U. S. 667, reversing 15 Fed. Rep. 650.

2. *Charlton v. Newcastle & Carlisle R. Co.*, 7 Weekly Rep. 731; 5 Jur. N. S. 1096.

3. *Midland R. Co. v. London and Northwestern R. Co.*, L. R., 2 Eq.

commerce pooling is now forbidden by act of Congress;¹ and several of the States have, in their constitutions or statutes, prohibitions of a somewhat similar character.²

III. EQUITABLE RELIEF.—The execution of an illegal pooling agreement may be enjoined at the suit of a non-assenting stockholder,³ or of the State,⁴ or of other railroad companies,⁵ or of any citizen, where the statute so provides.⁶ It is no defense to such a suit that the pool is advantageous to the roads,⁷ or that it has not resulted in increasing the freight rates beyond the statutory limits.⁸ Where the acting directors of the railroad company are made parties defendant to such a suit the fact of their election as such directors need not be proved by the corporate records.⁹ Where a pooling arrangement has been executed, and as a result one of the combining railroad companies has received money which according to the pooling contract ought to be divided between the combining companies, such company may be compelled by suit in equity to make such division, although the pool is contrary to statute.¹⁰

Cas. 524; *Maunsell v. Midland Great Western (Ireland) R. Co.*, 1 H. & M. 164; 32 L. J. Ch. 513.

1. Section 5 of the Inter-State Commerce Act provides that "it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof." 24 St. at L. 380.

In the second annual report of the Inter-State Commerce Commission (2 Int. Com. Rep. 436), it is said: "With pooling prohibited the tendency among the railroads seems likely to be in the direction of consolidation as the only means of effectual protection against mutual jealousies and destructive rate wars."

2. Thus in *Texas* there is a constitutional provision prohibiting railroad companies from controlling competing lines, and it has been held under it that a pooling agreement by which a managing committee is authorized to fix freight rates is illegal. *Gulf etc. R. Co. v. State*, 72 Tex. 404; 36 Am. & Eng. R. Cas. 481; *Missouri Pacific R. Co. v. Texas etc. R. Co.*, 28 Am. & Eng. R. Cas. 1.

In *New Hampshire* a statute prohibits the running of a railroad upon

any arrangement by a railroad and directs that each railroad shall be managed by its own officers and agents, and shall be dependent for support upon its own earnings. It has been repeatedly held that this statute makes pooling illegal. *Morrill v. Boston etc. R. Co.*, 55 N. H. 531; 11 Am. Ry. Rep. 484; *Manchester etc. R. Co. v. Concord R. Co.*, 20 Atl. Rep. 383; 8 Ry. & Corp. Law Jour. 443. See also *Currier v. Concord R. Co.*, 48 N. H. 321.

3. *Charlton v. Newcastle & Carlisle R. Co.*, 7 Weekly Rep. 731; 5 Jur., N. S. 1006.

4. *Gulf etc. R. Co. v. State*, 72 Tex. 404; 36 Am. & Eng. R. Cas. 481.

5. *Missouri Pac. R. Co. v. Texas etc. R. Co.*, 30 Fed. Rep. 2.

6. *Currier v. Concord R. Co.*, 48 N. H. 321.

7. *Missouri Pac. R. Co. v. Texas & Pac. R. Co.*, 30 Fed. Rep. 2.

8. *Gulf etc. R. Co. v. State*, 72 Tex. 404; 36 Am. & Eng. R. Cas. 481.

9. *Morrill v. Boston etc. R. Co.*, 55 N. H. 68.

10. *Manchester etc. R. Co. v. Concord R. Co.*, 20 Atl. Rep. 383; 8 Ry. & Corp. Law Jour. 443.

And though the road bound to make division has passed into the hands of a receiver. *Central Trust Co. v. Ohio Central R. Co.*, 23 Fed. Rep. 306; 23 Am. & E. g. R. Cas. 666.

RAILROAD SECURITIES.—See also MUNICIPAL SECURITIES, vol. 15, p. 1204; RAILROADS; RECEIVERS.

- I. Nature of Railroad Securities, 694.
- II. Power of Railroad Company to Mortgage Property 694.
- III. Form and Construction of Mortgage, 696.
- IV. Equitable Mortgages, 697.
- V. Statutory Liens and Mortgages, 698.
- VI. Who May Execute a Corporate Mortgage, 699.
 1. Generally, 699.
 2. Ratification, 701.
- VII. Construction of Provisions of Railroad Mortgages, 702.
- VIII. Property Covered by Railroad Mortgages, 704.
 1. *Property Appurtenant*, 705.
 2. *Fixtures*, 707.
 3. *Earnings*, 708.
 - a. Generally, 708.
 - b. *Basis of Computation*, 710.
 4. *Money*, 710.
 5. *After Acquired Property*, 710.
 - a. Generally, 710.
 - b. *Relative Priority of Liens and Mortgages on After Acquired Property*, 714.
 6. *Rolling Stock*, 716.
 - a. *Conditional Sales*, 717.
 - b. *Rolling Stock Regarded as Fixtures*, 718.
- IX. Bonds, 719.
 1. Generally, 719.
 2. *Power of Railroad Companies to Issue Bonds*, 719.
 3. *Formalities in Making and Issuing Bonds*, 720.
 4. *Negotiability of Railroad Bonds*, 721.
 5. *Incomplete and Altered Bonds*, 727.
 6. *Over-issue of Bonds*, 728.
 7. *Action Upon Bonds*, 728.
8. *Promissory Notes and Unsecured Bonds*, 729.
9. *Contracts of Guaranty*, 730.
10. *Indorsement of Bonds*, 731.
- X. Trustees, 733.
 1. *Duties and Rights*, 733.
 2. *Notice to Mortgage Trustees*, 735.
 3. *Rights of Trustees in Possession*, 736.
 4. *Debts of Mortgage Trustees in Possession*, 738.
 5. *Compensation*, 738.
 6. *Liability of Trustees for Negligence, etc.*, 739.
 7. *Removal*, 739.
 8. *Vacancies*, 740.
- XI. Payment of Bonds, 741.
 1. *Lost Bonds*, 741.
 2. *Subrogation*, 742.
 3. *Redemption*, 743.
- XII. Foreclosure, 744.
 1. *Default Must be Shown*, 744.
 2. *Parties*, 745.
 - a. *Plaintiffs*, 745.
 - b. *Defendants*, 748.
 3. *Defenses*, 750.
 4. *Decree*, 750.
- XIII. Receivers' Certificates, 752.
 1. Generally, 752.
 2. *Negotiability of Receivers' Certificates*, 753.
- XIV. Relative Priorities of Railroad Mortgages and Equities Arising Subsequently, 754.
 1. Generally, 754.
 2. *Equities Arising Under Contracts*, 761.
- XV. Reorganization, 762.
 1. Generally, 762.
 2. *Priority of Mortgages over Preferred Stock*, 763.
- XVI. Foreclosure Sales, 764.
- XVII. Rights of Purchasers, 771.
- XVIII. Proceedings in Bankruptcy and Insolvency Against Railroad Companies. 774.

I. NATURE OF RAILROAD SECURITIES.—Railroad securities ordinarily consist of bonds secured by mortgages.¹ They are issued by railway companies as a means of raising money to defray the expenses of constructing and equipping their roads.

II. POWER OF RAILROAD COMPANY TO MORTGAGE PROPERTY.—A railroad company has only such powers as its charter gives, either

1. Debentures are the commonest corporations. Brice on *Ultra Vires* form of security issued by English (2d ed.) 279.

expressly or incident to its existence.¹ It cannot, therefore, without legislative authority, mortgage its franchises² or that property which it takes and holds for the necessary use of its road.³ This doctrine is not founded upon any technical theory or arbitrary rule, but upon the reasonable implication that such alienation would be contrary to the intention of the legislature and subversive of the purposes for which the franchise was granted.⁴ The grant of the franchise is attended with an obligation on the part of the company to perform certain public duties, and it is held that they cannot therefore do an act which would amount to a renunciation of these duties. To mortgage the permanent way or fixed plant of the company would give the mortgagee the right to enter upon the property or to interfere with the use and possession of it, and thus divest the company of their capacity to discharge the duty to the public which devolves upon them.⁵ But there is nothing in their relation to the public which prevents them from making a valid mortgage of their personal property.⁶ And some of the cases hold that real property not in any way connected with the necessary use of the road may be mortgaged without legislative authority.⁷

The right of a railroad company to mortgage its property is provided for in a few of the States by special legislation,⁸ but almost all of them have a general statute upon the subject.⁹

1. Pullan v. Cincinnati etc. R. Co., 4 Biss. (U. S.) 35.

See CORPORATIONS, vol. 4, p. 207.

2. State v. Consolidation Coal Co., 46 Md. 1; Thomas v. West Jersey R. Co., 101 U. S. 71; Pierce v. Emery, 32 N. H. 484; State v. Mexican Gulf R. Co., 3 Rob. (La.) 513; Daniels v. Hart, 118 Mass. 543; Com. v. Smith, 10 Allen (Mass.) 448; 87 Am. Dec. 672; Bardstown etc. R. Co. v. Metcalfe, 4 Metc. (Ky.) 200; Stewart v. Jones, 40 Mo. 141; Black v. Delaware etc. R. Co., 22 N. J. Eq. 130; Troy etc. R. Co. v. Kerr, 17 Barb. (N. Y.) 581; Atkinson v. Marietta etc. R. Co., 15 Ohio 21; Stewart's Appeal, 56 Pa. St. 13; New Orleans etc. R. Co. v. Harris, 27 Miss. 517; Hall v. Sullivan R. Co., 21 Law Rep. 138; Wood v. Bedford etc. R. Co., 8 Phila. (Pa.) 94. See McAllister v. Plant, 54 Miss. 106. See also FRANCHISES, vol. 8, p. 634.

Note to the case Gloninger v. Pittsburgh etc. R. Co., 46 Am. & Eng. R. Cas. 292.

3. Pierce v. Emery, 32 N. H. 484; Coe v. Columbus etc. R. Co., 10 Ohio St. 372.

4. East Boston Freight R. Co. v. Eastern R. Co., 12 Allen (Mass.) 422.

5. See Richards v. Merrimac etc. R. Co., 44 N. H. 127.

6. Hendee v. Pinkerton, 14 Allen (Mass.) 381; Kelly v. Alabama etc. R. Co., 58 Ala. 489; 21 Am. Ry. Rep. 138; Shaw v. Norfolk Co. R. Co., 5 Gray (Mass.) 162; 16 Gray (Mass.) 407; Clay v. East Tennessee etc. R. Co., 6 Heisk. (Tenn.) 421; 12 Am. Ry. Rep. 38; Bardstown etc. R. Co. v. Metcalfe, 4 Metc. (Ky.) 205; McAllister v. Plant, 54 Miss. 106; 17 Am. Ry. Rep. 389; Jones v. Guaranty etc. Co., 101 U. S. 622.

7. Pierce v. Emery, 32 N. H. 504; Kelly v. Alabama etc. R. Co., 58 Ala. 489; 21 Am. Ry. Rep. 138.

See OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 103; FRANCHISES, vol. 8, p. 634 j, note 2.

8. There are no general statutes in the following States for the organization of railroad companies, and the power to borrow money and mortgage the corporate property and franchises as security is conferred by charter and special acts: *Delaware, Georgia, Kentucky, Mississippi, New Hampshire, Oregon, South Carolina.*

9. See also Ala. Code. 1876, §§ 2848, 2849, 2051, 2052; Ark. Act of Jan. 22,

Public convenience has not only, because of the large number of these corporations and the importance of their functions, demanded general laws upon the subject doing away with the necessity of special legislation so often as such corporations may have occasion to exercise this power, but also has the public welfare demanded that the authority conferred should be uniform and that it should be regulated and restricted in a uniform manner.¹

III. FORM AND CONSTRUCTION.—A mortgage of a railroad company is ordinarily in the form of a trust deed with a power of sale. It takes this form from an apparent necessity and for the convenience of those interested, and it thus becomes a contract between the corporation and the persons, who may become holders of the bond secured by it, and who are entitled to the same benefit they would have if actually made parties to the instrument.² The conveyance is usually made to two or more trustees jointly, so that upon the death of one his interest does not descend to his heirs but vests in the other. This rule is not affected by statutes abolishing joint tenancies and converting them into tenancies in common, unless the language of the statute expressly embraces trust estates. The reason for this was to remedy the improper accretion to one party of that which properly belonged to two, and the consequent enrichment of one and impoverishment of the other's estate. But inasmuch as trust property whether held by one or both could only be held for the benefit of the *cestui que trust*, whose estate would be in no manner affected by the death of one of the trustees, the reason of the law ceases and with it the law itself.³ A trust deed is in legal effect a mortgage which leaves the title in the grantor and the grantee holds the deed as a mere security for the debt.⁴ But if the conveyance is not a deed in trust but a mortgage, the mortgagee after a

1855, § 7; Cal. Civ. Co. §§ 456, 457; Codes and Stats. 1876, §§ 5456, 5457; Col. Gen. Laws 1877, §§ 301, 306; Conn. Gen. Sts. 1875, pp. 332, 333; Dak. Ter. Rev. Codes, 1877, pp. 303, 304; Civ. Code, §§ 464, 465; District of Columbia, Rev. States. 1874, § 644; Fla. Laws 1874, ch. 1987, §§ 9, par. 10; Ill. Rev. Sts. 1877; Dassel's Sts. (Kan.) 1876, vol. 1, p. 167; La. R. S. 1870, §§ 692, 683, 2396-97; Me. R. S. 1871; p. 454; Acts 1871, ch. 108; Md. Laws, 1876, p. 903; Mass. Acts 1874, ch. 372, §§ 4950-51-52; Acts 1875, ch. 58; Mich. 1873, p. 527; Minn. Sts. at Large, 1873, vol. 1, p. 430; Act of Mar. 25, 1868; 1 Wagnr. Stats. (Mo.) 1872, p. 298; Mont. Ter. L. 1873, p. 102, § 14; Neb. Gen. Sts. 1873, ch. 11, §§ 84, 117, 118, 119; Nev. Comp. L. 873, p. 292, § 3440; N. J. Laws 1873, ch. 413, § 20; 2 Rev. Sts. 1873, p. 931, §§ 108; N. Mex. Ter. Acts 1878, p. 35, § 14. N. Y. Rev. Sts. 1875,

p. 533, § 39, pl. 10; N. Car. Rev. 1873, p. 740, ch. 99, § 29, pl. 10; Ohio, (Ohio) R. S. 1860, ch. 29, § 31; Brights. Purdon's Dig. (Pa.) pp. 12, 13, § 8; Act of April 4, 1868, § 81; Tenn. Co. 1858, p. 315, § 1443; Comp. Sts. 1871, § 1443; Tex. Laws 1876, ch. 97, § 23 Vt. Gen. Sts. 1870, ch. 28, §§ 97, 98, 99; Va. Code 1873, ch. 61, § 43; W. Va. Acts 1872 to 1873, 68, §§ 20, 22; Wis. Laws 1877, ch. 144, § 1.

1. Jones on Corp. Bonds and Mortgages, § 27.

2. McClain v. Placerville etc. R. Co., 66 Cal. 621; Chamberlain v. Connecticut etc. R. Co., 54 Conn. 472; Butler v. Rahn, 46 Md. 541.

3. McAllister v. Plant, 54 Miss. 118.

4. Wisconsin Cent. R. Co. v. Wisconsin River L. Co., 71 Wis. 94; Southern Pac. R. Co. v. Doyle, 8 Sawy. (U. S.) 60.

transfer of any of the bonds, holds a legal title for his remaining interest and in trust for the other bondholders.¹

Securities issued by *English* corporations are instruments under seal creating a charge according to their wording upon the property of a corporation, and to that extent conferring a priority over subsequent creditors, and other existing creditors not possessed with such a charge, and are termed debentures, which are in effect statutory mortgages.² These securities differ widely from those in use in the *'United States'* in that each creditor is there secured by a separate mortgage, while here one mortgage is made to secure all the mortgage creditors.³

IV. EQUITABLE MORTGAGES.—A mortgage not being executed by or in the name of the corporation though intended to take effect as the deed of the corporation cannot operate as its deed, but it will be regarded in a court of equity as an equitable mortgage and the holders of what was intended to secure the payment of bonds will be entitled to their full right in equity to the mortgage which was intended to be given.⁴ An agreement for a mortgage has in equity the effect of a mortgage to the extent indicated,⁵ but it does not include damages for the breach of the contract. And stipulations in a contract for a mortgage for such sums as are specially mentioned in the contract raise the implication that no other or different mortgage or lien is to be given.⁶ So an agreement that bonds shall be a lien on property conveyed operates as an equitable mortgage,⁷ and a subsequent mortgage

1. *Mason v. York, etc. R. Co.*, 52 Me. 82; *In re York etc. R. Co.*, 50 Me. 552. See *Jones on Mortgages*, § 817.

2. *Brice on Ultra Vires* (2nd ed.) 279.

3. *Jones on Railroad Securities*, § 32.

4. *Miller v. Rutland, etc. R. Co.*, 30 Vt. 452.

5. *Waco Tap R. Co. v. Shirley*, 45 Tex. 355; 13 Am. Ry. Rep. 233. A court of equity treats an agreement for a mortgage or pledge of bonds or other property as binding, and will give them effect according to the intention of the party. *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414.

In *Ashton v. Corrigan*, 13 Eq. Cas. 76, the defendant had agreed to execute to the plaintiff a mortgage of certain leasehold premises in the usual form containing an absolute power of sale in consideration of money due and had, when requested to do so, failed to execute such mortgage. The court made a decree for specific performance. See also *Peto v. Brighton, etc. R. Co.*, 1 H. & M. 468.

6. *Waco Tap R. Co. v. Shirley*, 45 Tex. 255; 13 Am. Ry. Rep. 233.

7. Three railroad companies were associated together for the purpose of building and running their several roads as one continuous line. A mortgage deed of their several roads and of all the personal property and income thereof was executed to secure the payment of their bonds. The bonds were executed and sold or pledged. The same companies afterwards executed a second mortgage of the same property to the same trustees to secure the payment of additional bonds. When the money provided by these bonds was expended and the companies being insolvent and still in need of funds to complete their road, they executed another mortgage of the property conveyed by the first mortgage to one of the trustees in the first and second mortgages in trust to secure the payment of bonds to be issued thereunder. That mortgage provided among other things that no bonds should be issued thereunder until the holders of the first mortgage bonds had first signed an agreement whereby they should severally agree that for the purpose of com-

made subject to the former has priority though not executed and recorded.¹

If a company by a concluded agreement with another sets apart a specific fund in the hands of a third person to meet the interest and principal of its bonds, such agreement also creates an equitable lien or charge.² But a mortgage providing that the expenditure of all sums realized from the sale of bonds shall be made with the approval of at least one of the trustees, whose assent in writing shall be necessary to all contracts made by the corporation before the same shall be a charge upon any of the sums received from said sales, does not create a charge upon the proceeds of the sales of the mortgage bonds in favor of one who afterwards built a portion of the road under a written contract with the corporation, which contract did not itself impose such charge.³

V. STATUTORY LIENS AND MORTGAGES.—The bonds of a railroad company may be made a mortgage or lien on the road by legislative enactment without the execution of any deed of conveyance. Thus, where bonds are issued by the State to a company for the purpose of raising money to build its road and an act is passed by the legislature authorizing the issue of such bonds, they constitute a mortgage on the road.⁴ They are liens in the nature of mortgages created for the protection and indemnity of the State. In construing them, from the purpose for which they are created, and the terms employed in creating them, their scope and operation have been determined, as the scope and operation of a mortgage or other incumbrance would be ascertained.

It is not necessary that the obligation of the company to pay the bonds should be expressed. The law implies an obligation on the company to provide funds to pay them.⁵ But the statute

pleting the roads and paying the interest of certain debts, such companies might issue such bonds "to be denominated preference bonds" which should continue and be a lien "on the property conveyed by such mortgage prior to the bonds held by" the several signers thereof. Such an agreement was signed by holders of the first mortgage bonds and a bill was brought by the trustee under the last mortgage for a foreclosure thereon, and a cross-bill was brought by the trustee under the first mortgage for a foreclosure thereon. Both bills prayed for a settlement of priorities and for general relief. *Held*, that the agreement operated as an equitable mortgage or pledge of the interest under the first mortgage of those who signed as security for the payment of the preference bonds, but that it in no way affected the interest of those who did not sign. *Pollard v. Lamoille Valley R. Co.*, 52 Vt. 144.

1. *Coe v. Columbus etc. R. Co.*, 10 Ohio St. 372.

2. *Ketchum v. Pacific R. Co.*, 4 Dill. (U. S.) 78. Aff'd in *Ketchum v. St. Louis*, 101 U. S. 306; *Pinch v. Anthony*, 8 Allen (Mass.) 536; *Legard v. Hodges*, 1 Ves. Jr. 478; *Lett v. Morris*, 4 Sim. 607; *Ex parte Alderson*, 1 Madd. 553; *In re Strand Music Hall Co.*, 3 DeG. J. & S. 147; *Watson v. Wellington*, 1 Russ. & Myl. 602; *Yates v. Groves*, 1 Ves. Jr. 280.

3. *Dillen v. Bonnard*, 1 Holmes (U. S.) 386.

4. *Tompkins v. Little Rock etc. R. Co.*, 15 Fed. Rep. 6; *Wilson v. Boyce*, 92 U. S. 320; 2 Dill. (U. S.) 520; *Woodson v. Murdock*, 22 Wall. (U. S.) 351; *Murdock v. Wilson*, 2 Dill. (U. S.) 188.

5. *Dundas v. Desjardins Canal Co.*, 17 Grant (Up. Can. Ch.) 27; *Tompkins v. Little Rock etc. R. Co.*, 15 Fed. Rep. 10.

must clearly express the intention to give a lien.¹ If a statute authorizes a city to contract with a railroad company for its bonds to be secured by mortgages, transfers or hypothecations of stock in the company, or by such other securities, real or personal, as may be mutually agreed on, and the certificate of stock is accepted as security, such statute is held not sufficiently definite to transform the pledge of stock into a lien or mortgage upon the road.²

A State legislature, when not prohibited by its constitution, may discharge a statutory lien in its favor on receiving the full value of its security.³ Where the constitution of a State prohibits the legislature from releasing the lien held by the State from any railroad, it is not a restriction on the power of the legislature to hold any claim held by the State against a railway company, but means only that while the debt remains the legislature may not let go the security for it.⁴ So a statutory lien may be waived.⁵ It may not only be waived but another person may be substituted by agreement of the parties in place of the original lienholders.⁶

VI. WHO MAY EXECUTE A CORPORATE MORTGAGE.—1. Generally.—

The directors of a railroad company are competent to exercise the power of the corporation to convey or mortgage its property in security of its bonds unless prohibited by its charter or the laws of the State from which it derives its existence.⁷ And the holders of railroad bonds properly executed by the directors

1. Brunswick etc. R. Co. v. Hughes, 52 Ga. 557; Collins v. Central Bank, 1 Kelly (Ga.) 435.

2. Cincinnati v. Morgan, 3 Wall (U. S.) 275.

3. Murdock v. Woodson, 2 Dill. (U. S.) 188. See Darby v. Wright, 3 Blatchf. (U. S.) 170. Where a release of a State lien upon bonds of two companies is provided for by an act of the legislature by the consolidation of the companies, such a release will not take effect unless consolidation is effected. Gibbs v. Greenville etc. R. Co., 13 S. Car. 228.

4. Woodson v. Murdock, 22 Wall. (U. S.) 351.

5. Gibbs v. Greenville etc. R. Co., 13 S. Car. 228. If the waiver is made for the purpose of promoting the consolidation of two railroad companies, the waiver will take effect only upon the completion of such consolidation. Gibbs v. Greenville etc. R. Co., 13 S. Car. 228.

6. While the State was in full possession of the revenue of defendant's road upon certain express trusts, which, as was provided by statute,

were to continue until the said bonds loaned to the company were paid or exchanged, the county of St. Louis was empowered to loan such company its bonds, which was done, and accepted by the company. The statute authorized the person who had theretofore been in custody of the earnings of the road for the State to pay into the treasury out of such earnings a sum sufficient to meet the interest on said bonds loaned by said county as it accrued. Held, that by said act the State waived its lien and right to all the earnings of the company to the extent of the sum required to pay the interest on said bonds, and that the county was *pro tanto* substituted as to that amount in place of the State with a lien or charge to that extent as effectual as the State before possessed. Ketchum v. Pacific R. Co., 4 Dill. (U. S.) 78; aff'd in Ketchum v. St. Louis, 101 U. S. 306.

7. Ellis v. Boston etc. R. Co., 107 Mass. 1; Hendee v. Pinkerton, 14 Allen (Mass.) 381; Taylor Co. v. Baltimore etc. R. Co., 35 Fed. Rep. 161; Hodder v. Kentucky etc. R. Co., 7

cannot be prejudiced by the fact that the mortgage given to secure the same was executed out of the State or by virtue of a resolution of its directors at a meeting held out of the State.¹ The power of a president of a railroad company to borrow money on its behalf includes authority to mortgage its property or to give other ordinary security for the money borrowed.² But where authority to act as business and financial agent is conferred upon the president, his authority is confined to the ordinary business of the corporation, and the execution of a mortgage on the personal property of the company is without the scope of his authority.³ If he affixes the corporate seal to the instrument, it will add nothing to its validity. It will, however, be presumed to have been affixed by proper authority, and this presumption may be repelled by showing that the seal was affixed without authority.⁴ The mortgage should be made in the name of the corporation.⁵ If an officer has the power to execute a mortgage in behalf of the company in his individual name, the fact that it is not signed by the corporate name does not invalidate it if the deed purports to be the deed of the corporation.⁶ But if a deed purports to be the

Fed. Rep. 793; McCurdy's Appeal, 65 Pa. St. 290; Bank of Middleborough v. Rutland etc. R. Co., 30 Vt. 159. See also OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 17, p. 103.

Where a mortgage of the franchises of a railroad company was duly executed, acknowledged and recorded, under the authority of the directors, which was conferred by statute, it was held that the mortgage was valid though executed to a trustee. McCurdy's Appeal, 65 Pa. St. 290.

Where the general management and control of the property, business and affairs of a corporation were vested in the board of directors and president, and the corporation was by charter authorized to issue and sell bonds and execute a mortgage to secure the same; and the charter required the concurrence of the stockholders to authorize the consolidation with another company, held, the board of directors and president had the power, without the concurrence of the stockholders, to authorize the issue of bonds, and the execution of a mortgage upon the property of the company to secure them. Hodder v. Kentucky etc. R. Co., 7 Fed. Rep. 793.

1. Galveston etc. R. Co. v. Cawdley, 11 Wall. (U. S.) 459; Ohio etc. R. Co. v. McPherson, 35 Mo. 13; Coe v. New Jersey Midland R. Co., 31 N. J. Eq. 105. See Bassett v. Monto Cristo N. Co., 15 Nev. 293.

2. Hatch v. Coddington, 95 U. S. 548. **Irredeemable Bonds.**—The general power to borrow money does not authorize the president to execute a mortgage to secure the issue of irredeemable bonds. McCalmont v. Philadelphia, etc. R. Co., 7 Fed. Rep. 386; 3 Am. & Eng. R. Cas. 163.

3. Luse v. Isthmus Tran. R. Co., 6 Oregon 125; Dispatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205; Hoyt v. Thompson, 5 N. Y. 320; Whitwell v. Warner, 20 Vt. 425.

4. Wood v. Whelan, 93 Ill. 153; Fidelity Ins. Co. v. Shenandoah Valley R. Co., 32 W. Va. 244; Union Gold Min. Co. v. Bank, 3 Colo. 226.

The mere fact that a deed has a corporate seal attached, does not make it the act of the corporation, unless the seal was placed to it by some one duly authorized. Where neither the president, nor the secretary *pro tem.* who signed the mortgage, nor the regular secretary who was the rightful custodian of the seal, had any knowledge of the way in which a mortgage became sealed, then the burden of proof is thrown on the party offering it, to show the circumstances under which the mortgage was sealed, and that it was rightfully and properly done. Koehler v. Hubby, 2 Black (U. S.) 715.

5. OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 17, p. 154.

6. See Jones on Railroad Securities, § 47.

deed of the officer and is signed by him in that manner without disclosing his agency, nothing passes by it.¹ The authority given by the directors of a corporation to the president and secretary to execute a mortgage upon the company's property does not empower them to include a provision for attorney's fees in case of suit upon the mortgage.²

2. Ratification.³—A mortgage executed by the officers of a railroad company without previous authority may be expressly ratified by a vote of the stockholders or a ratification may be implied by the acts of the corporation as well as expressed by its vote.⁴ Thus, it may be impliedly ratified by the payment of interest upon the bonds,⁵ or by the receiving and detaining of money advanced by bondholders upon the mortgage.⁶ So if the president and secretary execute a mortgage more extensive than the one authorized to be made and the bondholders advance their money in good faith and it is received and used by the company in constructing its road, this is a ratification of the contract under which the money was obtained.⁷ Even if a statute providing that no railroad mortgage shall be valid unless authorized by a resolution adopted by a vote of two-thirds of all the stockholders and bonds are issued and secured by a mortgage in pursuance of a resolution not so adopted, the company is estopped from denying its authority to make a contract after it has received the benefits thereof.⁸ Good faith forbids that a security should be invalidated after one party has received the full benefit and can no longer place the other party in as good position as he originally occupied.⁹ But a mortgage cannot be ratified by a less number of stockholders than was required for its execution. So, where a vote of two-thirds of the stockholders of a company is required to enable the board of directors to mortgage the property of the company and the mortgage is given without such vote, it requires a two-thirds' vote to ratify it.¹⁰

1. OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 17, p. 154.

2. *Pacific Rolling Mill v. Dayton etc. R. Co.*, 7 Sawy. (U. S.) 61; 5 Fed. Rep. 852.

3. See OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 17, p. 162.

4. *Kelley v. Newburyport etc. R. Co.*, 141 Mass. 496; *St. James' Parish v. Newburyport etc. R. Co.*, 141 Mass. 501; *McCurdy's Appeal*, 65 Pa. St. 290; *Harrison v. Annapolis etc. R. Co.*, 50 Md. 490; *Singer v. St. Louis etc. R. Co.*, 6 Mo. App. 427; *Fidelity Ins. Co. v. Shenandoah Valley R. Co.*, 32 W. Va., 244.

5. *McCurdy's Appeal*, 65 Pa. St. 290.

6. *Ottaway etc. R. Co. v. Murray*, 15 Ill. 336; *Thomas v. Citizens' Horse*

R. Co., 104 Ill. 462; *Tyrell v. Cairo etc. R. Co.*, 7 Mo. App. 294; *Singer v. St. Louis etc. R. Co.*, 6 Mo. App. 427; *Harrison v. Annapolis etc. R. Co.*, 50 Md. 490.

7. *Elwell v. Grand Street etc. R. Co.*, 67 Barb. (N. Y.) 83. See *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 64; *Mahoney Min. Co. v. Anglo California Bank*, 104 U. S. 192; *Page v. Fall River etc. R. Co.*, 31 Fed. Rep. 257; *Lester v. Webb*, 1 Allen (Mass.) 34.

8. *Texas etc. R. Co. v. Gentry*, 69 Tex. 625; *Perkins v. Portland etc. R. Co.*, 47 Me. 573; *Foulke v. San Diego etc. R. Co.*, 51 Cal. 365.

9. *Elwell v. Grand Street etc. R. Co.*, 67 Barb. (N. Y.) 85.

10. *Forbes v. San Rafael Turnpike Co.*, 50 Cal. 34.

VII. CONSTRUCTION OF PROVISIONS OF RAILROAD MORTGAGES.—When the legislature confers power upon a railroad company to mortgage its road, it has an undoubted right to annex to this power certain conditions which must be complied with. So where the only authority to make a mortgage is conferred by a statute which provides that the bonds are not to mature at an earlier period than thirty years, a condition in them that upon the failure to pay any installment of interest the principal shall immediately become due, is invalid. The mortgage may, however, properly provide that it shall be foreclosed upon non-payment of interest. The property of the company may be mortgaged for the payment of these installments of interest as well as the principal, and the company have a right to make it one of the provisions of the mortgage that it may be foreclosed if these installments are not paid as they fall due.¹ If the amount of the overdue coupons is not paid, the court must then order a sale of the mortgaged property with a foreclosure of all rights subordinate to the mortgage with directions to bring the purchase money into court. There can be but one decree of the foreclosure of the same mortgage on the same property, and it is a necessity of that foreclosure, under the principles of equity, that all the sums secured by that mortgage must be protected according to their priority of lien. If the case proceeds so far as to have an order of sale made by the court, the mortgagee will have a lien on the money thus paid into court, not only for his overdue coupons, but for his principal debt, and it must be provided for in the order distributing the proceeds of the sale. If, however, the company shall pay the sum found due in the decree *nisi*, no further proceeding can be had until another default of interest or of the principal.²

So where an officer of a railroad company is authorized in general terms to execute a mortgage upon the road, he has implied authority to execute it in the usual form and with the usual provisions for mortgages of that kind. He is not authorized to insert unusual provisions.³ Where the mortgage is given for the purpose of securing the due payment of the principal of the bonds and the interest to accrue thereon and it provides that the trustees shall hold the property in trust for the equal *pro rata* use

1. *Howell v. Western R. Co.*, 94 U. S. 463; *Central Trust Co. v. New York City etc. R. Co.*, 33 Hun (N. Y.) 513; *Macon etc. R. Co. v. Georgia R. Co.*, 62 Ga. 103; 1 Am. & Eng. R. Cas. 378; *Wiimer v. Atlantic etc. R. Co.*, 2 Wood (U. S.) 409.

2. *Howell v. Western R. Co.*, 94 U. S. 463.

3. In *Jesup v. City Bank*, 14 Wis. 359, it was held that a resolution of a board of directors of a railroad company authorizing the president in gen-

eral terms to execute a mortgage upon the road, but not indicating any of its conditions or covenants, beyond saying that it was to secure bonds to be issued by the company, "running fifteen years with semi-annual interest," did not authorize the president to insert a stipulation in the mortgage and bonds that the principal sum should become due at the option of the holder upon default of the payment of the interest. See *Walworth Co. Bank v. Farmers' L. & T. Co.*, 14 Wis. 325.

of all persons who shall become holders of the bonds, and in case of the default of the company in paying the principal or interest the mortgagee is authorized to enter and sell the same, does not prevent him from at once bringing an action to foreclose the mortgage to collect any installment of interest falling due under the terms of the bonds as soon as default is made in its payment.¹ And it is no defense to such default that forgeries of the bonds were in circulation so executed as not to be distinguished from the genuine, and all the bondholders, except plaintiff, had accepted new bonds so prepared as to prevent the possibility of fraud or loss, and that plaintiff, after presenting his coupons and demanding payment, entered into negotiations for the protection of the obligor in case his coupons should, after payment, prove to be forgeries, and that the ninety days elapsed while these negotiations were pending.² But the provision that upon default in the payment of any installment of the principal or interest the whole debt shall become due and payable, must be inserted in the bonds as well as the mortgage. If not inserted in the bonds it will not effect their payment or enable a bondholder to enforce them by suit at law as becoming due upon default in the payment of interest.³ Where there is a difference between the terms of railroad bonds and of the mortgage given to secure them as to the payment of interest, the terms of the bonds will control.⁴ A railroad company cannot compel a foreclosure and payment of a mortgage bill before its maturity by refusing to pay the interest according to the obligation of its contract and appropriating its income and earnings to its own use.⁵ So where one of the terms of the mortgage is that if the principal or interest should not be

1. *Central Trust Co. v. New York City etc. R. Co.*, 33 Hun (N. Y.) 513.

2. *Wood v. Consolidated Electric Light Co.*, 36 Fed. Rep. 538.

3. Bonds were issued to certain trustees, bearing interest payable semi-annually, as provided in the interest coupons attached. Upon each of said bonds was a certificate signed by the trustees, which stated among other things that said series of bonds was secured by a first mortgage which contained a provision "that the principal sum secured by said mortgage shall become due in case the interest on the bonds remains unpaid for four months." The bonds contained no such provision and did not refer to the said mortgage. Plaintiff was the owner of some of these bonds, and the interest on the same had been unpaid for a period of four months after the same was due, and brought suit on the bonds to recover the principal of each, claiming that the sum had

become due and payable by reason of such provision in said mortgage, and the said certificate of the fact upon said bonds. It was held that the plaintiff was not entitled to recover the principal sums named in said bonds, and only entitled to recover the interest remaining unpaid and represented by the coupons; that this provision was not placed in the mortgage to give the several bondholders actions upon it for the principal of their bonds in case of non-payment of interest, but to give the trustees named in said mortgage (with whom in trust for the bondholders covenant was made) a right of action upon it for the foreclosure of the mortgage, thus making the mortgage a more complete security to the bondholders. *Malory v. West Shore R. Co.*, 3 Jones & S. (N. Y.) 174.

4. *Indiana etc. R. Co. v. Sprague*, 103 U. S. 756.

5. *Dow v. Memphis etc. R. Co.*, 20 Fed. Rep. 260.

paid at the time stated the principal sum secured by the mortgage should become immediately due at the election of the trustees, a subsequent act of the legislature cannot authorize a sale of the property free from this mortgage, unless the trustees have exercised such election and the mortgage moneys are due.¹ But if a written request of the holders of a majority of the bonds outstanding is required to authorize trustees to proceed to collect both principal and interest, it is necessary to prove that the bill was filed to foreclose for the whole debt upon the written request of the holders of a majority of the bonds then outstanding.² This restriction, however, applies only when advantage is sought to be taken of that default as advancing the date when the principal becomes due. A suit thus instituted by a coupon holder, without the assent of a majority of the bondholders, may be properly brought to the extent of accrued and unpaid interest.³

VIII. PROPERTY COVERED BY RAILROAD MORTGAGES.—In *England*, railway securities ordinarily pledge "the undertaking" for the payment of money borrowed.⁴ The undertaking is defined to be the combined result of the corporate franchise and all the property rights and net avails of such combined property, which is but another name for the net earnings of the company. By a mortgage of the undertaking nothing more passes than a priority of the right to the net earnings of the company.⁵ In the *United States* railway companies usually mortgage their property. But a railway company has no authority to execute a mortgage, unless it has been granted such power either in express words or by reasonable implication. The question as to what property is covered by the mortgage depends upon the authority under which it was issued, a construction of the language used, and also the intention of the parties to be gathered therefrom. If there is any implication in the matter, this necessarily involves construction, not, indeed, the liberal and broad construction to be given to

1. *Randolph v. Middleton*, 26 N. J. Eq. 542; *Middleton v. New Jersey West Line R. Co.*, 25 N. J. Eq. 306.

2. *Chicago, etc. R. Co. v. Fosdick*, 106 U. S. 47.

3. *Beekman v. Hudson etc. R. Co.*, 35 Fed. Rep. 3; *Chicago etc. R. Co. v. Fosdick*, 106 U. S. 47; *Shaw v. Little Rock etc. R. Co.*, 100 U. S. 605; *Credit Co. v. Arkansas etc. R. Co.*, 3 McCrary (U. S.) 23.

A railroad mortgage provided that, in case of default in interest for four months, the principal should become due, and that the trustees should, "upon written request of the holders of a majority in amount of . . . outstanding bonds, . . . proceed to foreclose the mortgage" within a

reasonable time. Acting upon such request, the trustees filed a bill to foreclose in the State courts, which was dismissed in special term for want of jurisdiction of the subject-matter. The trustees took an appeal, but, before it was determined, a bondholder urged the trustees to renew the litigation in the Federal courts, and, upon their refusal to do so, brought the suit there himself, and in his own name. *He'd*, on demurrer to the bill, that, to the extent of accrued and unpaid interest, the suit was properly brought. *Beekman v. Hudson etc. R. Co.*, 35 Fed. Rep. 3.

4. *Gardner v. London etc. R. Co.*, L. R. 2. Ch. App. 201.

5. *Myatt v. St. Helens, etc. R. Co.*, 2 Q. B. 364.

a remedial statute, or the strict construction to be given to a penal statute, but a construction consistent with and following a reasonable view of the general scope and purpose of the legislative grant viewed in the light of surrounding circumstances.¹ If the statute specifies what property may be mortgaged, of course the mortgage can embrace no other property, but as a rule, acts authorizing the issue of a mortgage by a railroad company are broad enough to embrace any property which the company may own, so that the question as to what is embraced in it is usually one depending on a fair construction of the mortgage itself, and the same rules of construction apply as are applied to the use of individuals.² Where the bonds of a company are made a mortgage on the road by legislative enactment without the execution of any formal mortgage, the act itself applied to the existing condition of the road, determines the character and extent of the lien.³

1. Property Appurtenant.—Where a conveyance of a railroad is made by mortgage, with its "corporate privileges and appurtenances," only such property passes as is directly appurtenant to the road, and is necessary for its maintenance, operation, preservation and security.⁴ The mortgage of the main line of a railroad

1. *State v. Florida Cent. R. Co.*, 15 Fla. 699.

2. 3 Wood's Railway Law, § 464.

3. *State v. Florida etc. R. Co.*, 15 Fla. 690; 3 Wood's Ry. L., § 464.

4. *State v. Glenn*, 18 Nev. 34; *Morgan v. Donovan*, 58 Ala. 241.

A railroad company held town lots adjoining their road-bed, ostensibly for a basin to connect with river navigation. They mortgaged the entire road with its corporate privileges and appurtenances, but without specific mention of the lots. The mortgaged property including the lots was sold under foreclosure proceedings, and the company brought an action of ejectment against the purchasers under the mortgage. It was held that the lands were not appurtenant to the road, and essentially and indispensably necessary to the enjoyment of the franchise, and as such were not included in the mortgage. *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465.

A railroad company organized under a charter which authorized it to take or purchase such real estate as might be necessary or convenient for the construction or operation of a road, made under authority of an act of the legislature, a mortgage to the treasurer of the State to secure an issue of bonds, which was recorded as required by the act, in the office of the secretary of state. The property mortgaged being

described as "all the railroad of said company, as the same is now, or may be hereafter located or constructed, and all the lands that are or may be included in the location of the road, or required by said company for the purpose of the railroad, with all property, real or personal, which now belongs or may hereafter belong to said company, and be used as a part of the railroad, or be appurtenant thereto, or necessary for its construction or operation, and all the property rights and franchises of said company under its charter. *Held*, that this mortgage did not cover by its terms lots outside of the lay-out of the road and not needed for its construction or use. *Boston etc. R. Co. v. Coffin*, 50 Conn. 150; 12 Am. & Eng. R. Cas. 375.

Hotels.—Where a railroad company executed a mortgage to a trust company, covering a part of the line of their road, "as said road is or may be hereafter constructed, maintained, operated or acquired, together with all privileges rights, franchises, real estate, right of way, depots, depot grounds, side tracks, water tanks, engines, cars and other appurtenances thereto belonging," it was held that a hotel used for the accommodation of the patrons and employes of the road was covered by the mortgage. *U. S. Trust Co. v. Wabash etc R. Co.*, 32 Fed. Rep. 480.

and its appurtenances has been held to include a lateral branch¹ but not an extension subsequently made.² Nor will a mortgage on the main line of a railroad in one State covering all rolling stock appurtenances and income, cover real estate, depot buildings and trackways, situated in another State across the State line from the terminal point of the main railway line.³ Where a change is duly made in the route from that described in the mortgage, the mortgage as executed binds the road as built, and the bondholders, to secure whose debts the mortgage was given, acquire a right to have the road as built sold to pay their bonds.⁴

But in *Mississippi Valley Co. v. Chicago etc. R. Co.*, 58 Miss. 896, it was held that such a mortgage did not cover a hotel not used in connection with the road and for its convenience, but as an ordinary hotel.

Canal Boats.—The railroad company mortgaged its locomotives, engines, cars, etc., and all other personal property whatsoever in any way belonging or appertaining to the railroad. *Held* not to include canal boats purchased by the corporation used and run in connection with the road. *Parish v. Wheeler*, 22 N. Y. 494.

Water Stations.—The company were authorized to hold so much land, not above five acres in any one place, and improvements necessary for water stations, etc. They purchased land which was not used for the road, and mortgaged all their property and franchises with the right to maintain possession "according to the effect and meaning" of the acts of incorporation. It was held that the land purchased was not included in the mortgage. *Youngman v. Elmira etc.*, 65 Pa. St. 278.

Unpaid Subscriptions to Stock.—A claim for unpaid subscription to corporate stock is not covered by a mortgage purporting to convey the right of way of the railroad and its other property. *Dean v. Biggs*, 25 Hun (N. Y.) 122.

Woodlands.—A railroad company, engaged in constructing a railroad to secure the payment of money borrowed for that purpose gave a mortgage, by which they granted to the party of whom the loan was obtained all their railroad, with its superstructure, track, and all other appurtenances made or to be made, and all the right and title of said company to the land on which said railroad was and should be constructed, together with all rights of way then

acquired, or thereafter to be acquired by the said company, and including the depots, engine houses, shops and other constructions at the termini and along the line of said railroad, and the parcels of ground on which the same were or should be erected, and all the lands which should be used for depot and station purposes, with the appurtenances, and all the embankments, bridges, viaducts, culverts, fences and structures thereon, and all other appurtenances belonging thereto, and all the franchises, privileges and rights of the said company in, to and concerning the same. *Held*, that such mortgage did not create any lien as against a subsequent mortgage creditor, upon a tract of 285 acres of woodland afterwards acquired by the company, situate seven miles from said railway, although said land was purchased and used by said company for the purpose of supplying said road with timber and fuel. *Dinsmore v. Racine etc. R. Co.*, 12 Wis. 725.

1. *Cole v. Delaware etc. R. Co.*, 34 N. J. Eq. 266; 4 Am. & Eng. R. Cas. 513; *Hardy v. Kentucky etc. R. Co.*, 7 Fed. Rep. 793; *Parker v. New Orleans etc. R. Co.*, 33 Fed. Rep. 693; *Meyer v. Johnston*, 53 Ala. 237; 64 Ala. 603. See LATERAL OR BRANCH RAILROADS, vol. 12, p. 948.

A branch road will pass built after the mortgage. *Seymour v. Canandaigua etc. R. Co.*, 25 Barb. (N. Y.) 284. Unless indeed, its construction is authorized by subsequent legislation. *Meyer v. Johnston*, 53 Ala. 237.

2. *Randolph v. New Jersey West Line R. Co.*, 28 N. J. Eq. 49; *Alexandria etc. R. Co. v. Graham*, 31 Gratt. (Va.) 769.

3. *Buck v. Memphis etc. R. Co.*, 4 Cent. L. J. 430.

4. *Elwell v. Grand Street etc. R. Co.*, 67 Barb. (N. Y.) 83.

2. Fixtures.—A mortgage of a railroad, and all its property, real and personal, covers everything which comes under the head of fixtures. It covers rolling stock,¹ materials placed on the land for use in repairing the road, such as iron rails, spikes and ties;² old iron rails, etc., taken up from the road as useless and replaced by new ones,³ station houses, engine houses, freight houses and work shops, with their appurtenances, piers and wharves and

A decree foreclosing a mortgage of a water ditch particularly described as lying between given termini and a sheriff's deed given in pursuance thereof, does not operate to pass the title to a new and independent ditch subsequently constructed by a purchaser *pendente lite* from the mortgagor along a different course and between different termini, for the purpose of being used by him in place of the mortgaged ditch, when the new ditch is not an appurtenant of or an improvement on the original ditch. *Mitchel v. Canal etc. R. Co.*, 75 Cal. 464.

1. *Meyer v. Johnston*, 64 Ala. 603; 8 Am. & Eng. R. Cas. 584; *Hamlin v. Jerrard*, 72 Me. 62; *Williamson v. New Jersey etc. R. Co.*, 28 N. J. Eq. 237; reversed 29 N. J. Eq. 311; *Butte v. Memphis etc. R. Co.* (Tenn.), 4 Cent. L. J. 430; *Palmer v. Forbes*, 23 Ill. 301; and it is not subject to levy or sale upon execution. *Youngman v. Elmira etc. R. Co.*, 65 Pa. St. 278; *Shamokin Valley etc. R. Co. v. Livermore*, 47 Pa. St. 465; *Coney v. Pittsburgh etc. R. Co.*, 8 Phila. (Pa.) 172; *Macon etc. R. Co. v. Parker*, 9 Ga. 377; *Gue v. Tidewater Co.*, 24 How. (U. S.) 257; but the mortgagee takes the property subject to all valid liens. *Fosdick v. Schall*, 99 U. S. 235; *Fosdick v. Southwestern Car Co.*, 99 U. S. 256; *Hall v. Frost*, 99 U. S. 389; *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258.

In some States, however, rolling stock is treated as personal property, and as such, subject to levy and sale upon execution, unless it has passed into the possession of the mortgagees. *Stephens v. Buffalo etc. R. Co.*, 31 Barb. (N. Y.) 590; *Hoyle v. Plattsburg etc. R. Co.*, 54 N. Y. 314; *Randall v. Elwell*, 52 N. Y. 521; *Williamson v. New Jersey etc. R. Co.*, 29 N. J. Eq. 311; *Coe v. Columbus etc. R. Co.*, 10 Ohio St. 372.

2. *Palmer v. Forbes*, 23 Ill. 237. In this case the court by Canton, C. J. said: "Nor do we want analogies in the well settled principles of the common law,

to hold that materials provided and designed to be attached to the road are, for the purposes of a mortgage or a conveyance, a part of the real estate itself. It is a familiar principle to all, that rails hauled on to the land, designed to be laid into a fence, or timber for a building, although not yet raised, but lying around loose, and in no way attached to the soil, are treated as a part of the realty, and pass with the land, as appurtenances. By applying these familiar principles of the common law, we may be enabled to determine what we should consider as appurtenant to the freehold, and what should pass by a conveyance of the road, and consequently what is covered by and embraced within a mortgage incumbering the road, acknowledged and recorded as a mortgage of real estate." *Wutzen v. St. Paul R. Co.*, 4 Hun (N. Y.) 529.

3. *Salem Bank v. Anderson*, 75 Va. 250.

The cast-off articles, fragments of old materials, once forming part of the road, or used in its operation still continue under the mortgage, if a proper and judicious management of the road requires that they should be recast or exchanged for new articles for the uses of the road. *Coopers v. Wolf*, 15 Ohio St. 523. In this case the court by Welch, J., said: "If such property is liable to execution, where shall we draw the line between the property of the mortgagees and that of the company? When a bridge breaks down, or a tunnel falls in, or when trains are thrown from the track and broken, shall executions be immediately levied upon the stone, the timbers, and the broken cars or engines? Shall creditors of an insolvent company line its track, and watch for, and seize its worn-out rails, broken wheels, fragments and scraps as fast as they come to hand; their priority over each other depending on their diligence in business? If so, it is easy to see, that the security of the mortgagees, which depends, ultimately, and almost solely,

their appendages,¹ and also office furniture;² but an iron safe, and an iron planing machine,³ and other tools and implements used in repairing the railway, or its appliances, but not attached to the realty, do not pass under such mortgage,⁴ nor does it cover coal, wood, or other material used for fuel.⁵

3. Earnings—*a. GENERALLY.*—Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business, shall be paid from the current receipts, before he has any claim upon the income. Only the net earnings can therefore be subjected to the lien of the mortgage.⁶ This is obtained by deducting from the gross earnings what is required for necessary operation and managing expenses, equipment and useful improvements. If, for convenience, something is taken from what may not be improperly called the current debt fund and put into that which belongs to the mortgage creditors, the current creditors thereby acquire a claim against the property.⁷ If the mortgage implies that the mortgagor is to hold possession and receive the earnings of the road until the mortgagee takes possession, they are not subject to the lien of the mortgage so long as they are allowed to remain in the possession of the mortgagor.⁸ So the income of a railroad company earned after the mortgage took effect may, so long as the company

upon the ability of the road to run, and produce a revenue, would be seriously impaired. Besides, it would be almost impracticable to mark the boundary between the rights of the mortgagees and those of the judgment creditors, and the result would be, a scramble between creditors, continual litigation, without any nearer approximation to justice and equity between the parties; or else, it would result merely in causing the company to be more careful and prompt in disposing of, or using its of-fals as they came to hand, without benefit to any one, and to the detriment of the road."

1. *Williamson v. New Jersey etc. R. Co.*, 28 N. J. Eq. 277. *Raymond v. Clark*, 46 Conn. 129.

2. *Raymond v. Clark*, 46 Conn. 129; *Wood v. Whelen*, 93 Ill. 153; *Ludlow v. Hurd*, 1 Disney (Ohio) 552; compare *Hunt v. Bullock*, 23 Ill. 320. Furniture in stations is held to be mere personalty, and not subject to the lien of the mortgage. *Lehigh etc. Co. v. Central R. Co.*, 35 N. J. Eq. 379.

3. *Titus v. Mabee*, 25 Ill. 257.

4. *Williamson v. New Jersey etc. R. Co.*, 29 N. J. Eq. 311; *Lehigh etc. Co. v. Central R. Co.*, 35 N. J. Eq. 379.

5. *Hunt v. Bullock*, 23 Ill. 320. Compare *Coe v. McBrown*, 22 Ind. 252.

6. *Addison v. Lewis*, 75 Va. 701; *Tompkins v. Little Rock etc. R. Co.*, 15 Fed. Rep. 6.

7. *Fosdick v. Schall*, 99 U. S. 255; *Calhoun v. St. Louis etc. R. Co.*, 14 Fed. Rep. 9. See *Parkhurst v. Northern etc. R. Co.*, 19 Md. 472; 81 Am. Dec. 648.

8. *Fosdick v. Schall*, 99 U. S. 235; *Merchants' Bank v. Pittsburg R. Co.*, 24 Pittsb. L. J. (Pa.) 192; 12 Phila. (Pa.) 482; *Sage v. Memphis etc. R. Co.*, 125 U. S. 361; *Galveston etc. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *American Bridge Co. v. Heidelberg*, 94 U. S. 798; *Teal v. Walker*, 111 U. S. 242; *Dow v. Memphis etc. R. Co.*, 124 U. S. 652; *Mercantile Trust Co. v. Missouri etc. R. Co.*, 36 Fed. Rep. 221; *In re Life Assoc.*, 96 Mo. 632; *Massachusetts etc. R. Co. v. U. S. Express Co.*, 81 Ill. 254; *Smith v. Eastern R. Co.*, 124 Mass. 154; *Bath v. Miller*, 51 Me. 341; *Noyes v. Rich*, 52 Me. 115; *Play v. Tennessee R. Co.*, 6 Heisk. (Tenn.) 421; *Dunham v. Isett*, 15 Iowa 284; *Emerson v. European etc. R. Co.*, 67 Me. 387; *Ellis v. Boston etc. R. Co.*, 107 Mass. 1.

Notwithstanding the general rule that the mortgagor is entitled to the earnings and profits of the mortgaged property while in possession or until

remains in the use and management of its property, be attached by trustee process to secure a claim accruing since that date.¹ If the mortgage trustees or the bondholders omit to take possession of the mortgaged property after a default, they cannot complain that the income of the road is applied to completing and operating the road, and to the payment of floating debts.² After the trustees take possession the earnings belong to them and are no longer subject to garnishment.³

Under a mortgage by a railway company conveying its road, franchises, tolls and income and providing that after default continued for a certain period the trustees might enter and take possession, the bondholders or trustees cannot make the railroad company or its assignees accountable for such income until at least a regular demand has been made upon the company therefor.⁴ So a receiver appointed in a suit to foreclose a railroad mortgage cannot recover the earnings of the road accruing before his appointment or until the company take possession through him.⁵

Where the mortgage conveys the income, rents, issues, and profits, and provides that if the interest or principal of its bonds should not be paid as they come due, then the trustees may take

some action is taken by the mortgagee, it is competent for the parties to agree in the mortgage that such future earnings and profits shall be held in equity by the mortgagee, and under such a contract such income whenever received is operated upon by the mortgage, and the party receiving it holds it in trust for whoever is in equity entitled to it. *Pullan v. Cincinnati etc. R. Co.*, 5 Biss. (U. S.) 237.

In *Iowa* it is held that a railroad company may mortgage its future net earnings to secure prompt payment of interest accruing on its construction bonds. *Jessup v. Bridge*, 11 Iowa 572; *Dunham v. Isett*, 15 Iowa 284.

1. *Ellis v. Boston etc. R. Co.*, 107 Mass. 1; *Smith v. Eastern etc. R. Co.*, 124 Mass. 154; *Bath v. Miller*, 51 Me. 341; 53 Me. 308; *Noyes v. Rich*, 52 Me. 115, overruling *Woodman v. New York etc. R. Co.*, 45 Me. 207; *Merchants' Bank v. Petersburg R.*, 34 Leg. Int. (Pa.) 240; *DeGraff v. Thompson*, 24 Minn. 452.

The earnings of a railroad company from the operation of its road, though mortgaged to secure the payment of certain bonds, before foreclosure or possession taken by the trustee, may be reached by other creditors of the company, and is liable to garnishment, where the mortgage provides that,

until default, the company may possess and use the road, etc., and receive the rents, profits and increase arising therefrom. *Mississippi etc. R. Co. v. U. S. Express Co.*, 81 Ill. 534.

2. *Williamson v. New Albany R. Co.*, 1 Biss. (U. S.) 198.

3. *Galena etc. R. Co. v. Menzies*, 26 Ill. 121.

4. *Gilman v. Illinois etc. Tel. Co.*, 1 McCrary (U. S.) 170.

A railroad company of Texas made four successive mortgages in 1853, 1855, 1857 and 1859, and issued bonds under each. The road and its appendages were sold under judgment in 1860. The purchasers operated the road until 1867, and realized large receipts therefrom. In 1857, after the making of the first three mortgages, the legislature passed a law subjecting the road and chartered rights of all railroad companies to sale for their debts, either under mortgages, deeds of trust or judgments. *Held*, that although the first three mortgages covered and conveyed the tolls and profits, yet the purchasers under the judgment were not accountable for the tolls and income received by them from the road, before they were notified to pay them over to the bond holders. *Galveston etc. R. Co. v. Cowdrey*, 78 U. S. 459.

5. *Bath v. Miller*, 51 Me. 341.

possession, work the road, and apply the net income to the payment of the bonds, interest and principal. With the affirmative right of possession and management of the road, it must follow that the manager has a legal right to contract for such articles as would enter into the expense in maintaining and operating the road.¹

b. BASIS OF COMPUTATION.—Where the mortgage on a section of a railroad is foreclosed, and it is shown in the proceedings before the master that the section has not been operated separately, but as a part of the whole road, and no separate accounts kept of the income or expenses of any particular part, he may make a *pro rata* estimate of the earnings and expenses of the whole road. Though such a rule leads to approximation merely, it is the best that can be adopted.²

4. Money.—A mortgage of the “income earnings,” etc., of a railroad company has no retrospective effect, and the use of the word “moneys” in connection with them does not enlarge the rights of the mortgagee so as to convey to him such moneys as are simply past income and earnings.³ So money in the hands of a station agent of a railway company, received for tickets sold and freight collected, cannot be attached in his hands by a trustee process in a suit against the company by one of its creditors.⁴ But funds in the hands of a treasurer, at the time of making a conveyance of all the property embraced therein, cannot be held against the paramount right of the trustees by a creditor of the company, who has subsequently caused them to be attached on trustee process, though the trustees have permitted the company to use and manage the road and its other property.⁵

5. After Acquired Property.—*a.* GENERALLY.—“*Qui non habet, ille non dat,*” is a maxim persistently followed at common law; therefore a mortgage of after acquired property is simply void and of no effect.⁶ But in equity a different rule prevails, and mortgages by railroad companies of after acquired property are valid.⁷ They are sustained either upon the ground that it is in

1. *Parkhurst v. Northern Central R. Co.*, 19 Md. 472.

2. *Pullan v. Cincinnati etc. R. Co.*, 5 Biss. (U. S.) 237.

3. *Dow v. Memphis etc. R. Co.*, 20 Fed. Rep. 768. See *DeGraff v. Thompson*, 24 Minn. 452.

4. *Petingill v. Androscoggin R. Co.*, 51 Me. 370; *Fowler v. Pittsburg etc. R. Co.*, 35 Pa. St. 22.

5. *Woodman v. York etc. R. Co.*, 45 Me. 207. See *Buck v. Memphis etc. R. Co.*, 4 Cent. L. J. 430.

6. *Jones v. Richardson*, 10 Met. (Mass.) 481; *Bonsey v. Amee*, 8 Pick. (Mass.) 236; *Letourno v. Ringgold*, 3 Cranch (C. C.) 103; *Gardner v.*

Macewen, 19 N. Y. 123; *Chapin v. Cram*, 40 Me. 561; *Pierce v. Emery*, 32 N. H. 484; *Hunt v. Bullock*, 23 Ill. 320; *Looker v. Pockwell*, 38 N. J. L. 253; *Wilson v. Wilson*, 37 Md. 1; *Hunter v. Bostworth*, 43 Wis. 583; *Williams v. Broggs*, 11 R. I. 476. See *MORTGAGES*, vol. 15, p. 749.

7. The proposition that a railroad company has power to mortgage after acquired property is almost universally supported by both English and American authorities. *Halroid v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, 2 Story (U. S.) 630; *Pennoch v. Coe*, 23 How. (U. S.) 117; *Barnard v. Norwich etc. R. Co.*, 2 Low.

the nature of accretions, or that the railroad has made an executory contract, which, though void in law, will in equity be allowed to become effective, when and as the property comes into existence.¹ Any authority given to a railroad company to mortgage the whole or part of its road implies the right to mortgage its after acquired property.² Whatever is added to the original structure becomes a part of it, and cannot be severed from it; and if the security by the mortgage is to continue to be of any value during the period that must transpire before the bonds become due, it must depend upon the implied covenant of the com-

(U. S.) 608; *Brett v. Carter*, 2 Low. (U. S.) 458; *Dillon v. Barnard*, 1 Holmes (U. S.) 368; *Butler v. Rahm*, 46 Md. 541; *Williamson v. New Jersey S. R. Co.*, 29 N. J. Eq. 311; *Cook v. Corthell*, 11 R. I. 482; *Morrill v. Noyes*, 56 Me. 458; *Wilmington etc. R. Co. v. Woelpper*, 64 Pa. St. 366; *Emerson v. European etc. R. Co.*, 67 Me. 387; *Bell v. R. Co.*, 34 La. Ann. 785; *Parker v. New Orleans etc. R. Co.*, 33 Fed. Rep. 693; *Boston S. D. & T. Co. v. Bankers' etc. Tel. Co.*, 36 Fed. Rep. 288; *Nichols v. Mase*, 94 N. Y. 160; 17 Am. & Eng. R. Cas. 230; *Texas Western R. Co. v. Gentry*, 69 Tex. 625; 33 Am. & Eng. R. Cas. 46; *Shaw v. Bill*, 95 U. S. 10; *Calhoun v. Memphis etc. R. Co.*, 2 Flip. (U. S.) 442.

The principle of law enumerated in the text is of comparatively recent origin. It is first clearly and definitely stated by Story in *Mitchell v. Winslow*, 2 Story (U. S.) 638, which was decided in 1843. "Here," said Story, "the true question is not whether the assignment of the property to be acquired in future is good at law, but whether it is good in equity. Upon the best consideration which I am able to give the subject, I think it is good and valid." Other decisions to the same effect speedily followed, and at length, as early as 1859, the principle received the sanction of the Supreme Court of the United States, in *Pennock v. Coe*, 23 How. (U. S.) 117. See also *Philadelphia etc. R. Co.*, 3 Phila. (Pa.) 173; *Butler v. Rahm*, 46 Md. 541; *Williamson v. New Jersey etc. R. Co.*, 29 N. J. Eq. 311; *Scott v. Canton*, 6 Biss. (U. S.) 529; *Brett v. Carter*, 2 Low. (U. S.) 458; *Dillon v. Barnard*, 1 Holmes (U. S.) 386; *Emerson v. European etc. R. Co.*, 67 Me. 387; *Stevens v. Watson*, 4 Abb. App. Dec. (N. Y.) 302; *Barnard v.*

Norwich etc. R. Co., 4 Cliff. (U. S.) 351; *Willenock v. Morris Canal Co.*, 3 Green Ch. 377; *Pierce v. Emery*, 32 N. H. 484; *Ludlow v. Hurd*, 6 Am. Law Reg. 493.

In *England* the same conclusion was not so early reached. Several authorities pointed to such a result, but it was not until the decision of the case of *Holroyd v. Marshall* that the law was deemed settled. In this case a decree was entered by Vice-Chancellor Stuart, affirming the validity of the mortgage. On appeal to the House of Lords that decree was reversed by L. C. Campbell, 2 De G. F. & S. 596. A reargument was, however, ordered, and in 1862 a decree reversing Lord Campbell was entered; Lord Westbury and Lord Wensleydale (Baron Parke) being of opinion that the mortgage was valid, though Lord Chelmsford dissented.

In *Louisiana* the execution of a mortgage by a railroad company does not extend to property acquired after the date of the mortgage. *State v. New Orleans etc. R. Co.*, 4 Rob. (La.) 231; *State v. Mexican Gulf R. Co.*, 3 Rob. (La.) 513. See 2 Rev. Code 1870, art. 3308.

1. *Hodder v. Kentucky etc. R. Co.*, 7 Fed. Rep. 799.

2. *Quincy v. Chicago etc. R. Co.*, 94 Ill. 537; *Dunham v. Cincinnati etc. R. Co.*, 1 Wall. (U. S.) 254; *Kelly v. Alabama etc. R. Co.*, 58 Ala. 489; *Hamlin v. European etc. R. Co.*, 72 Me. 83.

In *Covey v. Pittsburg etc. R. Co.*, 3 Phila. (Pa.) 173, Agnew, P. J., said: "To build a railroad requires a vast capital beyond ordinary means, and to borrow it, 'to carry into effect the objects of the corporation,' demands all the security within the possible power of the corporation to give. By necessity and practice, the money of the creditor capitalist finishes and

pany to keep it in running order, and thus earn the necessary sums to discharge the accruing interest, and eventually indemnify the creditors for the principal debt.¹

The question of exactly what acquired property passes by a mortgage depends in a very great degree upon the terms of the instrument. Some authorities may be found to the effect that a mortgage of the franchises and property of a railroad without more would be sufficient to pass all after acquired property, on the ground that such after acquired property is to be considered as an accretion to the property owned at the time of the mortgage.² But, as a rule, this principle does not obtain. Some specific terms indicative of an intent to pass after acquired property are usually required to be inserted in the mortgage.³ Sub-

equips the road; and slender indeed would his security be which extends not beyond the worn-out rails and rolling stock and equipment first in use, and these, indeed, not often in being at the time of the execution of the mortgage. In giving the power to borrow and pledge, it must be supposed the power was given to its fullest extent in order to carry into effect the objects of the incorporation."

1. *Ludlow v. Hurd*, 1 Disney (Ohio) 552.

2. *Dinsmore v. Racine etc. R. Co.*, 12 Wis. 649; *Farmers' L. & T. Co. v. Bank*, 11 Wis. 207; *Pierce v. Emery*, 32 N. H. 484.

3. *In re Panama etc. Mail Co.*, L. R., 5 Ch. 318; *Seymour v. Canada etc. R. Co.*, 25 Barb. (N.Y.) 284; *Elwell v. Grand St. etc. R. Co.*, 67 Barb. (N.Y.) 83; *Meyer v. Johnston*, 53 Ala. 237; *Shaw v. Bill*, 95 U. S. 10; *Walsh v. Barton*, 24 Ohio St. 28; *Farmers' L. & T. Co. v. Cary*, 13 Wis. 110; *Farmers' L. & T. Co. v. Bank*, 15 Wis. 424; *Brainard v. Peck*, 34 Vt. 496; *Campbell v. Texas etc. R. Co.*, 2 Wood (U. S.) 263; *Barnard v. Norwich etc. R. Co.*, 14 Niles' Bankr. Reg. 469; *Farmers' L. & T. Co. v. Fisher*, 17 Wis. 114; *Williamson v. New Jersey etc. R. Co.*, 26 N. J. Eq. 398; *Weetgen v. St. Paul etc. R. Co.*, 4 Hun (N.Y.) 529; *Bath v. Miller*, 53 Me. 308.

After acquired land not within the terms of the mortgage is not covered by it. *Dinsmore v. Racine etc. R. Co.*, 12 Wis. 649.

A mortgage executed by a railroad company on the "road" of the company, "whether made, or to be made, acquired or to be acquired, and all property, real or personal" "of the company, whether now owned or here-

after to be acquired, used or appropriated for the operating, or maintaining the said road" is not a lien upon the real estate of the company then owned, or afterwards acquired, which has not been used or appropriated for operating or maintaining the road. *Walsh v. Barton*, 24 Ohio St. 28.

And where the mortgage contains a provision, covering after acquired property, acquired by the company, and used or employed for the purposes of the road, lands acquired by the company, and not thus used do not come within the description of such a mortgage. *Seymour v. Canandaigua etc. R. Co.*, 25 Barb. (N.Y.) 284.

Leasehold Interests.—Where the mortgagors enumerate in the mortgage as objects of conveyance "all their lands, tracks, rails, bridges, depots, stations, leases, etc., and all the like estate that may be hereafter acquired, or constructed or belong to, or be controlled by the corporation," it is held to include a lease afterwards taken of another road. *Barnard v. Norwich etc. R. Co.*, 2 Low. (U. S.) 608; but where a lease executed by a mortgagor subsequent to the mortgage, and there is no privity, of estate, or contract thereby created between the mortgagee and lessee, and there is no attornment by lessee to mortgagee, the mortgagee cannot either after or before the mortgagor's default, demand the benefits without the consent of the lessee. *Moran v. Pittsburg etc. R. Co.*, 36 Fed. Rep. 878.

Contracts.—A mortgage of the railroad with its superstructure, track, etc., and all the title of the company to the land on which the road was or might be constructed with all the rights of way then acquired, or thereafter to be

sequently acquired personalty will, however, pass under the general terms of a railway mortgage without special mention, if the terms of the mortgage be broad and comprehensive enough to cover it.¹ The doctrine that where a railroad company mortgaged its entire road and all its franchises, any after acquired personal property will pass to the mortgagee, as an incident to the franchise of acquiring property, cannot, however, be applied to a case where several mortgages are given on separate divisions of

acquired, and all depots, etc., and the parcels of land on which they were, or should be erected, attaches to a piece of land purchased for the use of the company for depot grounds, and taken possession of by the company, and used for such purposes. *Farmers' L. & T. Co. v. Fisher*, 17 Wis. 114; *Hamlin v. European etc. R. Co.*, 72 Me. 83. So a railroad mortgage, conveying the road franchises and endowments does not cover or convey a contract with the United States for carrying the mail. *St. Paul etc. R. Co. v. U. S.*, 112 U. S. 733.

Iron Rails.—Where a mortgage provides that all property subsequently acquired by the company, shall become a part of the property covered thereby, iron rails subsequently acquired by the company are embraced in the mortgage, although still in the hands of its agents at a distant port, and the holders of the bonds secured by such mortgage may restrain by injunction, the fraudulent diversion of them. *Weetjen v. St. Paul etc. R. Co.*, 4 Hun (N. Y.) 529.

Fuel.—Where a railroad company is authorized by the special act of the legislature to extend its road, and to make a mortgage of its property, then owned by the new and old portion of the road, and all the property of the said extension, subsequently to be acquired, and the mortgage is accordingly executed, wood afterwards purchased with the earnings of the whole road will not pass by such a mortgage, and it is attachable. *Bath v. Miller*, 53 Me. 308.

Stock.—A mortgage of the real and personal property of a railroad, then held or to be acquired, covers railroad stock of another railroad company, subsequently purchased by the mortgagors. And under such a mortgage, it was held not necessary to the validity of the stock that it should have been filed, because the capital stock of the corporation is not goods and chattels,

within the meaning of the act concerning chattel mortgages. *Williamson v. New Jersey etc. R. Co.*, 26 N. J. Eq. 398.

1. *State v. Northern Cent. R. Co.*, 18 Md. 193; *Pullan v. Cincinnati etc. R. Co.*, 4 Biss. (U. S.) 35; *Miller v. Rutland etc. R. Co.*, 36 Vt. 452; *Morrill v. Noyes*, 56 Me. 458; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431.

In *Hamlin v. Jerrard*, 72 Me. 62; 4 Am. & Eng. R. Cas. 488, *Simons, J.*, said: "We regard it as settled by the weight of authority that any property connected with the use of the franchise of a railroad corporation for the purposes intended by its charter, to be subsequently acquired, may be effectually mortgaged. The validity of such a lien upon after acquired property is distinctly held by this court in *Morrill v. Noyes*, 56 Me. 458, 471, at least against a later mortgage given after the property was in existence and in the possession of the company; and the language of the court is quite as applicable to the case of a subsequent attaching creditor. That a mortgage of a railroad and the franchises of the company with all the rolling stock then owned and to be afterwards acquired and placed upon the road, will create a valid lien upon cars and engines subsequently purchased, there would seem to be no longer any doubt.

"It may therefore be regarded as judicially settled, with little or no divergence of opinion, that in equity a mortgage of a railroad will be held to apply to after acquired rolling stock, and other personal property, if the terms of the mortgage cover such future acquisitions; with the qualification, however, that the mortgage will attach to such property subject to the liens existing upon it when it comes into the hands of the mortgagor." See *Myer v. Johnston*, 64 Ala. 603; 8 Am. & Eng. R. Cas. 584.

After Acquired Personal Property Not Embraced Within the Terms of the

the road.¹ Where the legislature authorizes a railroad corporation to borrow such sums of money as may be necessary for completing its road, and to mortgage corporate property and franchises to secure the payment of debts contracted by the company for that purpose, lands acquired subsequently for a new location will be embraced in such mortgage, whether or not the right of way was all acquired at the time the mortgage was recorded, or whether the road had or had not at that time been entirely located.² To free the road *pro tanto* from the lien, because a deviation is made in the route laid down, would not only violate the terms of the mortgage, but would tend to weaken such security, and to discourage the construction of necessary public works, which the policy of the law seeks to promote.³

b. RELATIVE PRIORITY OF LIENS AND MORTGAGES ON AFTER ACQUIRED PROPERTY.—If the after acquired property comes into the mortgagor's hands subject to other liens, a mortgage intended to cover such property does not displace the other liens, though they may be junior in point of time. A mortgage by a railroad company covering all after acquired property only attaches to such interests as the mortgagor acquires.⁴ If the company give a mortgage for the purchase money at the time of the purchase, such mortgage whether registered or not has precedence

Mortgage.—A mortgage granted the "railroad with its superstructure, track, and all other appurtenances, made or to be made; also railroad furniture, including engines, tenders, cars of every description, tools, materials, machinery and every kind of personal property, which shall be used for operating said railroad." *Held*, that these provisions of the mortgage did not pass property thereafter to be acquired by the company, except so far as it should be appurtenant to, or be used in operating the road. And that certain railroad chairs, afterwards acquired by the company, but never used in the construction of the road, were not appurtenant to it, nor used in operating it; therefore, the mortgagee had no title, although after such chairs were acquired, the company surrendered possession of the road, and the mortgaged property to the mortgagee. *Farmers' L. & T. Co. v. Commercial Bank*, 11 Wis. 207; *aff'd* by *Dinsmore v. Racine* etc. R. Co., 12 Wis. 649; *Farmers' L. & T. Co. v. Carey*, 3 Wis. 110; *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 424. So, where the first mortgage of a railroad, and its appurtenances, in the description of a portion of the property conveyed, contain the following words: "And all other personal prop-

erty belonging to said company, as the same now in use by said company, or as the same may be hereafter changed or renewed by said company," it was held that these words did not embrace certain machinery for "burnetizing" ties and timber so as to render them more durable, which machinery was not in existence at the time of the mortgage, and took the place of nothing that was therein specified, but was constructed by the railroad company, as a new experiment, after the execution of the mortgage. *Brainerd v. Peck*, 34 Vt. 496.

1. *Farmers' L. & T. Co. v. Commercial Bank*, 11 Wis. 207.

2. *Seymour v. Canandaigua* etc. R. Co., 25 Barb. (N. Y.) 284.

3. *Elwell v. Grand* etc. R. Co., 67 Barb. (N. Y.) 83.

4. *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 254; *U. S. v. New Orleans R. Co.*, 12 Wall. (U. S.) 362; *Boston Safe Deposit* etc. Co. v. *Bankers' etc. Tel. Co.*, 36 Fed. Rep. 288; *Willink v. Morris Canal* etc. Co., 4 N. J. Eq. 377; *Branch v. Jesup*, 106 U. S. 468; *Myer v. Car Co.*, 102 U. S. 1; *Fosdick v. Schall*, 99 U. S. 235; *Western Union Tel. Co. v. Burlington* etc. R. Co., 3 McCrary (U. S.) 130; *Williamson v. New Jersey* etc. R. Co., 28 N. J.

of the general mortgage.¹ This rule is applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens and to real estate not used for railroad purposes.² But it fails, however, when the property purchased is annexed to a subject already covered by the general mortgage and becomes a part thereof, as when iron rails are laid down and become part of the railroad.³ Rails and other articles, which become affixed to, and part of a railroad covered by a prior mortgage, will be held by the lien of such mortgage, in favor of *bona fide* creditors, as against any contract between the vendors of the property and the railroad company, containing stipulations that the articles furnished should remain the property of the vendors until the contract price for them should be fully paid.⁴

Eq. 277; 29 N. J. Eq. 311; Haven v. Emery, 33 N. H. 66.

1. New Orleans etc. R. Co. v. Mellen, 12 Wall. (U. S.) 362.

2. Western Union Tel. Co. v. Burlington etc. R. Co., 3 McCrary (U. S.) 130; 11 Fed. Rep. 1; Frank v. Denver etc. R. Co., 23 Fed. Rep. 123; Central Trust Co. v. Ohio C. R. Co., 36 Fed. Rep. 520.

3. Porter v. Pittsburg Bessemer Steel Co., 120 U. S. 649; 122 U. S. 267; 30 Am. & Eng. R. Cas. 472, 495; New Orleans etc. R. Co. v. Mellen, 12 Wall. (U. S.) 362.

4. In New Orleans etc. R. Co. v. Mellen, 12 Wall. (U. S.) 362, the court, in their opinion, imply that the only exception to the general rule is where the property sought to be covered by the mortgage consists of rails or other material which can become affixed to and a part of the principal thing. They say: "A mortgage intended to cover after acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens the general mortgage does not displace them, although they may be junior to it in point of time. It only attaches to such interests as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not

come within the reason of the registry laws. These laws are intended for the protection of the subsequent, not prior, purchasers and creditors. Had the property sold by the government to the railroad company been rails, as in the case of Galveston etc. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, or any other material which became affixed to and a part of the principal thing, the result would have been different. But being loose property, susceptible of separate ownership and separate liens, such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company, and paramount thereto."

The general rule was recognized as applying to cars in Fosdick v. Schall, 9 Otto (U. S.) 235. It was there held that where one sold and delivered cars to a railroad company under an agreement that they were to remain his property until paid for, a prior mortgage given by the company upon all the property which it then owned or possessed, or might afterwards acquire, did not attach as lien upon the cars, but they remained the property of the vendor until paid for, and he might reclaim them on default of payment.

See generally Mississippi etc. R. Co. v. Chicago etc. R. Co., 59 Miss. 896; 2 Am. & Eng. R. Cas. 414; Hamlin v. European etc. R. Co. and note, 72 Me. 83; 4 Am. & Eng. R. Cas. 503; Hamlin v. Gerrard, 72 Me. 62; 4 Am. & Eng. R. Cas. 488; Little Rock etc. R. Co. v. Page, 35 Ark. 304; 7 Am. & Eng. R. Cas. 36; Meyer v. Johnson, 64 Ala. 603; 8 Am. & Eng. R. Cas. 514; Branch v. Jesup, 106 U. S. 468; 9 Am. & Eng. R. Cas. 558; Boston etc. R. Co. v. Coffin and note, 50 Conn. 150;

A mortgage covering after acquired property does not take a first lien on land conveyed to a railroad company, but is subject to the vendor's lien for unpaid purchase-money, and of such land, the mortgagee is not a purchaser for value.¹ So where land is taken for a right of way, and is afterwards transferred by mortgage, it passes subject to the paramount constitutional right of the owner of the legal estate in the land, and if compensation has not been made for damages for the taking of such property, the landowner has a lien on the property, which takes precedence of the mortgage.²

6. Rolling Stock.—A mortgage by a railroad company of "all the present and future acquired property of the company, including the right of way, and land occupied, and all rails and other materials used therein, or procured therefor," includes the rolling stock of the road.³ So a mortgage of the entire line of a railroad, with all the tolls and revenue thereof, covers not only the line of the road, but all the rolling stock and fixtures, whether movable or immovable, essential to the production of tolls and revenue.⁴ And a mortgage thus executed, on all the present and subsequently acquired property of a railroad, has priority of a

12 Am. & Eng. R. Cas. 375; *Mase v. Nichols*, 94 N. Y. 160; 17 Am. & Eng. R. Cas. 230.

Galveston etc. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, was a case where the seller of iron to a railroad was held to acquire no lien prior to an existing mortgage. The decision in this case was based upon the absence of a State lien law. The court said: "By the common law it is an inflexible rule that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the question here. The rails put down on the company's road become a part of the road. The road itself was included in the mortgage of the complainants. Pulsford, by allowing his property to go into or become a part of the road, consented to its being covered by the mortgages in question. He acquired no lien which can displace them. In certain States a lien is created by statute in favor of mechanics, called the mechanics' lien, by which a person furnishing materials for work on a building acquires a lien on the property to secure the payment of his claim. But this kind of lien did not exist in Texas in favor of those who supplied materials or money for constructing railroads. We have no hesitation in saying that Pulsford's claim to priority cannot be maintained."

Telegraph Wires.—Telegraph wires strung and connected with an existing system of telegraph lines do not lose their character as personalty, and become a part of the railroad, if it was the intention and the contract of the two companies, at the time they were affixed to the poles that they should retain their original character. With respect to this class of property, the parties in interest may agree that it shall remain personalty, subject to be removed; and such an agreement determines the real character, as against an existing mortgage. *Western Union Tel. Co. v. Burlington etc. R. Co.*, 3 McCrary (U. S.) 130; *Boston Safe Deposit & T. Co. v. Bankers' etc. Tel. Co.*, 36 Fed. Rep. 388.

1. *Loomis v. Davenport etc. R. Co.*, 17 Fed. Rep. 301.

2. *Buffalo etc. R. Co. v. Harvey*, 107 Pa. St. 319; 26 Am. & Eng. R. Cas. 642.

3. *Pullan v. Cincinnati etc. R. Co.*, 4 Biss. (U. S.) 35.

4. *State v. Northern Cent. R. Co.*, 18 Md. 193; *Ceymer v. Johnson*, 53 Ala. 237; 64 Ala. 603; compare *Miller v. Rutland etc. R. Co.*, 36 Vt. 452.

A mortgage of a railroad company purported to convey "all the present and future to be acquired property, together with the superstructure and tracks thereon, rails and other materials used therein, engines, tenders, cars, etc. Held to include rolling stock. Phil-

mortgage on after acquired rolling stock.¹ And such a mortgage lien is not lost by withdrawing the property from present uses upon the road, for the purpose of changing it to meet a contemplated narrow gauge.²

a. **CONDITIONAL SALES.**—Purchases of rolling stock are generally made on conditional sales. In nearly all the States, statutes have been enacted, providing in substance that contracts for the sale or lease of rolling stock with a reservation of title to the vendor, until full payment of the purchase price is made, shall not be valid as against judgment creditors of the vendee or purchasers, without notice, unless the contracts be in writing, and publicly acknowledged and recorded.³ In order to determine the real character of a contract, the courts always look to the purpose to be attained by it, rather than the name given to it by the parties. If it is the manifest intention of the parties by the agreement, that the ownership of the property transferred pass at once to the railroad company, such a transaction will not be changed by assuming the form of a lease, when it is, in effect, a mortgage.⁴ And the validity of such contracts is generally determined by the *lex rei sitæ*, rather than that of the jurisdiction

lipps v. Winslow, 18 B. Mon. (Ky.) 431.

1. *Coe v. Pennock*, 6 Am. L. Reg. 27; *Pennock v. Coe*, 23 How. (U. S.) 117. Bonds were issued by a railroad company for the purpose of completing and equipping their road, and were secured by a mortgage in trust of their road and franchise, together with all "cars, engines, and furniture that have been or may be purchased by such company." The company afterwards purchased an engine, and certain cars which they subsequently mortgaged to the plaintiffs, and upon failure to execute the trust, a bill in equity was commenced by the holders of the bond against the company and assignees of the former mortgage, and the defendant was appointed a receiver by consent, who took all the property of the railroad from possession of the company, to hold the same under the direction of the court *pendente lite*. The plaintiff thereupon demanded the engine and cars of the receiver, and upon his refusal to deliver the property, they commenced an action of trover, and obtained leave of court to prosecute it. *Held*, that under the former mortgage, a lien was created upon the rolling stock to be subsequently acquired, which attached as soon as it was afterwards purchased, and placed upon the railroad by the company, and the

plaintiffs acquired no title under their mortgage, which they could maintain against those holding under the former mortgage. *Morrill v. Noyes*, 56 Me. 458.

2. *Hamlin v. Girard*, 72 Me. 62.

3. Ala. Code 1886, §§ 1821, 1822, Colo. Laws 1885, p. 302; Dak. Laws 1883, ch. 93; Del. Laws 1883, ch. 146; Ill. Annot. Stats. 1885, ch. 114, § 84; Ind. Acts 1889, ch. 176; Md. Pub. Gen. Laws 1889, art. 21, § 84; Laws 1882, p. 317; Minn. Laws 1885, ch. 210; 2 G. S. (Supp.) 1888, ch. 34; §§ 91 d-91 H; Mont. Comp. Stat. 1887, ch. 36; §§ 709, 710, 711; N. J., R. S. Supp. 1887-1886, p. 846; N. Mex. Comp. Laws 1884, § 2739; N. Y., 4 R. S. 1889, p. 2521; N. Car. 1 Code 1883, § 2006; Laws 1883, ch. 416; Ohio R. S. 1884, p. 170; Act of March 16, 1882; Oregon, 2 Annot. Laws 1887, §§ 4042, 4043; Pa., 2 Brightly's Purdon's Dig. 1883, p. 1422, § 42; Tenn. Acts 1885, ch. 96; Va. Code 1887, § 2462; Wash. Laws, 1883, p. 62; Wis. Laws 1883, ch. 274.

4. *Frank v. Denver etc. R. Co.*, 23 Fed. Rep. 123; *Heryford v. Davis*, 102 U. S. 235; *Central Trust Co. v. Ohio etc. R. Co.*, 36 Fed. Rep. 520; *Fidelity Ins. etc. Co. v. Shenandoah Valley R. Co.*, 86 Va. 1; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664.

A contract, whereby cars and locomotive are leased to a railroad com-

where the owner lives. If the sale was valid where the property was situated at the time of the transaction, it is valid as against an attachment made in another State, although the mortgage was not valid or recorded, or although the sale was not made as required by the laws of the State where the attachment was made.¹ In the absence of proof to the contrary it is to be assumed that such personal property was, at the time of the execution of the mortgage, in the State where the corporation was organized, and where the mortgage was executed.²

b. ROLLING STOCK REGARDED AS FIXTURES.—The question as to whether rolling stock is to be regarded as a fixture or personal property has been variously decided. Many decisions hold that rolling stock, such as cars, tenders and locomotives are accessory to the real estate, and pass by mortgage as a fixture or necessary incident,³ and are not subject to levy or sale on execution.⁴ Others hold that rolling stock is personal property,⁵ and, as such, subject to levy and sale on execution, unless it has passed into the possession of the mortgagee. Rolling stock is declared a

pany, that agrees to pay for every car and locomotive so delivered, an annual rent, equivalent to one-sixth of the original cost thereof, for the period of ten years, at the end of which the cars and locomotives are to become the property of the railroad company, with a proviso that upon default in payment of the annual rent, or failure to observe any of the covenants of the lease, the rights of the railroad company shall be determined, and the property reclaimed by the lessors, is a mortgage, and not a lease. *Frank v. Denver etc. R. Co.*, 23 Fed. Rep. 123.

1. *Jones on Corp. Bonds and Mort.*, § 135; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Green v. Van Buskirk*, 5 Wall. (U. S.) 307; *U. S. Trust Co. v. Wabash W. Ry. Co.*, 38 Fed. Rep. 891; *Rogers Locomotive Works v. Lewis*, 4 Dill. (U. S.) 158; *Hart v. Barney etc. Mfg. Co.*, 7 Fed. Rep. 543, 550; *Jones on Chattel Mort.*, § 305; *Homans v. Newton*, 4 Fed. Rep. 880, 885; *Bank v. McLeod*, 38 Ohio St. 174; *Nichols v. Mase*, 94 N. Y. 160.

2. *Jones on Corp. Mort.*, § 135; *Nichols v. Mase*, 94 N. Y. 160.

3. *Gue v. Tide Water Canal Company*, 24 How. (U. S.) 257; *Scott v. Clinton etc. R. Co.*, 6 Biss. (U. S.) 529; *Milwaukee etc. R. Co. v. James*, 6 Wall. (U. S.) 750; *Farmers' L. & T. Co. v. St. Joseph etc. R. Co.*, 3 Dill. (U. S.) 412; *Pennock v. Coe*, 23 How. (U. S.) 117; *Youngman v. Elmira etc. R. Co.*, 65 Pa. St. 278; *Elizabethtown etc. R.*

Co. v. Elizabeth, 12 Bush (Ky.) 233; *Buck v. Memphis etc. R. Co.*, 4 Cent. L. J. 430; *Titus v. Mabree*, 25 Ill. 257; *Palmer v. Forbes*, 23 Ill. 311; *Hunt v. Bullock*, 23 Ill. 320. Compare *Sangamon etc. R. Co. v. Morgan Co.*, 14 Ill. 163.

4. *Youngman v. Elmira etc. R. Co.*, 65 Pa. St. 278; *Gue v. Tide Water Canal Company*, 24 How. (U. S.) 251; *Coney v. Pittsburgh etc. R. Co.*, 8 Phila. (Pa.) 173; *Shamokin Valley R. Co. v. Livermore*, 147 Pa. St. 465; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; *Macon etc. R. Co. v. Parker*, 9 Ga. 337.

5. *Neilson v. Iowa Eastern R. Co.*, 51 Iowa 184; *Boston etc. R. Co. v. Gilmore*, 37 N. H. 410; *Williamson v. New Jersey etc. R. Co.*, 29 N. J. Eq. 311; *Randall v. Elwell*, 52 N. Y. 521; *Hoyle v. Plattsburg*, 54 N. Y. 324; *Coe v. Columbus etc. R. Co.*, 10 Ohio St. 372; *Chicago etc. R. Co. v. Fort Howard*, 21 Wis. 44; *Stephens v. Buffalo etc. R. Co.*, 21 Barb. (N. Y.) 590. See RAILROADS.

The provision in the *Illinois* constitution of 1870, that the rolling stock of a railroad company shall be deemed personal, does not change the rule that the mortgage made by the company covering all after acquired property includes all such after acquired stock, if obtained before the rights of execution creditors attach. *Scott v. Clinton etc. R. Co.*, 6 Biss. (U. S.) 529. See *Union Trust Co. v. Morrison*, 105 U. S. 591.

fixture by statute in *Dakota, Florida, Iowa, Minnesota, Utah Territory, Vermont*, while in *Illinois, Missouri, Kansas, Nebraska, Texas*, and *West Virginia* the constitution expressly provides that it shall be regarded as personal property. When a mortgage of a railroad covers personal property in connection with the corporate real estate and franchises, statutes in regard to acknowledging and recording chattel mortgages do not ordinarily apply. Thus a mortgage by a railroad corporation embracing all its real and personal property, with its franchises, made in pursuance of express authority in its charter and recorded in each county through which the road passes, will create a valid and binding lien on its personal as well as its real property, notwithstanding it has not been acknowledged in accordance with the requirements of the chattel mortgage act.¹

IX. BONDS.—1. **Generally.**—Railroad bonds are ordinarily the forms of the obligations secured by the mortgage. They are instruments under seal containing an acknowledgment of certain debts and an agreement to pay the same upon the terms stated. They are a kind of public funds put on the market and dealt in as such. Coupons or interest certificates for each installment of interest accruing during the time the bonds have to run are attached to them and form a part of the original bonds.² And to make it a lien upon the property, and to give it priority over other claimants, it must be secured by a mortgage or deed of trust, unless it is made a charge upon the property by statute or by agreement.³ The mortgage provides for the security of the particular bonds it describes, and the company puts the bonds out from time to time as occasion requires. When thus put upon the market they are treated as current until past due or actually retired. The security is considered a continuing one, and the bonds negotiable by the company so as to carry the mortgage security until they have become commercially dishonored, or something else has been done to deprive the company of its power of putting them out.⁴

2. **Power of Railroad Companies to Issue Bonds.**—Railroad companies have an implied right to issue negotiable bonds, although that power may not be expressly conferred by the terms of their charter.⁵ They have the power to make a bond for any purpose for which they may lawfully contract a debt, without any special

1. *Cooper v. Corbin*, 105 Ill. 224; *Pecoria etc. R. Co. v. Thompson*, 103 Ill. 187; *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77; *Farmers' L. & T. Co. v. St. Joseph etc. R. Co.*, 3 Dill. (U. S.) 412; *Titus v. Mabree*, 28 Ill. 257.

2. See COUPONS, vol. 4, p. 430.

3. *In re Atlantic etc. R. Co.*, 3 Hughes (U. S.) 320.

4. *Claffin v. South Carolina etc. R.*

Co., 8 Fed. Rep. 118; 4 Hughes (U. S.) 12; 4 Am. & Eng. R. Cas. 231.

5. *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Richards v. Merrimack etc. R. Co.*, 44 N. H. 127; *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414; *Wood v. Whelan*, 93 Ill. 153; *Alabama Gold L. Ins. Co. v. Central A. & M. Assoc.*, 54 Ala. 73; *Kelly v. Alabama etc. R. Co.*, 58 Ala.

authority to that effect, unless restrained by some restriction express or implied in their charter or some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of their powers, but was originally the usual and peculiarly appropriate form of corporate agreement.¹ This implied power extends so far as to authorize the issuing of bonds for, or on account of, work done for a railroad company.²

3. Formalities in Making and Issuing Bonds.—Certain formalities in the preparation and issue of railroad bonds are generally imposed upon the officers of the company. Securities issued not in the prescribed form are subject to defenses in consequence thereof in the hands of *bona fide* holders.³ Thus, where the statute requires such bonds to be certified across their face and to be registered, and declares that no bond shall be valid unless so registered, bonds issued without such registry and certificate are void.⁴ But where the bonds are issued within the scope of the power of the officers of the company, a purchaser has a right to assume that all such conditions and formalities have been complied with.⁵ Where, therefore, the bonds on their face import a compliance with the law under which they were issued, a

489; *Branch v. Atlantic etc. R. Co.*, 3 Wood (U. S.) 481. Compare *Bateman v. Mid. Wales R. Co.*, 1 C. P. 499.

1. *Com. v. Smith*, 10 Allen (Mass.)

455.

2. *Pusey v. New Jersey R. Co.*, 14 Abb. Pr., N. S. (N. Y.) 434.

3. *Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548; *Singer v. St. Louis etc. R. Co.*, 6 Mo. App. 427; *Webb v. Herne Bay, L. R.*, 5 Q. B. 642.

In general, where the charter of a corporation provides some specific method in which bonds must be issued by it or some necessary conditions precedent to such issue, the method must be strictly pursued and the conditions fully complied with, otherwise the bonds are deemed void. In *Chambers v. Manchester & Milford R. Co.*, 5 B. & S. 588, the facts were these: A corporation authorized by its charter to borrow money only when its capital was all subscribed and half paid in, issued certain bonds prior to that time which were sought to be enforced against the company. The bonds were, however, held by the court to be clearly void.

To a similar effect are *Com. v.*

Smith, 10 Allen (Mass.) 448; *Rockwell v. Elkhorn Bank*, 13 Wis. 653.

4. *Morrison v. Bernards*, 36 N. J. L. 219. See *Maas v. Missouri etc. R. Co.*, 83 N. Y. 223.

5. *In re Atheneum Soc.*, 4 K. & J. 549; *Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 546.

In *Royal British Bank v. Turquand*, 6 E. & B. 327, the directors of a joint stock company were authorized to borrow on bonds such sums as should from time to time be authorized by resolution of the company. A bond sealed with a common seal was given by the directors to a bank, without a resolution of the company authorizing it. In an action upon the bond, it was held that the company was liable, inasmuch as the obligee took it in full faith and belief that it was authorized by, and would be a binding security upon the company, and he had a right to presume that there had been a resolution at a general meeting authorizing the borrowing of money on bond. See also *Agar v. Atheneum Life Assoc. Co.*, 3 C. B. N. S. 725; *Colonial Bank v. Willan*, L. R., 5 P. C. 417; *London etc. R. Co. v. McMichael*, 5 Ex. 855; *Eastern Coun-*

purchaser is not bound to look further.¹ But if there is an entire absence of power to issue the bonds, as distinguished from a defective execution of a power, the recitals therein will afford no protection to the *bona fide* holders who are bound to take notice of the want of authority to issue the bonds.² Third parties dealing with the officers of a railroad company are bound to take notice of the extent of their power, but they have a right to assume in the absence of anything suggesting inquiry that they have proceeded regularly in the execution of that power.³

Where a statute or charter requires that the bonds of a corporation shall be issued only upon the vote of the stockholders at a general meeting, bonds issued in disregard of such formality and placed on sale in the community, are valid, because the company is estopped by waiver of such formality from contesting their legality.⁴ Bonds given in pursuance of void contracts made by the directors of a railroad company, with a construction company cannot be enforced, unless they are negotiable instruments in the hands of innocent holders for value. In a suit to foreclose a mortgage given to secure such bonds, relief may be had as on *quantum meruit* for the work actually done and accepted without regard to the price fixed by the contract.⁵ But the bonds of a railroad company are not rendered void in consequence of being secured by a mortgage which the company may have had no authority to execute.⁶

4. Negotiability of Railroad Bonds.—Although in the phraseology of the law, the term bond usually denotes a specialty, yet it does not necessarily imply a contract under seal. The term is used in various significations in popular language, as importing the substantive action expressed by the verb to bind, and it may imply nothing more than a binding contract.⁷ Railroad bonds are made payable to the trustee named in the mortgage, or the bearer, and pass by delivery from hand to hand with all the ordinary properties of negotiable instruments.⁸ This

ties *R. Co. v. Hawkes*, 5 H. L. 331; *Freeman v. Cooke*, 2 Ex. 654; *Pickard v. Sears*, 6 A. & E. 469; *Lowe v. London etc. R. Co.*, 18 P. B. 632.

1. *Mercer Co. v. Hackett*, 1 Wall. (U. S.) 93; *Miller v. Berlin*, 13 Blatchf. (U. S.) 245; *Clay Co. v. Society for Savings*, 194 U. S. 579; *Hackett v. Ottawa*, 99 U. S. 86; *Warren Co. v. Marcy*, 97 U. S. 96; *Sherman Co. v. Simons*, 109 U. S. 735. Compare *Cagwin v. Hancock*, 84 N. Y. 532.

2. *Lippincott v. Pana*, 92 Ill. 24; *Williams v. Roberts*, 88 Ill. 11; *St. Joseph Township v. Rogers*, 16 Wall. (U. S.) 644; *Sykes v. Columbus*, 55 Miss. 115; *Williams v. Keokuk*, 44 Iowa 88; *Thompson v. Perrine*, 193 U. S. 806.

3. *Connecticut Mut. L. Ins. Co. v.*

Cleveland etc. R. Co., 41 Barb. (N. Y.) 9.

4. *Zabriskie v. Cleveland etc. R. Co.*, 23 How. (U. S.) 381.

5. *Thomas v. Brownville etc. R. Co.*, 109 U. S. 522; *Wardell v. Union etc. R. Co.*, 4 Dill (U. S.) 339; 103 U. S. 651.

6. *Philadelphia etc. R. Co. v. Lewis*, 33 Pa. St. 22.

7. *Ide v. Passumpsic etc. R. Co.*, 32 Vt. 297.

8. *White v. Vermont etc. R. Co.*, 21 How. (U. S.) 575; *Clark v. Iowa City*, 20 Wall. (U. S.) 583; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Aurora City v. West*, 7 Wall. (U. S.) 82; *Haven v. Grand Junction R. etc. Co.*, 109 Mass. 88; *Connecticut Mut. L. Ins. Co. v.*

principle holds, though the bonds contain a clause rendering them convertible into stock.¹

A purchaser of negotiable railroad bonds before maturity for value in good faith and without any actual notice of defect in title may enforce the same against the company.² Thus a sale of bonds by a railroad company under a power given by a constitution that "no railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received, and applied to the purposes for which such corporation was created;" and the proceeds are subsequently diverted to other than corporate purposes, the purchaser of such bonds, who has acted in good faith in the matter, cannot be affected by the subsequent misappropriation by the company.³ And it is not incumbent on the owner of bonds payable to bearer, and intended

Cleveland etc. R. Co., 41 Barb. (N. Y.) 9; Reed v. Mobile Bank, 70 Ala. 199; Lehman v. Tallassee Mfg. Co., 64 Ala. 467; Blackman v. Lehman, 63 Ala. 547; Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548; Morris Canal etc. Co. v. Fisher, 9 N. J. Ch. 667, 699; Carr v. LeFevre, 27 Pa. St. 413, 418; Chapin v. Vermont etc. R. Co., 8 Gray (Mass.) 575; Langston v. South Carolina R. Co., 2 S. Car. 248; *Ex parte* Williams, 18 S. Car. 299; Mercer Co. v. Hackett, 1 Wall. (U. S.) 83, 95; Bonner v. New Orleans, 2 Wood (U. S.) 135; Zabriskie v. Cleveland etc. R. Co., 23 How. (U. S.) 381, 400; Knox Co. v. Aspinwall, 21 How. (U. S.) 539; Hubbard v. New York etc. R. Co., 36 Barb. (N. Y.) 286; Beaver v. Armstrong, 44 Pa. St. 63, 68; Craig v. Vicksburg, 31 Miss. 216; Rice v. Southern Pa. Iron etc. R. Co., 9 Phila. (Pa.) 294; Blake v. Livingston Co., 61 Barb. (N. Y.) 149; Brainerd v. New York etc. R. Co., 25 N. Y. 496; Welch v. Sage, 47 N. Y. 143; Dinsmore v. Duncan, 57 N. Y. 573; Hodges v. Shuler, 22 N. Y. 114; Wicks v. Adirondack Co., 2 Hun (N. Y.) 112; Virginia v. Chesapeake etc. Canal Co., 32 Md. 501; Elizabeth v. Force, 29 N. J. Eq. 587.

"Such bonds," says Chief Justice Lewis, in Carr v. LeFevre, 27 Pa. St. 413, "are not strictly negotiable under the law merchant as are promissory notes or bills of exchange. They are, however, instruments of peculiar character, and being expressly designed to pass from hand to hand, and by common usage actually transferred are capable of passing by delivery so as to enable the holder to maintain an action upon them in his own name."

And in Junction R. Co. v. Cleneay,

13 Ind. 162, it is held that bonds of a railroad company are not exactly governed by the law merchant, but pass by delivery like bank notes, and they are entitled to all the privileges of commercial paper.

1. Hotchkiss v. National Banks, 21 Wall. (U. S.) 354.

2. Madison etc. R. Co. v. Norwich Sav. Soc., 24 Ind. 247; New Orleans etc. R. Co. v. Mississippi College, 47 Miss. 560; Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 459; Gilbough v. Norfolk etc. R. Co., 1 Hughes (U. S.) 410; Bronson v. La Crosse etc. R. Co., 2 Wall. (U. S.) 283; McElrath v. Pittsburgh etc. R. Co., 55 Pa. St. 189; Philadelphia etc. R. Co. v. Lewis, 33 Pa. St. 33; Nelson v. Iowa Eastern R. Co., 21 Iowa 184; 33 Am. Rep. 124; Railway Co. v. Sprague, 103 U. S. 756; Seybel v. National Currency Bank, 54 N. Y. 288; Dutchess Co. Mut. Ins. Co. v. Hachfield, 1 Hun (N. Y.) 675; 47 How. Pr. (N. Y.) 330; Belo v. Forsythe Co., 76 N. Car. 489; Grand Rapids etc. R. Co. v. Sanders, 17 Hun (N. Y.) 552.

If the bond is not signed in compliance with a special requirement, it does not seem to effect the right of one who has purchased in good faith, without knowledge of the informality. Prince of Wales L. Assur. Co. v. Harding, E. B. & E. 183; *In re* Land Credit Co. of Ireland, L. R., 4 Ch. 460; Hill v. Manchester & S. W. Works Co., 5 B. & Ad. 886; Allen v. Sea F. & L. Assur. Co., 9 C. B. 574; Bargate v. Shortridge, 5 H. L. 297; *In re* Norwich Yarn Co., 22 Beav. 143; Atwood v. Shenandoah Valley R. Co., 85 Va. 966.

3. Peoria etc. R. Co. v. Thompson, 103 Ill. 187.

to be circulated from hand to hand, in seeking to recover upon them, to account how he, or any freeholder obtained them. They will be presumed to be the rightful holders, until the contrary is shown.¹ But if fraud or illegality in the inception of negotiable paper be shown, an indorsee, before he can recover, must prove that he is a holder for value. The mere possession of paper under such circumstances is not enough.²

A purchaser of railroad bonds in good faith and for their market value may be a *bona fide* holder, although some of the interest coupons attached thereto are past due and unpaid at the time of purchase.³ But where it appears that the interest on the bond is overdue and unpaid this is held in some cases to be a circumstance of suspicion, sufficient to put the purchaser on his guard.⁴ The better doctrine, however, seems to be that suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. Only bad faith on the part of the purchaser of bonds can destroy their validity, and the burden of proof lies upon the person who assails the right claimed by the party in possession.⁵ Bad faith on the part of the seller makes him liable

1. Chicago etc. R. Land Co. v. Peck, 112 Ill. 408.

2. Simmons v. Taylor, 38 Fed. Rep. 636. See Smith v. Sac Co., 11 Wall. (U. S.) 139; Stewart v. Lansing, 104 U. S. 505.

3. McClain v. Placerville etc. R. Co., 66 Cal. 606; Morton v. New Orleans etc. R. Co., 79 Ala. 590; State v. Cobb, 64 Ala. 127; Boss v. Hewitt, 15 Wis. 260; Morgan v. U. S., 113 U. S. 476; Thompson v. Perrine, 106 U. S. 589; Indiana etc. R. Co. v. Sprague, 103 U. S. 756; National Bank v. Curley, 108 Mass. 497; Cromwell v. Sac Co., 96 U. S. 51.

The presence of two past-due coupons upon an unmatured bond is not notice to a transferee of the dishonor thereof. Indiana etc. R. Co. v. Sprague, 103 U. S. 756; 2 Am. & Eng. R. Cas. 532.

4. First Nat. Bank of St. Paul v. Scott Co., 14 Minn. 77; Parsons v. Jackson, 99 U. S. 434; Morton v. New Orleans etc. R. Co., 79 Ala. 590.

5. Murray v. Lardner, 2 Wall. (U. S.) 110; Philadelphia etc. R. Co. v. Lewis, 33 Pa. St. 33; Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 459; Spence v. Mobile etc. R. Co., 79 Ala. 576.

Upon the presentation of a negotiable

bond, the presumption of law is that the person presenting is a *bona fide* holder, and until evidence is introduced tending to negative that presumption, he is under no obligation of proving himself a *bona fide* holder. Kennicott v. Wayne Co., 6 Biss. (U. S.) 128; North Carolina R. Co. v. Brew, 3 Wood (U. S.) 692; Wicks v. Adirondack Co., 2 Hun (N. Y.) 112.

Where the petition avers the fact that the plaintiff is a *bona fide* holder, and it is denied by the answer, he has a right to prove by direct affirmative proof that he is a *bona fide* holder. Macon v. Shores, 97 U. S. 272; Reed v. Bank of Mobile, 70 Ala. 199.

Stolen Bonds.—Purchasers of negotiable bonds before maturity, in the usual course of business, and in good faith, acquire a good title thereto, although they have been stolen; and in a suit by the purchasers on such bonds the burden of proof that they did not acquire them in good faith is upon the defendant. Everton v. National Bank, 66 N. Y. 14; Spooner v. Holmes, 102 Mass. 503; Seybel v. National Currency Bank, 2 Daly (N. Y.) 382; California v. Wells, 15 Cal. 336; Consolidated Ass'n v. Numa Av. Egno, 38 La. Ann. 552; Carpenter v. Lomel, 5 Phila. (Pa.) 34; Gilbough v. Norfolk etc. R. Co., 1 Hughes (U. S.) 410.

ex delicto and *ex contractu*. There is an implied warranty on his part that they belong to him, and that they are not forgeries.¹

A *bona fide* purchaser of bonds for value before maturity takes them freed from all infirmities in their origin, and he can recover against the maker the full amount of them, although he may have paid less than their par value. He can recover the full amount of such bonds, unless personally chargeable with fraud in purchasing them,² and it is only by specific allegations, distinctly proving such fraud, that their title can be impaired.³ The fact that bonds were received from the treasurer of a railroad company in payment of goods is not of itself sufficient to bar the merchant from claiming as a *bona fide* holder, if the goods were of such character as would be of value to the company in the construction or operation of the road.⁴ After maturity a purchaser for value is not a *bona fide* purchaser to the extent of being protected in his purchase (unless he succeeds to the right of such a holder who became such before maturity), for the fact of non-payment discredits the instrument and deprives it of any immunity which, before maturity, was secured to it in favor of a *bona fide* purchaser for value, without actual notice of any defect either in the obligation or the title. So if the bonds are stolen and sold after maturity, the purchaser for value is not a *bona fide* purchaser to the extent of being protected in his purchase against the rightful owner, unless he has succeeded to the rights of the *bona fide* purchaser before maturity. The burden is upon the purchaser in such case to show that he is, or has succeeded to the rights of a *bona fide* purchaser before maturity. If they are stolen before maturity and bought after maturity in good faith, and after passing through the hands of several persons who are purchasers in good faith and for value, there is no presumption that the thief had negotiated the paper before it came overdue.⁵

The holder of the bonds is not liable to the company issuing them for damages sustained by reason of any failure to comply with the terms of the contract upon which they were issued.⁶ Where bonds refer to a mortgage, purchasers are bound by the statement contained in the mortgage.⁷ If the bonds refer to the

1. Otis v. Cullom, 92 U. S. 447.

2. Cromwell v. Sac Co., 96 U. S. 51.

3. Lehman v. Tallassee Mfg. Co., 64 Ala. 567; Morton v. New Orleans etc. R. Co., 79 Ala. 590; Wicks v. Adirondack Co., 2 Hun (N. Y.) 112; Bronson v. LaCrosse etc. R. Co., 2 Wall. (U. S.) 283.

4. Kennicott v. Wayne Co., 6 Biss. (U. S.) 138.

5. Northampton Nat. Bank v. Kinder, 106 N. Y. 221; Hinkly v. Merchants' Nat. Bank, 131 Mass. 147.

6. Thus, where a railroad company

enters into a contract for finishing their road in a specified time, and in accordance with its terms delivers their coupon bonds from time to time to the contractor as the road progresses, and the road is not finished within the specified time, the company are estopped from setting up a claim for damages for the delay of finishing, against holders of the bonds, who had received them *bona fide* from the contractor. McElrath v. Pittsburg etc. R. Co., 55 Pa. St. 189.

7. Ceylus v. New York etc. R. Co., 10 Hun (N. Y.) 295.

statute under authority of which they were issued or indorsed, every person taking directly from the company issuing them is put on inquiry, and is chargeable with notice of the requirement of the statute, and for the uses and purposes for which they could be legally issued and transferred.¹ So persons who purchase bonds of a railroad company while a statute is in force authorizing the consolidation of the railroad, must be held to have contemplated, at the time of the purchase of the bonds, that the railway issuing them might consolidate with other railroad companies.² But purchasers of bonds are not bound to inquire whether they in fact were executed by the company contemporaneously with the execution of the mortgage by which they were secured.³ It has been held to be a presumption of law that all bonds secured by mortgage were issued at the same time, and the fact that they were numbered consecutively gives no priority to any, and interferes in no manner with the equality of their holders on distribution.⁴

If the bonds contain special stipulations, and their payment is subject to contingencies, not within the control of their holders, they are, by established rules, deprived of the character of negotiable instruments, and become exposed to any defense existing thereto as between original parties to the instrument. It is essential that the bond should provide for the unconditional payment to a person or order, or the bearer of a certain sum of money, capable of exact ascertainment.⁵

Bonds issued in violation of restrictions imposed by the charter are not void, when in the hands of *bona fide* holders. Thus, when a charter imposes a restriction that the bonds cannot be sold at less than par value, and they are delivered to *bona fide* holders for value, the fact that they were negotiated at less than par value cannot be received to defeat recovery of the *bona fide* holder.⁶ But where bonds of a railroad corporation are put upon the market for sale for a small per cent. of the face value, by the trustee named therein, whose duty is to enforce payment, the

1. *Morton v. New Orleans etc. R. Co.*, 79 Ala. 590; *Hillman v. New Orleans etc. R. Co.*, 79 Ala. 566.

2. *Tysen v. Wabash R. Co.*, 11 Biss. (U. S.) 510.

3. *Nelson v. Iowa Eastern R. Co.*, 8 Am. Ry. Rep. 88; *Pennock v. Coe*, 23 How. (U. S.) 117; *Com. v. Susquehanna etc. R. Co.*, 122 Pa. St. 321.

4. *Nelson v. Iowa Eastern R. Co.*, 8 Am. Ry. Rep. 88. The court in this case by Day, J., said: "The bonds are payable to bearer, and are intended to be negotiated for the purpose of raising money to construct the road. If the purchaser of a bond in New York in Amsterdam or London, is bound to

inquire whether the bond in fact was executed by the company contemporaneously with the execution of the mortgage, or whether before the signing or the negotiating of the bonds, liens of laborers or material men may not have attached to the road, it is apparent that the value of these securities would be much depreciated, and all industries which depend upon the raising of means through negotiation would be paralyzed."

5. *Reed v. Bank of Mobile*, 70 Ala. 199; *Savannah etc. R. Co. v. Lancaster*, 62 Ala. 555.

6. *Ellsworth v. St. Louis etc. R. Co.*, 98 N. Y. 552; 33 Hun (N. Y.) 7.

purchaser is put upon inquiry in regard to the regularity or validity of their issue.¹ And where a railroad company issues illegal bonds, such bonds will be void in the hands of all persons acquiring them with notice of the facts showing the illegality of their delivery for unauthorized purposes.² So where a purchaser has notice that an authorized agent is disposing of bonds to him for an unauthorized purpose, he takes them at his peril.³ And bonds purchased with knowledge of an equitable lien thereon, remain subject to such lien in the hands of the purchaser.⁴ But a purchaser of a mortgage, and the bonds secured by it, with notice of a claim upon the property from one without such notice will be protected.⁵

Where bonds are pledged as collateral security, the pledgee becomes a legal holder of both the undue coupons attached and the bonds themselves, and he is entitled to be protected to the extent of his debt as fully as if he were the owner. He may ordinarily sue on such collaterals in his own name, and in the absence of any defense is entitled to recover for their full amount. From the sum thus recovered, he can rightfully deduct his debt, with interest and costs, and the surplus he holds as trustee for the pledgor. If the bonds thus pledged are without consideration, or are subject to prior equities, or have been fraudulently misappropriated, the pledgee, if a *bona fide* holder for value before maturity, may, nevertheless, prove or sue for the entire amount of the collaterals, but he can recover no surplus over and above the amount of his debt, or advances with proper costs of suit.⁶ Where a railroad company lawfully receives bonds issued by municipal corporations, and puts them on the market instead of their own, with a guaranty of payment on the back of them, the company becomes liable to the holders thereof.⁷ But written contracts are not necessarily negotiable, simply because by their terms they inure to the benefit of the bearer. So, certificates issued to stockholders in lieu of their stock, though they pass from hand to hand by delivery, do not partake of the character of negotiable paper. Holders may transfer them, but the assignees take them subject to every equity in the hands of the original owners.⁸

1. *Riggs v. Pennsylvania etc. R. Co.*, 16 Fed. Rep. 804.

2. *Chicago v. Cameron*, 120 Ill. 447; 22 Ill. App. 91; *Pierce v. Madison etc. R. Co.*, 21 How. (U. S.) 441.

3. *Chew v. Henrietta Min. etc. Co.*, 2 Fed. Rep. 5; 1 *McCrary* (U. S.) 222.

4. *Hervey v. Illinois Midland R. Co.*, 28 Fed. Rep. 169.

5. *Porter v. Pittsburgh Bessemer Steel Co.*, 122 U. S. 267.

6. *Morton v. New Orleans etc. R. Co.*, 79 Ala. 621; *Warner v. Rising Fawn Iron Co.*, 3 Wood (U. S.) 514.

Clafin v. South Carolina R. Co., 4 Hughes (U. S.) 12; *Atwood v. Shenandoah Valley R. Co.*, 85 Va. 966; *Duncomb v. New York etc. R. Co.*, 84 N. Y. 190.

7. *Chicago etc. R. Co. v. Howard*, 7 Wall. (U. S.) 392.

8. *Weaver v. Barton*, 49 N. Y. 286; *Chicago etc. R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Dunn v. Commercial Bank*, 11 Barb. (N. Y.) 580; *Leitch v. Wells*, 48 N. Y. 585; *Shaw v. Spencer*, 100 Mass. 382; *Salisbury Mills v. Townsend*, 109 Mass. 115.

5. Incomplete and Altered Bonds.—If the bonds put in circulation are incomplete or uncertain as to the amount of both principal and interest and place of payment, holders of them, though *bona fide* for value, are not protected by the rules which govern the transfer of commercial paper.¹ Where the name of the payee is left blank, the holder may fill in his own name, and bring suit upon the instrument.² But if the place of payment is left blank, the holder is not authorized to fill the blank, when the bond says that the place of payment should be designated by the president.³ So where the mortgage requires that the bonds be signed and sealed by a railroad company, and also be certified to by a trust company, and these are forged and affixed to the bonds after being stolen, a purchaser for value and in good faith cannot hold the company liable thereon, or compel the issue of other bonds in

1. *Maas v. Missouri etc. R. Co.*, 83 N. Y. 223; 3 Am. & Eng. R. Cas. 30; *Jackson v. Pittsburgh etc. R. Co.*, 2 Wood (U. S.) 141; *Parsons v. Jackson* 99 U. S. 454.

The T. and N. R. R. Co. executed a mortgage on its road to secure its bonds to defendant, the U. T. Co., as trustee for the bondholders, and bonds were prepared for issuing, each of which contained a clause that it should not become obligatory until authenticated by a certificate indorsed thereon duly signed by said trustee. Said bonds were signed by the proper officers of the company, but before the company's seal was affixed or the required certificate attached a portion of them were stolen, a seal and certificate forged thereon, and the bonds sold; plaintiffs purchased them for a valuable consideration and in good faith. The T. and N. Co. was consolidated with defendant, the M., K. and T. Ry. Co. By the agreement of consolidation the latter was to take up outstanding bonds of the former company, issuing its own in exchange. In an action to compel such an exchange for plaintiffs' bonds, *held*, that plaintiffs were bound by the condition of the bonds making the certificate of the trustee essential to their validity; that neither the payment of value nor good faith on their part created a cause of action, and that the defect in the bonds was not waived by the agreement of consolidation; also, that the failure of the obligor, after discovering that the bonds had been lost or stolen, to notify the public of that fact did not constitute negligence making it liable. *Maas v. Missouri etc. R. Co.*, 83 N. Y. 223; 3 Am. & Eng. R. Cas. 30.

2. *Chapman v. Vermont etc. R. Co.*, 8 Gray (Mass.) 555; *White v. Vermont etc. R. Co.*, 21 How. (U. S.) 575.

3. A railroad company executed bonds for 225 pounds each, if payable in London, or for \$1,000 each, if payable in New York or New Orleans, and with coupons attached, by each of which the company promised to pay 9 pounds if payable in London, or \$40 if payable in New York or New Orleans, and the bonds declared that the president of the company was authorized by his indorsement to fix the place for the payment of both the principal and interest of the bonds. The bonds were indorsed as follows: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in _____," and the indorsement was signed with the genuine signature of the president. *Held*, that if such bonds were stolen from the company, and passed into the hands of *bona fide* holders for value, such holders would have no authority to fill the blank left in the indorsement and thus fix the place of payment, but would hold the bonds subject to any defect of title arising from the manner in which they were put in circulation. *Jackson v. Vicksburg etc. R. Co.*, 2 Wood (U. S.) 141.

Bonds of a railroad corporation were conditioned to be paid either in English or United States currency, according to the place to be fixed for their payment, and authorized the president of the corporation to fix by his indorsement such place of payment. They had been indorsed in blank by the president. While in the possession of the corporation they were stolen. *Held*, that a *bona fide* holder could not acquire or

their place.¹ Alterations in bonds and coupons are not necessarily evidence of fraud.² If the bonds are not required by law to be numbered, alterations of the numbers which do not change the tenor of the bonds so as to affect either in substance or in form a written contract or the proof thereof are immaterial. An immaterial alteration of a negotiable bond payable to the bearer, although made with fraudulent intent, does not avoid it against the holder, who took it afterwards in good faith, for value, without notice of, or reason to suspect the alteration.³

6. Over-issue of Bonds.—Bonds issued in excess of a certain sum per mile, contrary to an agreement, are void as against holders of regularly issued bonds to a limited extent, where none of the holders of the over-issued bonds are innocent purchasers.⁴ But where a company issues bonds in excess of the amount secured by the mortgage the company is estopped from denying that the extra bonds are secured by the mortgage.⁵

7. Action Upon Bonds.—A timely deposit of funds for payment of bonds by the party liable thereon is equivalent to a tender of the sum payable, provided such deposit was not accompanied by a condition not authorized by the instrument.⁶ A suit may be brought upon a coupon bond made payable at a certain time and place without first making a demand of payment,⁷ nor is it necessary to make a demand of payment at the place where the bonds are made payable when the corporation is insolvent and has no funds at the place designated.⁸ But the insolvency of the company and its want of funds at the place where the bonds were payable must be alleged in the bill or admitted by demurrer.⁹ If the bonds are lost, a court of chancery has the power to compel

convey any title to the bonds. *Ledwich v. McKim*, 53 N. Y. 309.

1. *Maas v. Missouri etc. R. Co.*, 11 Hun (N. Y.) 8.

2. *Birdsall v. Russell*, 29 N. Y. 220.

3. *Elizabeth v. Force*, 29 N. J. Eq. 587; *Com. v. Emigrant Industrial etc. Bank*, 98 Mass. 12; *Birdsall v. Russell*, 29 N. Y. 220.

4. *Union Trust Co. v. Nevada etc. R. Co.*, 20 Fed. Rep. 80; 17 Am. & Eng. R. Cas. 207.

Where a railroad company contracts with the purchaser of part of its issue of mortgage bonds that the issue shall be restricted to a certain sum for each mile of completed road, a person who thereafter receives bonds exceeding the contract limit, and who has notice of the restriction, cannot be deemed a *bona fide* holder for value entitled to a first lien under the mortgage for the bonds so issued to them. But when the mortgage contains no provision giving effect to the restriction in the contract,

purchasers of bonds for value without notice of the provision of the contract acquire a title to bonds which is not affected by the restriction. *McMurray v. Moran*, 134 U. S. 150; 43 Am. & Eng. R. Cas. 442.

5. *Stevens v. Benton*, 1 Duv. (Ky.) 112.

6. *Bailey v. Buchanan*, 22 Jones & S. (N. Y.) 237.

7. *Langston v. South Carolina R. Co.*, 2 S. Car. 248; *Truman v. McCullom*, 20 Wis. 360; *First Nat. Bank v. Scott Co.*, 14 Minn. 77.

8. *Shaw v. Bill*, 95 U. S. 10.

9. *Jones on Railroad Securities*, § 218; *Potomac Mfg. Co. v. Evans*, 84 Va. 717.

Where a railroad company issued bonds payable at its office in a particular way, and at the maturity of the bonds there was no office of the company at that place, it was held that a demand for payment elsewhere was sufficient. *Alexander v. Atlantic etc. R. Co.*, 67 N. Car. 198.

a re-execution of them,¹ and it makes no discrimination against loss by theft.² A court of equity will not, however, in all cases of lost bonds, decree the execution of new ones, but if such loss exposes the owner to undue perils in the future assertion of his rights, such a decree is eminently proper.³

8. Promissory Notes and Unsecured Bonds.—Railroad companies have implied power to issue promissory notes.⁴ And they can be enforced against such corporations when in the hands of holders in good faith for value taken before maturity, and without knowledge that the maker had not received full consideration, though made as accommodation notes.⁵ If it is not within the scope of the corporate powers of the company to issue such paper the defense of *ultra vires* is not available in a suit brought by a *bona fide* indorsee, provided a corporation is authorized to give notes for any purpose. The reason is that the corporation by giving the note has virtually represented that it was given for some legitimate purpose, and the indorsee cannot be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable, not only in the hands of the payee, but in those of any subsequent holder because all persons dealing with

1. Chesapeake etc. Canal Co. v. Blaire, 45 Md. 102; Force v. Elizabeth, 27 N. J. Eq. 408.

Where registered coupon railroad bonds were destroyed at the same time that their owner lost his life by the burning of a steamboat, and an action was brought by the administrator of the decedent to compel the railroad company to pay interest in arrears and issue of the bonds, it was held that upon receiving an indemnity with sureties, the defendant should comply with the demands of the plaintiff. Rogers v. Chicago etc. R. Co., 6 Abb. N. Cas. (N. Y.) 253.

2. Force v. Elizabeth, 27 N. J. Eq. 408.

3. New Orleans etc. R. Co. v. Mississippi College, 47 Miss. 560.

4. Olcott v. Tioga etc. R. Co., 27 N. Y. 546; Moss v. Averell, 10 N. Y. 449, 457.

"No question is better settled upon authority than that a corporation not prohibited by law from doing so, and without any expressed power in its charter for that purpose, may make a negotiable promissory note, payable either at a future day, or upon demand, or when such note is given for any of the legitimate purposes for which the company was incorporated." This principle is well settled by the courts

in the *United States*. Richmond etc. R. Co. v. Snead, 19 Gratt. (Va.) 354; Smith v. Eureka Flour Mills Co., 6 Cal. 1; Barker v. Mechanics' F. Ins. Co., 3 Wend. (N. Y.) 94; Clark v. Farmers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256.

But in *England* the decisions are not altogether uniform in this matter, for while there are a few decisions which really rest upon the principle that a corporation may make such ordinary negotiable paper as is incidental to the nature of its business, yet the cases generally are the other way. Jones on Railroad Securities, § 225. See *In re* Moseland Green Coal etc. Co., 4 DeG., J. & S. 756; Bateman v. Mid Wales R. Co., L. R., 1. C. P. 449.

5. Maitland v. Citizens' Nat. Bank, 40 Md. 540; Monument Nat. Bank v. Globe Works, 101 Mass. 57; 3 Am. Rep. 322; Farmers' etc. Bank v. Empire Stone etc. Co., 5 Bosw. (N. Y.) 275; Smead v. Indianapolis etc. R. Co., 11 Ind. 104; Bank of Genessee v. Patchin Bank, 13 N. Y. 309; Mechanics' Bank Association v. New York etc. White Lead Co., 35 N. Y. 505; Morford v. Farmers' Bank, 26 Barb. (N. Y.) 568; Central Bank v. Empire Stone Co., 26 Barb. (N. Y.) 22; Olcott v. Tioga R. Co., 27 N. Y. 546; Bridgeport City

a corporation are bound to take notice of the extent of its chartered powers.¹

A corporation having the right to contract an obligation for a specific purpose has also the right to issue any instrument which either party may consider convenient in the acknowledgment of it.² So where the legislature confers upon a corporation the power to borrow money on mortgage to enable them to complete their work, bonds issued without any accompanying mortgage are valid.³

9. Contracts of Guaranty.—The general rule is that one corporation cannot, without express power, lend its credit to another,⁴ because such a power is contrary to the objects of the incorporation. Nor can railway companies engage or pledge their funds, or intermingle their affairs in unauthorized transactions upon the speculation that they may obtain legislative authority for doing acts which were beyond their powers at the time when they were done.⁵ Authority of railroad corporations to enter into contracts of guaranty is ordinarily given by special or general statutes, but a number of cases hold that they may, on sufficient consideration, guarantee the payment of the bonds of another company, even if there is no authority conferred upon them to do so by their charters or the general statutes.⁶ And the authority to make the

Bank v. Empire Stone Dressing Co., 30 Barb. (N. Y.) 421.

1. Bissell v. Michigan etc. R. Co., 11 N. Y. 289. In Smead v. Indianapolis etc. R. Co., 11 Ind. 104, it was held that if a company have the general power so to make money liabilities, but abuse that power in a particular instance, the instrument will be binding in the hands of the *bona fide* holder; but that if there is a total absence of power—that if the corporate powers of the country are clearly short of the privileges of making such instruments, they will not only be void *ab initio*, but also in the hands of subsequent holders, if indeed there can be any *bona fide* holders of paper made under such circumstances.

2. Miller v. New York etc. R. Co., 18 How. Pr. (N. Y.) 374; 8 Abb. Pr. (N. Y.) 431; Kelly v. Alabama etc. R. Co., 58 Ala. 489; Dana v. Bank of U. S., 5 W. & S. (Pa.) 223.

3. Philadelphia etc. R. Co. v. Lewis, 33 Pa. St. 33.

4. Central Bank v. Empire Stone Dressing Co., 26 Barb. (N. Y.) 23; Bridgeport City Bank v. Empire Stone Dressing Co., 30 Barb. (N. Y.) 421; Smead v. Indianapolis etc. R. Co., 11 Ind. 104; Bank of Genessee v. Patchin Bank, 13 N. Y. 309, 19 N. Y. 312; Stark Bank v. U. S. Pottery Co.,

34 Vt. 144; Lexington v. Butler, 14 Wall. (U. S.) 382; Sumner v. Marcey, 3 Woodb. & M. (U. S.) 105.

The directors of a railway company, for the purpose of increasing the traffic, proposed to guarantee certain profits, and secured the capital of an intended steam-packet company, who were to act in connection with the railway. Held, first, that such a transaction was not within their powers, and they were restrained by injunction. Held, secondly, that in such a case one of the shareholders in a railway company was entitled to sue "on behalf of himself and all the other shareholders, except the directors," who were defendants, although some of the shareholders had taken shares in the steam-packet company. Colman v. Eastern Counties R. Co., 10 Beav. 1; 4 Ry. Cas. 513.

5. Logan v. Courtney, 13 Beav. 22; 23 L. J. N. S. Ch. 347.

6. Low v. California Pac. R. Co., 52 Cal. 53; Chicago etc. R. Co. v. Howard, 7 Wall. (U. S.) 392; Arnot v. Erie R. Co., 67 N. Y. 315.

A railroad corporation which has power by its charter to issue its own bonds, has power to guarantee the bonds of another railroad corporation which it receives in payment of a debt

guaranty cannot be denied where it is shown that it had been acquiesced in by the company for a number of years.¹ Where a statute empowers one company to guarantee bonds of another, but requires certain preliminary action on the part of the guaranteeing company, a company which exercises the power conferred by such statute cannot afterwards be permitted to show in defence of its liability on the bonds that the statutory requirements were not complied with.²

A railroad company may guarantee bonds taken and held by it in the usual course of its business.³ And a guaranty of

due to it, and which it sells for value or transfers in payment of its own debts, the guaranty being given as the means of augmenting the credit of the bonds, or to enable it to obtain an adequate price for them. *Rogers Locomotive etc. Works v. Southern R. Assoc.*, 34 Fed. Rep. 278.

Section 3303 Rev. Laws *Vermont*, which provides that a railroad company may make contracts for leasing and running the roads of other companies, confers upon a railroad company power to enter into a lease by which it agrees to guarantee the payment of the interest on coupons and the mortgage bonds of the lessor company. *Eastern Township Bank v. St. Johnsbury etc. R. Co.*, 40 Fed. Rep. 423; 40 Am. & Eng. R. Cas. 566.

1. *Camden etc. R. Co. v. Coxe (Pa.)*, 26 Am. & Eng. R. Cas. 10.

2. Thus, in 1851, the legislature of Ohio passed a general law relating to railway companies, which empowered them at any time, by means of their subscription to the capital stock of any other company or otherwise, to aid such other railroad company, provided no such aid shall be furnished until, at a called meeting of the stockholders, two-thirds of the stock represented shall have assented thereto. In 1852 another act was passed for the creation and regulation of incorporated companies in Ohio, re-enacting the above section, and providing further that any existing company might accept any of its provisions, and, when so accepted, a certified copy of their acceptance filed with the secretary of state, that portion of their charters inconsistent with the provisions of this act should be repealed. In 1854 the *Cleveland, Columbus & Cincinnati R. Co.* endorsed a guaranty upon four hundred bonds of one thousand dollars each, issued by the *Columbus, Piqua & Indiana R. Co.*

The *C., C. & C. R. Co.* had not formally complied with either of the above requirements. A stockholder of the *Cleveland etc. Co.* filed a bill to enjoin the directors from paying the interest upon the bonds, which they had thus guaranteed, upon the ground that the directors had exceeded their legal authority in making the guaranty. *Held*, that as between the parties to the suit, the acceptance of the acts of 1851 and 1852 might be inferred from the conduct of the incorporators themselves. That as the corporation had executed the powers and claimed the privileges conferred by them, they could not exonerate themselves from responsibility by asserting that they had not filed the evidence required by the statute to evince their decision. *Zobriskie v. Cleveland etc. R. Co.*, 23 How. (U. S.) 381. See also *Cozart v. Georgia R. etc. Co.*, 54 Ga. 379; *Madison etc. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457.

3. *Madison etc. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457.

Even though the guaranty be made for a purpose not authorized by the charter, as for the accommodation of another road, the right of a *bona fide* holder without notice to recover upon it, is not affected thereby. *Madison etc. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457.

When Guaranty Ultra Vires.—Where a corporation guarantees the bonds of another company, its stockholders may be estopped from repudiating the guaranty, though the indorsement or guaranty be *ultra vires*. *Cozart v. Georgia etc. R. Co.*, 54 Ga. 379; *Atchison etc. R. Co. v. Fletcher*, 35 Kan. 236.

The defendant company, in pursuance of an agreement made with another railroad company, guaranteed the payment of the interest of certain bonds issued by the latter company. Subsequently these bonds came into the possession of the defendant, and some of

bonds without other designation embraces both principal and interest.¹ If the coupons be detached from the bonds as they become due, the guarantor of the prompt payment of the principal and interest is liable upon the detached coupons from the time the same are payable.² And as to the consideration of such a guaranty, it has been held that an arrangement between several connecting railroad companies entered into for the purpose of securing a uniform gauge of the several roads, and thus increasing the business and profits of each, was sufficient.³ So a lease by one company of its road, etc., to another company is a sufficient consideration for the guaranty of its bonds.⁴

Where bonds of a company are pledged to secure the payment of money borrowed by an authorized agent, the lender is not to receive the full amount of the bonds and account to the agent, but is entitled only to his loan and interest. The agent is in equity entitled to the benefit of the bonds received by a surety, or by a person standing in the position of a surety, for his indemnity, and to discharge the debt he is liable for, and it makes no difference that the agent did not know of the security at the time, or did not give credit on the faith of it.⁵ If the agent pays a part only of the debt of the principal debtor for which the guaranty was given, he cannot claim reimbursement out of the funds of such debtor as against the common creditor until the latter is fully satisfied.⁶

One who guarantees the payment of a debt, for failure to pay which relief is sought under a statute respecting railroads, is on payment of the debt, entitled to the benefit of the statute as a creditor in respect of the debt so paid, notwithstanding the fact that he has guaranteed the payment thereof.⁷

10. Indorsement of Bonds.—A railroad company may, without special authority, indorse negotiable instruments which it has taken in the course of business, or in payment of debts due it.⁸ Bonds issued by a municipal corporation payable to a railroad

them were bought for a valuable consideration, sold and transferred to the plaintiff's testator. It was held that the defendant, having itself transferred the bonds and received the avails thereof, was estopped from claiming that the guaranty was *ultra vires*. *Arnot v. Erie etc. R. Co.*, 67 N. Y. 315; 5 Hun (N. Y.) 608.

If a railroad has the general power to make a guaranty, it is immaterial as between third parties without notice, whether its act is authorized or ratified by vote of the stockholders. Holders of the coupon guaranty have a right to presume that the guarantors have done their duty and have proceeded regularly in execution of the power. *Connecti-*

cut Mutual L. Ins. Co. v. Cleveland etc. R. Co., 41 Barb. (N. Y.) 9.

1. *New Orleans v. Clark*, 95 U. S. 644.

2. *Philadelphia etc. R. Co. v. Knight*, 124 Pa. St. 58.

3. *Connecticut Mut. L. Ins. Co. v. Cleveland etc. R. Co.*, 41 Barb. (N. Y.) 9.

4. *Opdyke v. Pacific R. Co.*, 3 Dill. (U. S.) 55; *Low v. California Pac. R. Co.*, 52 Cal. 53.

5. *Rice's Appeal*, 79 Pa. St. 168.

6. *Virginia v. Chesapeake etc. Canal*, 32 Md. 501.

7. *Pennsylvania etc. R. Co. v. Pemberton etc. R. Co.*, 28 N. J. Eq. 338.

8. *Olcott v. Tioga etc. R. Co.*, 27 N. Y. 546.

company may be indorsed and transferred by the company.¹ So railroad bonds indorsed by a State are negotiable instruments by the general commercial law which must be presumed to be in force where they are payable, and are capable of transfer by delivery.² And the addition of the office or official title to the signature of the officer indorsing the instrument, is immaterial where his official character and position appears fully in the body and in the attestation clause of the instrument of indorsement.³ So where a railroad company indorses State bonds, the case comes within the rule which makes an indorser of commercial paper the guarantor of the genuineness and validity of the instrument he indorses, and the company are bound by the indorsement, though the bonds be void because issued under unconstitutional legislation.⁴ If the governor is authorized by statute to indorse bonds of a railroad company, *bona fide* holders for value of the bonds indorsed by the governor assuming to act under such authority may presume that the indorsement is regular.⁵

X. TRUSTEES.—1. Duties and Rights.—The duties of trustees of a railroad mortgage depend upon the express terms of the instrument and the necessary implications arising from the relation of the parties and the condition of the trust property.⁶ If the mortgage is made by virtue of a statute which imposes duties upon the trustees, the parties are relieved from the necessity of providing therefor in the mortgage.⁷ The duties of trustees are ordinarily performed or expected to be performed by the corporation or its officers so long as prompt payment of the principal and interest is made. If a forfeiture occurs, either by non-payment of interest or principal, or both, the duties of the trustees become not only active and responsible, but critical and delicate. It is no longer a dry and naked trust, but the trustees are generally required to take possession of the mortgaged property and use it for the benefit of the bondholders.⁸

When it becomes the duty of a trustee to enforce the mort-

1. *Bonner v. New Orleans*, 2 Woods (U. S.) 135. See *Chicago etc. R. Co. v. Howard*, 7 Wall. (U. S.) 392.

2. *State v. Cobb*, 64 Ala. 127; *Morton etc. R. Co. v. New Orleans etc. R. Co.*, 79 Ala. 590; *Gilman v. New Orleans etc. R. Co.*, 72 Ala. 566.

3. *Levy v. Burgess*, 6 Jones & S. (N. Y.) 431.

4. *Florida Cent. R. Co. v. Schutte*, 103 U. S. 118.

5. *Young v. Montgomery etc. R. Co.*, 2 Woods (U. S.) 606. See *Mercer Co. v. Hackett*, 1 Wall. (U. S.) 83; *Meyer v. Muscatine*, 1 Wall. (U. S.) 384; *Knox Co. v. Aspinwall*, 21 How. (U. S.) 539.

6. *Sturges v. Knapp*, 31 Vt. 1, 55; *Corn. v. Susquehanna R. Co.*, 122 Pa.

St. 306; *Fidelity Ins. etc. Co. v. Shenandoah Valley R. Co.*, 32 W. Va. 344; 33 W. Va. 761; 38 Am. & Eng. R. Cas. 577.

7. *Mercantile Trust Co. v. Portland etc. R. Co.*, 10 Fed. Rep. 604.

In Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut there are statutes which prescribe more or less fully the duty of the trustees under railroad mortgages. Such statutes, so far as they provide for the rights and duties of trustees of the corporation, relieve the parties from providing therefor in each mortgage executed. *Mercantile Trust Co. v. Portland etc. R. Co.*, 6 Fed. Rep. 604.

8. *Sturges v. Knapp*, 31 Vt. 1, 55.

gage, he is required to act discreetly as well as judiciously in making the best use of the security for the protection of the beneficiaries;¹ and that duty is personal to the trustee and he cannot divest himself of its responsibility by delegating its performance to any other person or persons. Thus, where a trustee colludes with a railroad company in fraudulently disposing of a large amount of iron rails bought by the company for its use and embraced in the mortgage as after acquired property, the bondholders are entitled to an action to prevent such a diversion of the property.² So where a trustee allows applicants claiming to own a majority of the bonds, to institute proceedings in his name to foreclose the mortgage and carry on the proceedings to final judgment and sell the property thereunder, the trustee, paying no attention to the said proceedings, but leaving them wholly subject to the control and direction of such persons, will be liable to a holder of one of the said bonds for the damages sustained by him by reason of the trustee's neglect to faithfully perform and discharge the duties imposed upon him by the acceptance of the trust.³

And it is the plain duty of the trustees in the execution of their trust to make the proceeds of the sales of lands as available as possible for the extinction of the indebtedness of the corporation.⁴ So where they take possession under a mortgage given to secure bonds, they cannot deal in such bonds, because they are regarded as the trustees of the corporation as well as of the bondholders. Such dealings would be inconsistent with the duties which they owe to the corporation.⁵ The trustee, in executing his trust, may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be

1. *Weetjen v. St. Paul etc. R. Co.*, 4 Hun (N. Y.) 529; *Kennebec etc. R. Co. v. Portland etc. R. Co.*, 59 Me. 47.

A mortgage trustee, after taking possession of the road and entering upon the performance of the active duties of his trust, cannot make a valid contract for the railroad corporation in which he is a stockholder and director. *Ashuelot R. Co. v. Elliott*, 57 N. H. 397.

2. *Weetjen v. St. Paul etc. R. Co.*, 4 Hun (N. Y.) 529.

No *cestui que trust*, however, can allege that to be a breach of trust which has been done under his own sanction, whether by previous consent or subsequent ratification. Either concurrence in the act or acquiescence without original concurrence will release the trustees. Thus, where a plaintiff, the holder of bonds secured by a mortgage on the property of an elevated railroad

company, objected to the conduct of the trustee who bought the property under foreclosure in conveying it to a new organization and sought to enforce his objections by suit against the trustee and the new organization, and stay the consummation of their scheme, and thereafter withdrew his action and agreed to join the new organization, it was held a ratification of the trustee's act which precluded the plaintiff from alleging them as a breach of trust. *Butterfield v. Cowing*, 112 N. Y. 486.

3. *Merrill v. Farmers' L. & T. Co.*, 24 Hun (N. Y.) 297. See *Wilkinson v. Perry*, 4 Russ. 272; *Chalmer v. Bradley*, 1 J. & W. 51; *Wilson v. Towle*, 36 N. H. 129; *Hawley v. James*, 5 Paige (N. Y.) 318.

4. *Little Rock etc. R. Co. v. Huntington*, 120 U. S. 160.

5. *Ashuelot R. Co. v. Elliott*, 57 N. H. 435.

governed by the voice of the majority acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust.¹ Whenever the trustees fail to perform their duties either from willfulness, indifference, or error of judgment, the bondholders who are aggrieved by their conduct may obtain relief from a court of equity. Thus, where they neglect to take possession of the mortgaged property after default of the corporation to pay the debts secured by the mortgage, the bondholders may maintain a bill to compel performance of this duty. It is no defense that a litigation may be necessary to ascertain what property is covered by the mortgage, or that a great burden and personal liability for any deed done and debts subsequently incurred will thereby be imposed upon them.²

The trustees represent the bondholders in all legal proceedings carried on by them affecting their trust to which they are not actual parties.³ It is not necessary where the bondholders secured by a railroad mortgage are numerous, to make all of them parties to the suit, or to make any of them parties if the trustees are parties. The rule of chancery pleading which allows some parties to sue and to be sued, in behalf of all where their right is the same and the number is so large as to render it difficult to bring them all before the court, is held to apply in suits for the foreclosure of railroad mortgages. If the trustees fail or refuse to act, any of the bondholders, for themselves, and in behalf of the rest, may step forward and put in motion the machinery of the law, making the trustees parties defendant.⁴

2. Notice to Mortgage Trustees.—The rule that notice to a trustee is notice to the *cestui que trust* applies to trustees under an ordinary mortgage made by a railroad company to secure the holders of bonds issued under it.⁵ Notice to the trustee of an

1. In two suits for the foreclosure of two mortgages of an insolvent railway, which had by amendments and cross-bills become practically consolidated, the two sets of trustees acting in harmony and good faith, and with the approbation of the holders of the bonds issued under each mortgage (but against the wishes and objections of persons holding a minority of one of the issues as collateral and contesting the priority of lien as to some of the property, and the legality of some of the issues of bonds) procured the entry of a decree which ordered a speedy sale of all the property covered by either or both mortgages as being for the best interest of all concerned, but left the conflicting claims as to the priority of lien, and the amount of bonds issued to be settled by subsequent decree or decrees. *Held*, that the trustees represented the bondholders in the foreclosure pro-

ceedings and that a decree making such a sale was right. *First Nat. Bank v. Shedd*, 121 U. S. 74; 30 Am. & Eng. R. Cas. 439.

2. *First Nat. Bank Ins. Co. v. Salisbury*, 130 Mass. 303.

3. *Shaw v. Little Rock etc. R. Co.*, 100 U. S. 605.

Where the legal right is vested in a trustee all actions at law which affect the trust must be brought in his name. *Pennsylvania R. Co. v. Duncan*, 111 Pa. St. 352; 29 Am. & Eng. R. Cas. 354.

4. *Campbell v. Railroad Co.*, 1 Wood (U. S.) 368; *In re Chickering*, 56 Vt. 82; *Murdock v. Woodson*, 2 Dill. (U. S.) 188.

5. *Fidelity Ins. Co. v. Shenandoah Valley R. Co.*, 86 Va. 1; *Pierce v. Emery*, 32 N. H. 484; *Western Min. etc. Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 409.

The trustees of railroad mortgages

equitable mortgage is notice to the bondholders and they therefore take their bonds subject to all the legal consequences of such a mortgage.¹ But notice to trustees, who take a conveyance for the mere purpose of upholding an estate, without having any previous connection with the title, is not always nor perhaps usually regarded as notice to the *cestuis que trustent*.² Nor does notice of defense to bonds, given to one of the trustees in the deed of trust which secures their payment, operate to destroy the *bona fide* holding of the bondholders under the deed of trust.³

3. Rights of Trustees in Possession.—When the legislature confers power upon a company to mortgage its road to secure the issue of its bonds, the trustees have an implied authority in case of default in the payment of the bonds, to use the property conveyed in a proper and beneficial manner. The road cannot be taken up and the materials sold to pay the mortgage, but the trustees are endowed with sufficient powers to discharge the duty, which the public have a right to demand of them, by keeping in repair, maintaining, and operating the road, and for this purpose they may use their own proper names or adopt any other convenient business name as any other individual or company may do, and they are under no necessity of adopting the name of the company to whose rights and property they have succeeded.⁴ If the mortgage gives them power to take possession of the road and use it in certain contingencies, and, at their discretion, on certain conditions, to sell it, they may do the former only, or both. The trustees need not confine themselves to either measure, but may first enter and then sell, using the road for the purpose of the trust until the sale is effected.⁵

When the trustees have taken possession for condition broken the owner of the equity may save the effect of the foreclosure by payment of what is due on the mortgage, but he cannot be let into possession unless he pays or provides security for the remainder of the debt secured by the mortgage not yet due, although the mortgage provides that the trustee shall not be entitled to possession till the condition is broken.⁶ But where a railroad company is in default in respect of interest on bonds, the

are appointed by law to act for the bondholders and must be considered in the light of agents; they act for those who lend their money on the security of the mortgage; they are charged with the duty of protecting the interests of the bondholders who are unconnected individuals, having no ready means of acting together except through the trustees. *Pierce v. Emery*, 32 N. H. 521.

1. *Miller v. Rutland etc. R. Co.*, 36 Vt. 452.

2. *Pierce v. Emery*, 32 N. H. 521.

3. *Johnson v. Thayer*, 94 U. S. 631.

4. *Palmer v. Forbes*, 23 Ill. 318.

Where a railroad has been taken possession of under a mortgage, by trustees for bondholders, and is being operated by them, and where, by the mortgage, power is given to them to make repairs and additions to the road, they may be held for a performance of the duties imposed by the statute in relation to fences. *Jones v. Seligman*, 81 N. Y. 190; 3 Am. & Eng. R. Cas. 236. 5. *Macon etc. R. Co. v. Georgia R. Co.*, 63 Ga. 103; 1 Am. & Eng. R. Cas. 378.

6. *Wood v. Goodwin*, 49 Me. 260.

principal of which does not mature for many years to come, and the trustee, as mortgagee, enters into possession of the railroad, he cannot hold possession of the road after being paid the amount of past due interest, and may be directed to surrender the possession of the road to the railway company.¹ So where the trustees obtain an absolute judgment of foreclosure and receive possession, they hold this absolute title in trust for the bondholders. And if the mortgagee thereupon brings suit in equity for the purpose of having their title declared invalid, and obtaining authority to sell the premises for the benefit of the *cestui que trust*, the mortgagors and their privies in estate cannot be heard to object that the mortgage was not properly sealed, or that on a true construction of its terms an absolute judgment of foreclosure could not have been entered.²

Where trustees are in possession and operating the road under a mortgage for the security of bondholders they are entitled, there being no debts for current expenses, to receive all profits earned by the road since the commencement of the suit.³ No right of set-off can accrue against them,⁴ but they may be held liable to the extent of funds received by them in operating the road, to keep the road, buildings and equipments in repair, furnish such new rolling stock as is necessary for the running expenses, and apply the balance to the payment of any damages arising from misfeasance in the management of the road, and after that to the mortgage, as the rights of the parties may require.⁵ They are also liable as common carriers and for injuries occasioned in the operation of the road to the extent of the income realized by them therefrom.⁶ Thus, when a mortgage is made by authority

1. Union Trust Co. v. Missouri etc. R. Co., 26 Fed. Rep. 485.

2. Haven v. Grand Junction R. etc. Co., 12 Allen (Mass.) 337. See Kennebec etc. R. Co. v. Portland etc. R. Co., 59 Me. 47.

3. Dow v. Memphis etc. R. Co., 124 U. S. 562; reversing 20 Fed. Rep. 768.

4. The Wallkill Valley Company having made default in the payment of the interest falling due on mortgage bonds issued by it, plaintiffs, the trustees under the mortgage, in pursuance of the terms thereof, entered into possession of the road and received the rents and tolls thereof for the benefit of the bondholders. An action was brought to recover money due to the road for transporting the mails received by the agent of the road, and which he refused to pay over, he claiming to be entitled to set-off against this amount a note given by the company to him while in their service before the default, and which had not matured at that time.

Held, that the trustees' right to receive the earnings of the road was absolute, and no offset thereof could be made. Murray v. Deyo, 10 Hun (N. Y.) 3.

5. Stratton v. European etc. R. Co., 76 Me. 269; 38 Am. & Eng. R. Cas. 277.

6. Wilkinson v. Fleming, 30 Ill. 353; Grand Tower Mfg. etc. Co. v. Ullman, 89 Ill. 244; Palmer v. Forbes, 23 Ill. 301. See Lamphear v. Buckingham, 33 Conn. 237; Smith v. Eastern R. Co., 124 Mass. 154; Union Trust Co. v. Cuppy, 26 Kan. 754; 11 Am. & Eng. R. Cas. 562; Rogers v. Wheeler, 43 N. Y. 598; Jones v. Seligman, 81 N. Y. 190; 3 Am. & Eng. R. Cas. 236. Ballow v. Fornam, 9 Allen (Mass.) 47; State v. Consolidation etc. R. Co., 67 Me. 479; Barter v. Wheeler, 49 N. H. 9; Sprague v. Smith, 29 Vt. 421.

Trust deeds usually contain provisions limiting the liability of trustees as such to the moneys received, and their personal liability to misfeasance or fraud. Hollister v. Stewart, 111 N. Y.

of the legislature and the trustees take possession under it for breach of condition, they are liable for damages by fire from the engines upon the railroad in their possession to the same extent as the corporation itself would have been if no mortgage had been made.¹ A claim for damages to the property by fire thus communicated by a locomotive while passing along its track at a time when the road was in the possession of and operated by such trustees, does not depend upon proof of malfeasance or negligence, but is an incident to the running of the road, and may be considered a part of the running expenses, and is therefore an equitable lien upon the funds liable in the hands of the trustees.² If they have no rolling stock and equipment and no means of purchasing any, they cannot be required to attempt to operate the road on their own account, but may lease it to a company owning a connecting line.³

4. Debts of Mortgage Trustees in Possession.—Trustees under a railroad mortgage have an inherent equitable right to be reimbursed all expenses which they reasonably incur in the execution of the trust. All such expenses are a lien upon the trust property prior to that of the bondholders, and the trustee will not be compelled to part with the property until such expenses are paid.⁴ Among the expenses which should be allowed him are reasonable fees for counsel employed by him in the proper discharge of his trust, the cost of litigation, and the expenses of taking care of, protecting, and repairing the property in his charge.⁵ But the trustees cannot bind the bondholders personally for the payment of these expenses, nor for the performance of contracts which extend beyond the duration of the trust.⁶

5. Compensation.—Trustees may have reasonable compensation for their services. The old *English* doctrine that a trustee could not be paid, is changed in the *United States* by statutes and judicial determinations.⁷ Services, for which a trustee is entitled to compensation, performed in executing the bonds, etc., are to be paid for in preference to the claims of bondholders secured by the deed.⁸

A decree in a suit for the foreclosure of a railroad mortgage fixing the compensation to be paid to the trustees under the

644; *Stratton v. European etc. R. Co.*, 74 Me. 422.

1. *Daniels v. Hart*, 118 Mass. 543.

2. *Stratton v. European etc. R. Co.*, 76 Me. 269; 17 Am. & Eng. R. Cas. 277.

3. *Sturges v. Knapp*, 31 Vt. 1.

4. *McLane v. Placerville etc. R. Co.*, 66 Cal. 606; *Morrison v. Morrison*, 7 De G. M. & G. 214; *Rensselaer etc. R. Co. v. Miller*, 47 Vt. 146.

5. *McLane v. Placerville etc. R. Co.*, 66 Cal. 606; *Cowdrey v. Galveston etc. R. Co.*, 93 U. S. 352; 9 Am. Ry. Rep. 361.

6. *Chaffee v. Rutland R. Co.*, 53 Vt. 345; 4 Am. & Eng. R. Cas. 212.

7. *Gilman v. Des Moines etc. R. Co.*, 41 Iowa 22; *Northern Cent. R. Co. v. Keighler*, 29 Md. 572; *Tuttle v. Robinson*, 33 N. H. 104; *Greening v. Fox*, 12 B. Mon. (Ky.) 187; *McKnight v. Walsh*, 23 N. J. Eq. 136; *Meacham v. Stearns*, 9 Paige (N. Y.) 398; *Blake v. Pegram*, 101 Mass 592; *Barney v. Saunders*, 16 How. 535. And see 2 *Perry on Trusts*, §§ 916-919.

8. *Smith v. Washington City etc. R.*

mortgage from the fund realized from the sale, is a final decree as to that matter, from which an appeal may be taken. And a holder of railroad bonds secured by mortgage under foreclosure has an interest in the amount of the trustee's compensation which entitles him to intervene and to contest it, and to appeal from an adverse decision.¹

6. Liability of Trustees for Negligence, etc.—Trustees under mortgage deeds where they are in the exercise of the franchises of the railroad company and running its trains as common carriers, for the time being are generally liable for the acts of those under their control in matters, either of contract or tort, to the extent of the income realized by them therefrom.²

7. Removal.—A court of equity has power to remove a trustee in an *ex parte* proceeding, when called on for the purpose of preserving a trust estate situated mainly within its jurisdiction, even where service on the absent trustee is impossible.³ The *cestuis que trustent* are entitled to the personal services of the trustee, and the courts, when the trust is accepted will not permit the trustee to abandon it. Thus when such trustee voluntarily removes to, and becomes a resident of a foreign country, he incapacitates himself from discharging the duties of his office, and thereby vacates the same. The courts will enjoin him from further prosecuting an action, or from acting as such trustee.⁴ Where the mortgage provides for the appointment of a successor to the trustee therein named, in case of his absence from the State, such a provision means a permanent and not a mere casual or temporary absence.⁵ A citizen of the United States, however, has a

Co., 33 Gratt. (Va.) 617; Nickerson v. Atchinson, 3 McCrary (U. S.) 455.

1. Williams v. Morgan, 111 U. S. 684; 17 Am. & Eng. R. Cas. 217.

2. Lamphear v. Buckingham, 33 Conn. 237; Smith v. Eastern R. Co., 124 Mass. 154; Daniels v. Hart, 118 Mass. 543; State v. Consolidated etc. R. Co., 67 Me. 479; Barter v. Wheeler, 49 N. H. 9; Ballou v. Fornam, 9 Allen (Mass.) 47; Union Trust Co. v. Cuppy, 26 Kan. 754; 11 Am. & Eng. R. Cas. 562; Jones v. Seligman, 81 N. Y. 190; 3 Am. & Eng. R. Cas. 236; Rogers v. Wheeler, 43 N. Y. 598; Sprague v. Smith, 29 Vt. 421.

3. Ketchum v. Mobile etc. R. Co., 2 Wood (U. S.) 532.

The fact that such absent trustee was within the territory of a country at war with the country in which the court was sitting was held not to detract from the power of the court to remove him and appoint another, but to furnish a good reason for its exercise. Ketchum v. Mobile etc. R. Co., 2 Wood (U. S.) 532.

But the holding of the court in Washington etc. R. Co. v. Alexandria etc. R. Co., 19 Gratt. (Va.) 592, is inconsistent with the foregoing. In this case, the mortgage provided that if the trustee should become incapable of acting, any court of record, of Alexandria County, upon the application of three-fifths of the holders of the bond upon notice of the president, or any director of the company may appoint a trustee. The trustees, president and directors went into the enemies lines and remained there during the war. An order of the court of Alexandria County substituting another person as trustee, and a sale by such substituted trustee was held void for want of proper notice. This decision, however, can hardly be regarded as authority.

4. Farmers' L. & T. Co. v. Hughes, 11 Hun (N. Y.) 130; Hughes v. Chicago etc. R. Co., 15 Jones & S. (N. Y.) 531.

5. Equitable Trust Co. v. Fisher, 106 Ill. 189.

right to hold real and personal property, absolutely, or in trust for his own benefit, or in trust for the benefit of himself and others in any State of the Union. State statutes disqualifying a non-resident to act as such trustee are inconsistent with the constitutional provision,¹ that, "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."²

When proceedings are taken for the removal of trustees, they cannot be allowed to prevent the prosecution so begun by becoming themselves plaintiffs against their assailants on the theory that such bondholders are improperly resisting a scheme to which a large majority of the bondholders have assented and which is for the best interest of all.³ It seems that the right of removal is not controlled by a majority of the bondholders. It can only be made upon sufficient grounds.⁴

8. Vacancies.—In the *New England States* there are statutes which provide for the choice of new trustees at stated times or upon the happening of vacancies.⁵ But it is not uncommon for the mode of supplying vacancies in the office of trustee to be defined by the trust instrument, and when it is done appointments are governed by the instrument and not by the general law.⁶ And the provisions for the appointment of a successor in the trust must be strictly followed to render the acts of the successor valid.⁷ Where the mortgage provides that in case of any vacancy in the board of trustees, the remaining trustees, or trustee, shall supply the vacancy by appointment from the bondholders, the selection of persons who have procured bonds for the purpose of qualifying themselves will not be held invalid if no fraud is intended.⁸ If the intention is apparent that the board shall always be kept full, no proceedings can be taken by the trustees or any of them while there is a vacancy in the board. So where a suit is already commenced it does not abate by the death of one of the trustees, but must be postponed until the vacancy is filled.⁹

1. U. S. Const., art. 4, § 2.

2. *Farmers' L. & T. Co. v. Chicago* etc. R. Co., 27 Fed. Rep. 146.

3. *Farmers' L. & T. Co. v. McHenry*, 9 Abb. N. C. (N. Y.) 235.

4. A person who is a trustee under two railroad mortgages will not be removed from his trusteeship on the application of a majority in interest of the bondholders under the first mortgage, on the ground that he declines to employ counsel for the foreclosure of the first mortgage selected by such majority, and to elect to act as trustee only under one of the mortgages, and to resign his trusteeship under the other, where it is not clear but that the action of the trustee was the result of sound judgment and not against the interest of any of the

bondholders. *Beadleson v. Knapp*, 13 Abb. Pr., N. S. (N. Y.) 335.

5. Me. R. S. 1883, ch. 51, §§ 85-92; N. H., G. S. 1878, ch. 165; Vt. R. L. 1880, §§ 3453-3456; Mass. P. S., 1882, ch. 112, §§ 66-70. For original statute, see Acts 1857, ch. 178; R. L., P. S. 1882, ch. 178, § 11; Conn., G. S. 1888, §§ 3573-3580.

6. *Macon etc. R. Co. v. Georgia R. Co.*, 63 Ga. 103; 1 Am. & Eng. R. Cas. 290; *Pillsbury v. Consolidated European R. Co.*, 69 Me. 394.

7. *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

8. *Richards v. Merrimac, etc. R. Co.*, 44 N. H. 127.

9. *Shaw v. Norfolk Co. R. Co.*, 5 Gray (Mass.) 162.

XI. PAYMENT OF BONDS.—Bonds or coupons are payable in gold coin when provisions have been made therefor.¹ But an undertaking to pay in gold under the legal tender acts must be either express or implied in the contract; the implication cannot be gathered from the mere expectation of the parties.²

The modification of the mortgage does not extinguish it, nor is its lien affected by the substitution of new bonds for the old ones.³ But where a railroad corporation issues bonds in order to fund its indebtedness and creditors surrender old securities and accept new ones, such acceptance, in the absence of an agreement governing the transaction, constitutes a novation of the debt and a payment of the former obligation.⁴

Outstanding equities cannot be adjusted in the foreclosure of a mortgage executed by a railroad company to secure the issue of a limited number of bonds. The company, the trustees, or a court of equity have no power to enlarge the mortgage so as to make it security for an additional sum.⁵ Nor can the debt secured be increased as against subsequent encumbrancers without their consent.⁶

1. Lost Bonds.—When bonds have been lost without any negligence on the part of the holder, a court of chancery has power to enforce the payment of them provided such relief can be given without derogating from any positive agreement or violating any equal or superior equity in other parties. The relief will be granted, however, upon the condition that full and secure indemnity shall be furnished against its being enforced in the hands of others.⁷ Indemnity should be furnished upon each

1. *Pollard v. Pleasant Hill*, 3 Dill. (U. S.) 195; *Missouri v. Hayes*, 50 Mo. 34; *Trebilcock v. Wilson*, 12 Wall. (U. S.) 687.

2. *Knox v. Lee*, 12 Wall. (U. S.) 457.

3. *Gilbert v. Washington City etc. R. Co.*, 33 Gratt. (Va.) 586; *Stevens v. Mid-Hants etc. R. Co.*, 8 Ch. 1064.

A railroad company having executed a mortgage to secure a limited number of bonds, afterwards executed another mortgage upon the same property to secure a larger number of bonds, which recited that the holders of the bonds secured by the original mortgage had agreed to surrender the same and receive in substitution therefor new bonds to be secured by the original mortgage as modified by the second mortgage. All the bonds secured by the first mortgage except twenty were exchanged for bonds secured by the second. Held, that the holders of such twenty bonds were not entitled to be paid out of the said proceeds of the mortgaged property in preference to the holders of the substituted bonds, but

that they could not be prejudiced by the increase of the number of bonds secured by the second mortgage, but were entitled to the same proportion of the proceeds for the mortgaged property as if the second mortgage had not been executed. *Ames v. New Orleans etc. R. Co.*, 2 Woods (U. S.) 206.

Old mortgage bonds were surrendered by a creditor and new ones received for all excepting a small portion of the reduced indebtedness to him. No bond was issued for it because no bond was issued for so small a sum. Held, that the said creditor was entitled to a lien equal to that of other mortgage creditors for the whole amount due him. *Blair v. St. Louis etc. R. Co.*, 23 Fed. Rep. 524.

4. *Fidelity Ins. etc. R. Co., v. Shenandoah Valley R. Co.*, 86 Va. 1.

5. *Vose v. Bronson*, 6 Wall. (U. S.) 455.

6. *Jones on Railroad Securities*, § 322; *Taylor v. Atlantic etc. R. Co.*, 55 How. Pr. (N. Y.) 279.

7. *New Orleans etc. R. Co. v. Mis-*

payment of interest as well as upon the payment of the principal sum, and then if at any time before final payment it be made to appear that the indemnity for past payments was insufficient or had become insecure, the court might properly make it a condition precedent to the receipt of further payments that additional indemnity be given in respect to payments previously made. All risks may in this way be provided against, and if the bonds should be discovered or be presented by a *bona fide* holder, the obligations issued in their place will cease to be of value.¹

2. Subrogation.—The right of subrogation is independent of any contractual relations between the parties. It is a creature of equity and is enforced solely for the purpose of accomplishing the ends of justice. So when it is the duty of a mortgagor to protect junior incumbrancers against a prior lien, and he fails to do so and they pay the amount of such lien to prevent a forced sale of the property, they are entitled to be subrogated to the rights of the prior lienholder.² And *bona fide* purchasers of certificates issued by a receiver in excess of the amount ordered may, in equity, be subrogated to the rights of the holders of coupons which were paid for out of the money raised from the sale of such certificates.³ But there is no equitable subrogation where a right of substitution to the security is given by statute though the result may be similar.⁴

Statutes authorizing the indorsement of bonds of a railroad company by the governor create a lien not purely personal to the State, but holders of the bonds are entitled to be subrogated to such statutory lien on a bill filed by the trustees to foreclose the deed of trust, and are entitled to be first paid out of the proceeds

Mississippi College, 47 Miss. 560; Miller v. Rutland etc. R. Co., 40 Vt. 399. See Lawrence v. Lawrence, 42 N. H. 109.

In New Orleans etc. R. Co. v. Mississippi College, 47 Miss. 561, the court by Peyton, C. J., said: "The jurisdiction in the case of lost bonds originates in the doctrine of profert at law. It was anciently a rule of pleading in the common law courts, that they could give no remedy for a debt secured by bond, unless the creditor offered to produce his bond in court. This was called making profert of the bond. If the bond were lost, profert was impossible, and the remedy at law was gone. But the court of chancery, on proof that the bond was really lost, entertained jurisdiction to compel its re-execution and payment of the money secured. The rule requiring profert is now dispensed with at law, in the event of loss; but the change of practice at common law does not annul the jurisdiction in equity. Adams' Eq. 166, 167. It thus appears

that a court of chancery not only has the power to enforce the payment of a lost bond upon sufficient indemnity given the obligor, but also to compel a re-execution of it."

1. Jones on Railroad Securities, § 327; Chesapeake etc. Canal Co. v. Blair, 45 Md. 102.

2. Memphis etc. R. Co. v. Dow, 120 U. S. 287.

3. Newbold v. Peoria etc. R. Co., 5 Bradw. (Ill.) 367.

4. See Jones on Railroad Securities, § 328.

Under an act of the legislature passed in 1869, certificates of indebtedness were authorized to be issued by a railroad company for funding interest due upon its bonds which were secured by a lien under an act of 1866, and which lien was extended by the latter act to cover these certificates of indebtedness. Held, that this was a mere substitution and not a payment, and that the lien of these certificates was superior to that of

of the sale of the property.¹ But where a State issues its own bonds to a railroad company to aid its construction, there can be no subrogation as against it in behalf of a holder to whom the company has transferred the bonds. Thus, where a State issues bonds to a railroad company, and land is conveyed to the State by the company as indemnity against losses on her bonds, the holders of such bonds cannot be subrogated against the State, and her grantees take the property discharged of any claim of the bondholders.² So a lien created by an act of the legislature providing for a loan of the bonds of the State to a railroad company stands as a security for the payment of the bonds in favor of the *bona fide* holders of the same.³ An act of the general assembly providing that all the property of a railroad company should stand pledged and mortgaged to the State for the payment of certain bonds issued by such company and guaranteed by the State also creates a statutory lien for the benefit of the bondholders as well as the State, which no subsequent statute can postpone.⁴

3. Redemption.—The right of redemption is derived from State statutes allowing redemption after foreclosure sales. These statutes are valid and binding in the Federal courts as well as those of the States,⁵ except when called upon to decree a foreclosure sale of the mortgage which covers as an entirety the rights, franchises, and road of the company existing in several States.⁶ So statutes of a State giving the right to redeem mortgaged lands sold under a decree, do not embrace the real estate of a railroad corporation mortgaged in connection with its franchises and

the mortgage executed between 1866 and 1869. *Gibbs v. Greenville etc. R. Co.*, 13 S. Car. 228; 4 Am. & Eng. R. Cas. 459.

1. *Colt v. Barnes*, 64 Ala. 108; *Young v. Montgomery etc. R. Co.*, 2 Woods (U. S.) 606; *Forrest v. Ledington*, 68 Ala. 1; *Morton v. New Orleans etc. R. Co.*, 72 Ala. 566.

A State indorsed the bonds of a railroad company, upon the express condition that such indorsement should vest in the State the title of all property purchased with the proceeds of said bonds, and should give the State a first lien on all the property of the company; and that upon failure of the company to pay the interest or principal of the bonds, the governor should take possession of all its property and sell the same for the purpose of paying said bonds. Default was made by the railroad company in the payment of interest, and the governor took possession of its property, which he advertised for sale: *Held*, that at the suit of a holder of bonds of a subsequent issue, which

the State had indorsed on the same terms as the first issue, but which indorsement the legislature had declared not binding on the State, the court would not restrain the sale of the road by the governor, nor take the possession thereof from the State, nor appoint a receiver therefor. *Branch v. Macon etc. R. Co.*, 2 Woods (U. S.) 385.

2. *Chamberlain v. St. Paul etc. R. Co.*, 92 U. S. 299.

3. *Tomkins v. Little Rock etc., R. Co.*, 21 Fed. Rep. 370; 15 Fed. Rep. 6; 18 Fed. Rep. 344; *North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 692; *Daniels v. Iearney*, 102 U. S. 415; *Clews v. New Brunswick etc. R. Co.*, 54 Ga. 215; *Improvement Fund v. Jacksonville etc. R. Co.*, 6 Fla. 708.

4. *Hand v. Savannah etc. R. Co.*, 12 S. Car. 314; *Gibbes v. Greenville etc. R. Co.*, 13 S. Car. 288.

5. *Brine v. Hartford F. Ins. Co.*, 96 U. S. 627.

6. *Turner v. Indianapolis etc. R. Co.*, 8 Biss. (U. S.) 382.

personal property. Nor do they embrace the authority to sell the appurtenances and franchises when mortgaged as a whole.¹ Its real estate, personalty, and franchises so mortgaged should be sold as an entirety and without the right of redemption given by statute.²

The vested right of a mortgagor to redeem under the general law cannot be destroyed or impaired by a special statute enacting that the mortgage has been foreclosed, or that it shall be foreclosed in case the debt be not paid within one year from the passage of the act.³ But where a railroad company mortgages its road, franchises, and property to a State to secure the payment of a loan made by the State, and subsequently surrenders the property to the State, the right of redemption to which the mortgagor is entitled cannot be enforced by suit against the State in its own courts, for a State cannot be impleaded in its own courts, except by its own consent clearly manifested by an act of its legislature.⁴

XII. FORECLOSURE.—It is usual for railway mortgages to contain a clause authorizing the trustees, to whom they are made, either to enter into possession of the premises in case of default in payment of interest, or else to expose said premises to sale. Trustees may exercise either of these powers, if they see fit;⁵ or they may, if they please, waive all rights to exercise these powers, and have resort to the ordinary remedy of a bill of foreclosure.⁶

1. Default Must be Shown.—The allegations of a bill in foreclosure proceedings must show a default within the terms of the mortgage. If the mortgage or deed of trust provides that the bonds may be considered due by any bondholder on default of payment of interest, the mortgage may be foreclosed for the whole amount, for a failure to pay a single installment of interest.⁷ Such a stipulation in a railway or other mortgage is not regarded as a penalty, but simply as a provision for the earlier maturing of the deed upon the happening of certain contingen-

1. *Peoria etc. R. Co. v. Thompson*, 103 Ill. 187.

2. *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77; *Turner v. Indianapolis etc. R. Co.*, 8 Biss. (U. S.) 380; *Simons v. Taylor*, 36 Fed. Rep. 682.

3. *Ashuelt R. Co. v. Elliott*, 52 N. H. 387.

4. *Troy etc. R. Co. v. Com.*, 127 Mass. 43.

5. *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141.

The trustees must, of course, conform strictly to the provisions of the mortgage as to the time, when and the mode in which they shall exercise these powers. *Macon etc. R. Co. v. Georgia*

R. Co., 63 Ga. 103; 1 Am. & Eng. R. Cas. 378.

These powers must also be exercised upon the mortgaged premises as a whole. The trustees cannot, by virtue of them, intervene to prevent the sale of particular parts or portions of the mortgaged premises under execution issued by junior incumbrancers. *Goe v. Peacock*, 14 Ohio St. 187.

6. *Williamson v. New Auburn etc. R. Co.*, 1 Biss. (U. S.) 108.

7. *McLean v. Pressley*, 56 Ala. 211; *Gates v. Boston etc. R. Co.*, 53 Conn. 333; 24 Am. & Eng. R. Cas. 143; *Pope v. Durant*, 26 Iowa 233; *Holden v. Gilbert*, 7 Paige (N. Y.) 208; *Bushfield v.*

cies.¹ In the absence of such a stipulation in the mortgage, however, the decree of foreclosure can direct the payment of such part of the debt only as is due at the time of the commencement of the action, or such part as may become due before the final hearing; and enforce such decree by directing the sale of such part only of the mortgage premises as may be necessary to pay that portion of the debt which has matured.²

2. Parties.—*a. PLAINTIFFS.*—In a bill to foreclose a railway mortgage, it is not necessary that all the bondholders should be joined as plaintiffs.³ The trustee to whom the mortgage has been executed is the proper party to file the bill.⁴ If the mortgage has been executed to all the stockholders by name, instead of a trustee, they must, of course, all join in the foreclosure proceedings.⁵

Where the trustee named in a railroad mortgage files a bill of foreclosure he need not join the various bondholders as parties

Meyer, 10 Ohio St. 334; Hesie *v.* Gray, 71 Pa. St. 198; Richard *v.* Holmes, 59 U. S. 143.

1 Stillwell *v.* Adams, 29 Ark. 346; Gratten *v.* Wiggins, 23 Cal. 16; Jones *v.* Lawrence, 18 Ga. 277; Morgenstern *v.* Klees, 30 Ill. 422; Smart *v.* McKay, 16 Ind. 45; Taber *v.* Cincinnati etc. R. Co., 15 Ind. 459; Hunt *v.* Harding, 11 Ind. 245; Cecil *v.* Dynes, 2 Ind. 266; Greenman *v.* Pattison, 8 Blackf. (Ind.) 465; Hough *v.* Doyle, 8 Blackf. (Ind.) 300; Andrews *v.* Jones, 3 Blackf. (Ind.) 440; Mobray *v.* Leckie, 42 Md. 474; Schooley *v.* Romain, 31 Md. 575; Salmon *v.* Clagett, 3 Bland Ch. (Md.) 125; Magruder *v.* Eggleston, 41 Miss. 284; Goodman *v.* Cincinnati etc. R. Co., 2 Disney (Ohio) 176; Baker *v.* Lehman, Wright (Ohio) 522; Richards *v.* Holmes, 59 U. S. 143.

2. Mussina *v.* Bartlett, 8 Port. (Ala.) 284; Greenman *v.* Pattison, 8 Blackf. (Ind.) 465; Adam *v.* Essex, 1 Bibb (Ky.) 149; 4 Am. Dec. 623; Cauffman *v.* Sayre, 2 B. Mon. (Ky.) 202; Magruder *v.* Eggleston, 41 Miss. 284; James *v.* Fisk, 17 Miss. 144; 47 Am. Dec. 111.

3. Shaw *v.* Norfolk Co. R. Co., 5 Gray (Mass.) 162; Chicago etc. R. L. Co. *v.* Peck, 112 Ill. 408.

4. Savannah etc. R. Co. *v.* Lancaster, 62 Ala. 555; Boston etc. Air Line R. Co. *v.* Coffin, 50 Conn. 150; Hale *v.* Nashua & L. R. Co., 60 N. H. 333; Hays *v.* Gallon Gas Light etc. Co., 29 Ohio St. 230; Coe *v.* Columbus etc. R. Co., 10 Ohio St. 372; Knapp *v.* Railroad Co., 20 Wall. (U. S.) 117; Bards-

town etc. R. Co. *v.* Metcalf, 4 Metc. (Ky.) 109.

In Hays *v.* Gallon Gas Light etc. Co., 29 Ohio St. 335, the court by Boynton, J., said: "The trustee in such case is usually, if not always, selected and appointed by the company for the convenience and benefit of itself, and of those who may become the owners of its obligations. One mortgage to the trustee is all that is required, no matter how numerous the holders of the notes or bonds secured thereby. He is the representative of the common interests of all who may invest in the security. The right of the owner of the debt secured by the mortgage to be represented by him gives additional value to the security, and facilitates the collection of the debt upon its maturity, and consequently enables the company the more readily and easily to realize and obtain the loan desired. It is not infrequently the case, especially in the business of great corporations, that the holders of the bonds are so numerous that it would be not merely inconvenient, but utterly impracticable, to bring them all before the court in a proceeding to foreclose the equity of redemption. Doubtless this is one of the considerations that gave rise to the rule held in Coe *v.* The Columbus, Piqua and Indiana R. R. Co., 10 Ohio St. 372, that the bondholders, when numerous, were, in an action for foreclosure, neither necessary nor proper parties."

5. Nashville etc. R. Co. *v.* Orr, 18 Wall. (U. S.) 471.

defendant.¹ They will all be at any rate bound by the decree.² Where in such case the trustee is also a bondholder he will be bound by the decree in his capacity of bondholder.³ If there be two trustees, one of a mortgage upon the whole road, the other of a mortgage upon only a portion of it, they may unite in filing the foreclosure bill, and such bill will not be deemed multifarious.⁴

A single bondholder cannot file a bill of foreclosure in behalf of himself and all the other bondholders,⁵ unless the trustee to whom the mortgage has been executed refuses or neglects to act, or has assumed a position prejudicial to the bondholders; or unless there be a vacancy in the office of trustee.⁶ A single bondholder may insist upon a foreclosure, though the mortgage provides for a foreclosure by the trustees upon the request of a majority of the bondholders.⁷ If the suit is brought by one bondholder in behalf of all, it is unnecessary for the rest to become formal parties to the suit.⁸ The proceedings being instituted for all of them, will, of course, enure to the benefit of all.⁹ The property conveyed to the trustee cannot, however, be reached by a single bondholder in a suit to enforce his individual claim. He must proceed against the trustee, not for his own separate benefit, but as a bondholder and on behalf of the bondholders as a class.¹⁰

The trustees or bondholders of a mortgage which is declared to be for the purpose of securing the payment of the interest as well as the principal of certain bonds may file a bill for its foreclosure after the default in the payment of either principal or interest

1. *Shaw v. Norfolk Co. R. Co.*, 5 Gray (Mass.) 162.

2. *McElrath v. Pittsburgh etc. R. Co.*, 68 Pa. St. 37; *Board of Supervisors etc. v. Mineral Point R. Co.*, 24 Wis. 93; *Campbell v. Railroad Co.*, 1 Wood (U. S.) 308.

3. *Corcoran v. Chesapeake etc. Canal Co.*, 94 U. S. 741.

4. *Mobile etc. R. Co. v. Talman*, 15 Ala. N. S. 472.

5. *March v. Eastern R. Co.*, 40 N. H. 548; *Mason v. New York etc. R. Co.*, 52 Me. 82; *Carpenter v. Canal Co.*, 35 Ohio St. 307; *Com. v. Susquehanna etc. R. Co.*, 122 Pa. St. 306; *Brooks v. Vermont Central R. Co.*, 14 Blackf. (U. S.) 463; *Mercantile Trust Co. v. LaMoille Valley R. Co.*, 16 Blackf. (U. S.) 324.

6. *Campbell v. Railroad Co.*, 1 Wood (U. S.) 368; *Susquehanna R. etc. Co. v. Blatchford*, 11 Wall. (U. S.) 172; *Galveston R. Co. v. Cowdley*, 12 Wall. (U. S.) 479; *Knapp v. Troy etc. R. Co.*, 20 Wall. (U. S.) 117; *Webb v. Vermont Central R. Co.*, 20 Blackf. (U. S.) 218; *Davies v. New York Con- cert Co.*, 41 Hun (N. Y.) 497; *Weet-*

jen v. St. Paul etc. R. Co., 4 Hun (N. Y.) 265; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Greaves v. Gouge*, 69 N. Y. 154; *Com. v. Susquehanna etc. R. Co.*, 122 Pa. St. 306; *Chicago etc. R. Co. v. Fosdick*, 106 U. S. 47; *Credit Co. v. Arkansas Cent. R. Co.*, 5 McCreary (U. S.) 23.

7. *Alexander v. Central R. Co.*, 3 Dill. (U. S.) 487; *Farmers' L. & T. Co. v. Central R. Co.*, 4 Dill. (U. S.) 532; *Sage v. Central R.*, 93 U. S. 412.

8. *March v. Eastern R. Co.*, 40 N. H. 548; *Mason v. York etc. R. Co.*, 52 Me. 82; *Wilmer v. Atlanta etc. R. Co.*, 2 Woods (U. S.) 447; *Campbell v. Railroad Co.*, 1 Woods (U. S.) 368.

9. *Fisk v. New York Water Proof Co.*, 29 N. J. Eq. 16; *Pennock v. Coe*, 23 How. (U. S.) 117; *Martin v. Mobile etc. R. Co.*, 7 Bush (Ky.) 116.

10. *Com. v. Susquehanna etc. R. Co.*, 122 Pa. St. 306; *Philadelphia etc. R. Co. v. Johnson*, 54 Pa. St. 127; *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141; *Philadelphia etc. R. Co. v. Woelpper*, 64 Pa. St. 366; *Hackensack Water Co. v. Dekay*, 36 N. J. Eq. 548.

continued for a period named.¹ So in the absence of any special provision therefor, the mortgage as security for the interest as well as principal may be foreclosed on default in payment of the interest.²

A mortgage may contain a clause making a demand for interest upon arrears a necessary precedent to foreclosure.³ If the usual place of payment is not at the place stipulated in the mortgage and the mortgagee knows that the mortgagor has the money ready at the usual place and requires payment at the place so designated in the mortgage, he should notify the mortgagor to this effect, and if he does not and he refuses to receive payment at the usual place except on conditions, he waives the right of payment elsewhere and cannot on a default so made treat the whole debt as due.⁴

While a cause is pending in the court of chancery to foreclose a mortgage brought by a part of the bondholders in behalf of themselves and all others, bondholders secured by the same mortgage who might choose to come into the suit on petition may, in the discretion of the court, be made parties. And this is so although the cause had passed to the supreme court and at the time the petition was brought had been pending for several terms in the court of chancery, having been remanded with a mandate affirming the decree below, and the bonds of the original orators paid off.⁵ So where a person holds the bonds of a railroad company as collateral security, his right to institute foreclosure proceedings is as great as though he held them by an absolute title.⁶ If, however, the amount advanced upon the bonds be less than their face value, the assignor ought to be made a party to the foreclosure proceedings.⁷

1. *Central Trust Co. v. New York City R. Co.*, 33 Hun (N. Y.) 513; *Chicago etc. R. Co. v. Fosdick*, 106 U. S.

47.
2. *Mercantile Trust Co. v. Missouri etc. R. Co.*, 36 Fed. Rep. 221; 36 Am. & Eng. R. Cas. 259; *Central Trust Co. v. Texas etc. R. Co.*, 23 Fed. Rep. 846.

3. *Chicago etc. R. Co. v. Fosdick*, 106 U. S. 47; 7 Am. & Eng. R. Cas. 427.

A deed of trust, to secure certain coupon bonds, with interest coupons payable "upon presentation and surrender" as they become due, after providing that the interest shall be paid punctually when due, and on default, at any time "after demand" for any period exceeding six months, the trustee shall sell the trust property on demand in writing of the bondholders, contains the following clause: "It is further agreed . . . in the event of any de-

fault in the payment of interest . . . which shall continue for a period of six months . . . the whole principal . . . shall become due," provided a majority of the bondholders shall make a written demand upon the trustee. *Held*, that a default in the payment of interest can be predicated only upon refusal to pay after a demand has been made, and such default must continue for a period exceeding six months before a right of action accrues. *Potomac Mfg. Co. v. Evans*, 84 Va. 717.

4. *Union Mut. L. Ins. Co. v. Union Mill Plaster Co.*, 37 Fed. Rep. 286; *Jones on Railroad Securities*, § 383.

5. *Smith v. Rutland etc. R. Co.*, 56 Vt. 82; 26 Am. & Eng. R. Cas. 646.

6. *McCurdy's Appeal*, 65 Pa. St. 290; *Peck v. New York etc. R. Co.*, 59 How Pr. (N. Y.) 419.

7. *Ackerson v. Long Branch etc. R. Co.*, 28 N. J. Eq. 542.

b. DEFENDANTS.—Where property and franchises of a railroad company have been conveyed by trust deed or mortgage to trustees for the benefit of the bondholders, the bondholders are not generally necessary parties to a bill brought to foreclose the mortgage.¹ Nor need individual stockholders be joined.² They cannot even intervene in the cause unless indeed it be shown that the directors of the company are not properly protecting their interests.³

Whether the United States can compulsorily be made a defendant to a foreclosure bill, where it holds a lien or mortgage on the property in respect to which the foreclosure is sought, is not well settled.⁴ And where a State has indorsed bonds, the fact that it cannot be sued will alone excuse its joinder as a party defendant.⁵

If the bonds be indorsed by another corporation, that corporation should undoubtedly be a party to the cause.⁶ But ordinarily it is not necessary nor proper to make prior mortgagees parties to a foreclosure proceeding. Junior mortgagees must sell property subject to the lien of the prior mortgage.⁷ Nor is

1. *Chicago etc. R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Vose v. Bronson*, 6 Wall. (U. S.) 452; *Shaw v. Little Rock etc. R. Co.*, 100 U. S. 605; *Wetmore v. St. Paul etc. R. Co.*, 1 McCrary (U. S.) 466; *Shaw v. Norfolk etc. R. Co.*, 5 Gray (Mass.) 562; *In re Atlantic etc. R. Co.*, 3 Hughes (U. S.) 320.

2. *Chicago etc. R. Co. v. Howard*, 7 Wall. (U. S.) 392.

3. *Bronson v. La Crosse etc. R. Co.*, 2 Wall. (U. S.) 383; *Chicago etc. R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Forbes v. Memphis etc. R. Co.*, 2 Woods (U. S.) 323; *Des Moines Gas Co. v. West*, 50 Iowa 16; *Alexander v. Searcy*, 81 Ga. 536; 36 Am. & Eng. R. Cas. 239.

Neither the minority stockholders nor one who is not a stockholder at the time of the alleged illegal transactions can maintain a bill in defense of the foreclosure of a railroad mortgage alleging that the affairs of the corporation have been mismanaged in the interest of the principal stockholder, and that the bonds are void for usury in their negotiation, where no demand has been made upon the directors or stockholders to make such defense, the only excuse for not making the demand being that the officers are in collusion with the plaintiff. *Alexander v. Searcy*, 81 Ga. 536; 36 Am. & Eng. R. Cas. 239.

4. *Meier v. Kansas etc. R. Co.*, 4 Dill. (U. S.) 378; *Elliott v. Van Voorst*, 3 Wall. Jr. (C. C.) 299.

5. *Davis v. Gray*, 16 Wall. (U. S.) 203; *Young v. Montgomery etc. R. Co.*, 2 Woods (U. S.) 606.

6. *Searles v. Jacksonville etc. R. Co.*, 2 Woods (U. S.) 261.

7. *Payne v. Hook*, 7 Wall. (U. S.) 432; *Jerome v. McCarter*, 94 U. S. 734; *Young v. Montgomery etc. R. Co.*, 3 Woods (U. S.) 606.

There are a great number of authorities which hold that it is both improper and unnecessary to join a prior incumbrancer or mortgagee in foreclosure proceedings, and that even if made parties the decree can have no effect whatever upon their rights. *Rose v. Page*, 2 Sum. 471; *Shepherd v. Gwennet*, 3 Swanst. 151; *Richards v. Cooper*, 5 Beav. 304; *Richards v. Chesapeake etc. R. Co.*, 1 Hughes (U. S.) 28; *Jerome v. McCarter*, 94 U. S. 734; *Weed v. Beebe*, 21 Vt. 499; *Strobe v. Downer*, 13 Wis. 10; *Walker v. Jarvis*, 16 Wis. 28; *Wakeman v. Grover*, 4 Paige (N. Y.) 23; *Eagle F. Co. v. Lant*, 6 Paige (N. Y.) 637; *Lewis v. Smith*, 9 N. Y. 502; *Kay v. Whittaker*, 44 N. Y. 565; *Hancock v. Hancock*, 22 N. Y. 268; *Brundage v. Domestic etc. Missionary Soc.*, 60 Barb. (N. Y.) 204; *Post v. Markall*, 3 Bland (Md.) 495; *Hall v. Hall*, 11 Tex. 547; *Tome v. Building etc. Co.*, 34 Md. 12; *Bogey v. Shute*, 4 Jones Eq. (N. Car.) 174; *Young v. R. Co.*, 3 Am. L. J. R. (N. S.) 91; *Hagen v. Walker*, 14 How. (U. S.) 37; *Summers v. Bromley*, 28

it necessary to make purchasers *pendente lite* parties. But subsequent encumbrancers must usually be made parties.¹ So all

Mich. 125; *Wurcherer v. Hewitt*, 10 Mich. 453; *Comstock v. Comstock*, 24 Mich. 39; *Patterson v. Shaw*, 6 Md. 377; *Wright v. Bundy*, 11 Ind. 398; *Murphy v. Farwell*, 9 Wis. 102; *Payne v. Hoole*, 7 Wall. (U. S.) 432; *Straight v. Harris*, 14 Wis. 509; *Dawson v. Danbury Bank*, 15 Mich. 489; *Frost v. Koon*, 3 N. Y. 428; *Pridgen v. Andrews*, 7 Tex. 451; *Jones on Ry. Sec.*, Sect. 443.

But on the other hand other authorities may be found authorizing their joinder and declaring that a decree will bind their rights. *Finley v. Bank of U. S.*, 11 Wheat. (U. S.) 304; *Bishop of Winchester v. Beaver*, 3 Ves. 315; *Haines v. Beach*, 3 Johns. Ch. (N. Y.) 459; *Bishop of Winchester v. Paine*, 11 Ves. 108; *Mondey v. Mondey*, 1 V. & B. 223; *Cookes v. Sherman*, 2 Freeman 14; *Ensworth v. Lambert*, 4 Johns. Ch. (N. Y.) 605; *McGowan v. Yerkes*, 6 Johns. Ch. (N. Y.) 450; *Standish v. Daw*, 21 Iowa 363; *Heimstreet v. Winnie*, 10 Iowa 430; *Morris v. Miller*, 45 N. Y. 708. See *Woods v. Pittsburg etc. R. Co.*, 3 Am. & Eng. R. Cas. 525, and note.

It is in some cases necessary to join the prior mortgagees as parties, as, for example, where the amount due them is not fixed, or the lien of their mortgage is disputed. Without their formal joinder no decree can be entered in such case which will be conclusive upon their rights. *Richards v. Chesapeake etc. R. Co.*, 1 Hughes 28; *Young v. Montgomery etc. R. Co.*, 2 Woods (U. S.) 606; *Pittsburgh etc. R. Co. v. Marshall*, 85 Pa. St. 187; *Sutherland v. Lake Superior Ship Canal R. etc. Co.*, 1 Cent. L. J. 127; *Bronson v. La Crosse etc. R. Co.*, 2 Black (U. S.) 524; *Woods v. Pittsburgh etc. R. Co.*, 3 Am. & Eng. R. Cas. 525; *Miltenberger v. Logansport R. Co.*, 106 U. S. 286; 12 Am. & Eng. R. Cas. 464.

In some cases it appears that it is proper to make a prior mortgagee a party when it sought to create a receivership for the benefit, not only of the party filing the bill, but for all parties concerned. *Miltenberger v. Logansport R. Co.*, 106 U. S. 286; 12 Am. & Eng. R. Cas. 464.

The various courts differ widely upon the point in the text. It is generally

conceded that the joinder of the junior incumbrancer is necessary to enable the foreclosure sale to pass a title free of all incumbrances. But as to how this result is to be attained there is a great diversity of opinion. Some authorities say that the court may decree such a sale, even though the prior incumbrancer may object, throwing him back to his claim on the fund. *Clark v. Prentice*, 3 Dana 468; *Train v. Hunt*, 8 Blackf. (Ind.) 580; *Persons v. Alsip*, 2 Md. 67; *Sutherland v. Lake Canal Co.*, 9 Nat. Bank. Reg. 208; *Braward v. Hoeg*, 15 Fla. 370; *Walter v. Riehl*, 38 Md. 211.

Others indicate that it is necessary to obtain the assent of the prior incumbrancer. *Miller v. Finn*, 1 Neb. 254; *Rucks v. Taylor*, 49 Miss. 552; *Ducker v. Belt*, 3 Md. Ch. 13; *Vanderkemp v. Shelton*, 11 Paige (N. Y.) 28. Such is certainly the law in *England*. *Langton v. Langton*, 7 De G. M. & G. 30; *Wickerden v. Rayson*, 6 De G. M. & G. 219; *Parker v. Fuller*, 1 R. & M. 656. And under this view of the case a prior mortgagee may obtain an injunction against a sale discharging all incumbrances, to which he has not given his consent. *Rucks v. Taylor*, 49 Miss. 552. A joinder of the prior mortgagee is sometimes made to ascertain the amount due on his mortgage so that the purchaser at the sale may know what burden he takes subject to. *Richards v. Chesapeake and Ohio R. Co.*, 1 Hughes 28; or else to test the validity or priority of such mortgage, which is perfectly proper. *Dawson v. Danbury Bank*, 15 Mich. 439.

It may be said that in general, the disposition of courts of equity at the present day is towards recognizing the validity of the joinder of the first incumbrancer, in order that all the various rights may be at once considered and adjudicated. See *Thomas on Mortgages in N. Y.* 243-247. If the prior incumbrancer be improperly joined in the opinion of the court, his name will be stricken off, on application of either party without prejudice to complainant. *Corning v. Smith*, 6 N. Y. 82; *Banning v. Bradford*, 21 Minn. 308; *Wilkinson v. Daniels*, 1 Greene (Iowa) 179.

1. *Youngman v. Elmira etc. R. Co.*, 65 Pa. St. 278.

subsequent judgment creditors must be joined.¹ Persons belonging to a class represented in a suit, such as mortgage creditors, represented by the trustees of the mortgage are regarded as *quasi* parties, and may be heard on petition and motion.²

3. Defences.—No other or further defences are allowed in an action to foreclose a railroad mortgage given to secure negotiable instruments than would be allowed in an action on such negotiable instruments.³ Persons taking bonds with a full knowledge that they are subject to bonds issued under a prior mortgage cannot deny the validity of the mortgage which they have assumed.⁴ So where a railroad company succeeds, through various *mesne* conveyances, to the franchises of another railroad company which is mortgaged, it cannot, in a proceeding to foreclose such mortgage, deny the incorporation of the mortgagor company.⁵ In a bill to foreclose, at the instance of a mortgagee who has acquired all the claims against a corporation and has been allowed by the receiver to enter into the possession of the corporate property and assets, the receiver cannot set up, as a defence, an agreement with the complainant by which the receiver was to hold the road for the benefit of the complainant, and the latter was to pay all the receiver's costs and expenses, which he has not done, such agreement not being intended to secure to the receiver the right to set off his fees and costs against the amount due on the mortgage.⁶

4. Decree.—The usual decree in foreclosure proceedings fixes the amount of principal and interest, and then stipulates a certain time within which said amount is to be paid. In case of failure to pay within the specified time, the mortgaged premises are ordered to be sold to satisfy the debt.⁷ But so long as a doubt exists as to the character and extent of the mortgage lien, a court of equity will not expose the mortgaged premises for sale under it if the interest be capable of being reduced to a certainty.⁸ A decree fixing the amount of principal and interest due, and stipulating the time within which it is to be paid, is final.⁹

1. *Searles v. Jacksonville, Pensacola & Mobile R. R. Co.*, 2 Woods 261; *Sang v. Brewster*, 31 N. Y. 218. If he be not joined, the foreclosure proceeding are as to him void. *Bronson v. La Crosse etc. R. Co.*, 2 Wall. (U. S.) 283; *Kay v. Whittaker*, 44 N. Y. 565; *Howard v. Milwaukee etc. R. Co.*, 7 Biss. (U. S.) 80.

2. *Benjamin v. Elmira etc. R. Co.*, 49 Barb. (N. Y.) 441; *Howard v. Milwaukee etc. R. Co.*, 7 Biss. (U. S.) 23; *Bronson v. La Crosse etc. R. Co.*, 2 Wall. (U. S.) 283; *Railroad Co. v. James*, 6 Wall. (U. S.) 750.

3. *Kenicott v. Wayne Co.*, 16 Wall. (U. S.) 452.

4. *Bronson v. La Crosse etc. R. Co.*,

2 Wall. (U. S.) 283. See *Jerome v. McCarter*, 94 U. S. 734; *Minnesota Co. v. St. Paul Co.*, 6 Wall. (U. S.) 722.

5. *Beckman v. Hudson River etc. R. Co.*, 35 Fed. Rep. 3.

6. *Ryan v. Anglesea R. Co.* (N. J.), 35 Am. & Eng. R. Cas. 51.

7. *Blossom v. Milwaukee etc. R. Co.*, 1 Wall. (U. S.) 655; *Milwaukee etc. R. Co. v. Soutter*, 2 Wall. (U. S.) 440; *Hinckley v. Gilman etc. R. Co.*, 94 U. S. 467; *Washington etc. R. Co. v. Bradley*, 7 Wall. (U. S.) 575.

8. *Sutherland v. Lake Superior etc. R. Co.*, 1 Cent. L. J. 127; *Jerome v. McCarter*, 94 U. S. 734.

9. *Milwaukee etc. R. Co. v. Soutter*,

and may be modified or set aside,—1, by appeal within the time allowed; 2, by bill of review filed within the time allowed for an appeal, charging error apparent upon the record; and 3, by original bill charging fraud or newly discovered evidence.¹

In foreclosure proceedings, decrees are often entered by consent. These are not to be regarded as decrees. Properly speaking they are rather agreements of the parties to which judicial sanction is given.² Courts exercise the right of correcting them so long as they remain unexecuted.³

When the property of a railroad company lies in two States, the courts of one of the States may, nevertheless, decree a sale of the whole property.⁴ Where, however, such corporation is incorporated by both States, the property in the State, the courts of which have not ordered the sale, will be sold subject to the existing liens thereon.⁵

There must be due and proper notice of the sale under the decree of foreclosure.⁶ If there be any material error in the notice, this will avoid the sale. Thus, where the notice recited that more bonds were outstanding than was actually the case, this was held a fatal error.⁷ But a foreclosure decree is not void as to persons actually parties by reason of the fact that a necessary party plaintiff or defendant has not been joined. It is, on the contrary, valid and binding upon the parties to the cause.⁸ So when a decree of foreclosure has once been entered, the defendants cannot set up any irregularity in the mortgage.⁹

² Wall. (U. S.) 440; *Blossom v. Milwaukee etc. R. Co.*, 1 Wall. (U. S.) 655; *Hinckley v. Gilman etc. R. Co.*, 94 U. S. 467; *Chicago etc. R. Co. v. Fosdick*, 106 U. S. 47; *Grant v. Phoenix Ins. Co.*, 106 U. S. 429; *First Nat. Bank v. Shedd*, 121 U. S. 74; *Forgay v. Conrad*, 6 How. (U. S.) 201; *Ray v. Law*, 3 Cranch (U. S.) 179.

A decree directing a sale of trust property and that the proceeds be brought into court, is a final decree. *Washington etc. R. Co. v. Bradley*, 7 Wall. (U. S.) 575.

An order affecting a substantial right made in proceedings in relation to the appointment and removal of receivers is a final order and from which there may be an appeal. *Cincinnati etc. R. Co. v. Sloan*, 31 Ohio St. 1.

In a suit to foreclose a mortgage on a railroad, a decree fixing an allowance to the trustee for his compensation is a final decree and appealable. *Williams v. Morgan*, 111 U. S. 684.

A decree which does not fix the amount due, nor specify the price of the property to be sold in the event of non-payment, is not a final decree from which an appeal lies. *North*

Carolina R. Co. v. Swasey, 23 Wall. (U. S.) 405; *Bostwick v. Brinkerhoff*, 106 U. S. 3.

¹ *Huntington etc. R. Co. v. Little Rock etc. R. Co.*, 16 Fed. Rep. 906; *Duncan v. Atlantic etc. R. Co.*, 4 Hughes (U. S.) 125.

² *Vermont etc. R. Co. v. Vermont Cent. R. Co.*, 50 Vt. 500; 14 Am. Ry. Cas. 497.

³ *Wadhams v. Gay*, 73 Ill. 415; *Farmers' L. & T. Co. v. Central R. Co.*, 4 Dill. (U. S.) 533; *Anderson v. Jacksonville etc. R. Co.*, 2 Woods (U. S.) 268. *Edgerton v. Nuse*, 2 Hill Eq. (S. Car.) 51.

⁴ *Muller v. Dows*, 94 U. S. 444; *Wilmer v. Atlanta etc. R. Co.*, 2 Woods (U. S.) 447; *McElrath v. Pittsburgh etc. R. Co.*, 55 Pa. St. 189.

⁵ *Hand v. Savannah etc. R. Co.*, 12 S. Car. 314.

⁶ *Kennebec etc. R. Co. v. Portland etc. R. Co.*, 59 Me. 9.

⁷ *James v. Milwaukee etc. Co.*, 6 Wall. (U. S.) 752.

⁸ *Board of Supervisors v. Mineral Point R. Co.*, 24 Wis. 92.

⁹ *Haven v. Grand Junction R. Co.*, 12 Allen (Mass.) 337.

The decree should name an upset price large enough to cover costs and all allowances made by the court, receivers' certificates and interest, liens prior to the bonds, amounts diverted from the earnings and all undetermined claims which will be settled before the confirmation and sale.¹ If the amount of the claims allowed depends upon a long course of litigation, it is proper for the court to order the property sold subject to such claims as finally adjudicated.²

XIII. RECEIVERS' CERTIFICATES.—1. **Generally.**—Courts of equity are frequently required, in foreclosure proceedings of railroad mortgages, to take possession of the property for its preservation. This is done through the agency of receivers. The receiver of a railroad, appointed to run it so as to keep it alive as a going concern, may be authorized by the court to cover all necessary expenses for repair and equipment. In analogy to the right of a mortgagee in possession to supply things necessary to put a house upon the estate in a condition to be rented or to be occupied, the receiver of a railroad may supply it with rolling stock or with other things essential to the operating of the road.³ In order to provide funds to meet these expenses, the court may authorize the receiver to borrow money, and make the sum so borrowed a lien on the railroad property superior to that of the first mortgage.⁴ And the priority of such lien is not affected by the fact that the suit in which the receiver was appointed was not brought by the bondholders or their trustee.⁵ The court may authorize the receiver to issue negotiable certificates of indebtedness which shall constitute the first lien on the property, all proceeds of which shall be redeemable within a limited time, or when the property is sold by the court.⁶

As the mortgagees themselves in most instances ask or expressly assent to the making of the orders by the court authorizing receivers to borrow money and make their obligations a first lien upon the property, they are precluded from afterwards claiming any priority over the lien thus

1. Blair v. St. Louis etc. R. Co., 25 Fed. Rep. 232.

2. Turner v. Indianapolis etc. R. Co., 8 Biss. (U. S.) 380.

3. Jones on Corp. Bonds and Mortg., § 541; McLane v. Placerville etc. R. Co., 66 Cal. 606; Woodruff v. Erie R. Co., 93 N. Y. 601; Union Trust Co. v. Illinois etc. R. Co., 117 U. S. 434; Wallace v. Loomis, 97 U. S. 146; Hale v. Nashua etc. R. Co., 60 N. H. 333; Gilbert v. Washington City etc. R. Co., 33 Gratt. (Va.) 586.

4. Stanton v. Alabama etc. R. Co., 2 Woods (U. S.) 506.

Statutes.—In some of the States provision is made by statute authoriz-

ing receivers to borrow money and create liens upon the property. See Vt. Gen. Sts. 1870, p. 924; Acts 1866, No. 41, p. 53; N. J., 1 R. S. 1877, p. 196, § 106; Laws 1874, p. 11; Ohio Laws 1872, p. 31, §§ 1, 3, 4.

5. Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434; Wallace v. Loomis, 97 U. S. 146.

6. Taylor v. Philadelphia etc. R. Co., 14 Phila. (Pa.) 451; Central Trust Co. v. Tappan (N. Y.) 6 Ry. & Corp. L. Journ. 489.

The issuing of certificates cannot be authorized except after full notice to the parties interested and ample opportunity for them to be heard. And

created for the purpose of preserving the mortgage property.¹ But a court cannot give certificates priority over liens already existing, without the consent of the parties holding such liens.² So debts contracted by receivers under a consent order are not binding upon bondholders who refuse their consent.³

2. Negotiability of Receivers' Certificates.—Receivers' certificates are not ordinarily negotiable.⁴ They are wanting in nearly every

they should never be issued in excess of the urgent present need. *Jones on Corp. Bonds and Mort.*, § 549; *Meyer v. Johnson*, 53 Ala. 237; 64 Ala. 603; 8 Am. & Eng. R. Cas. 584; *Hoover v. Montclair etc. R. Co.*, 29 N. J. Eq. 7.

1. *Jerome v. McCarter*, 94 U. S. 734; *Kennedy v. St. Paul etc. R. Co.*, 2 Dill. (U. S.) 448; *Cowbley v. Railroad Co.*, 1 Wood (U. S.) 331; *Cooper v. Montclair etc. R. Co.*, 29 N. J. Eq. 4; *Monson v. Monson*, 7 DeG. M. & G. 214; *Stanton v. Alabama etc. R. Co.*, 2 Wood (U. S.) 506; *Bright v. North*, 2 Phila. (Pa.) 216; *In re Regent's Canal Iron Works*, L. R., 3 Ch. Div. 411; *In re N. S. Rolling Stock Co.*, 55 How. Pr. (N. Y.) 286; *Galveston R. Co. v. Conden*, 11 Wall. (U. S.) 59.

But in some instances, such consent has not been obtained and the order giving such priority has been made notwithstanding the opposition of prior incumbrances. *Myers v. Johnson*, 53 Ala. 123. This course has, however, been severely criticised in two able articles on "Claims and Equities Affecting the Priority of Railroad Mortgages," in 12 Am. L. Rev. 660, and 13 Am. L. Rev. 40. It may be doubted whether it is justified.

Waiver of Priority.—If the bondholders or trustees petition that the receiver, whose appointment they have obtained, may be allowed to borrow money on the credit of the property, there can be no question that they waive the priority secured to them by their mortgage in favor of such debts. So if the petition be made by the receiver himself, and the bondholders are mortgage trustees or parties to the proceedings, and before the court, and make no objection to the creating of such debts and liens upon the property by the receiver, they cannot afterwards object to according priority to the lien so created. *Humphreys v. Allen*, 101 Ill. 490; *Metropolitan Trust Co. v. Tonawanda etc. R. Co.*, 103 N. Y. 345.

Where a plaintiff has procured the

appointment of a receiver with power to control and operate the mortgage road, he may not object to the depreciation of his security by expenses incurred for that purpose, but he may properly seek to have excluded any previous ones. *Metropolitan Trust Co. v. Tonawanda etc. R. Co.*, 103 N. Y. 235; *Vatable v. New York etc. R. Co.*, 96 N. Y. 49; *Hand v. Savannah etc. R. Co.*, 17 S. Car. 219.

When Parties Are Estopped to Deny Priority.—When persons act as receivers and managers and issue negotiable obligations as such, with the knowledge and assent of all the parties interested in the subject-matter of the receivership as against the bondholders of such obligations, such parties are estopped to deny that they are just what they purport to be, namely, the obligations of receivers and managers, and as such, entitled to the priority of payment from the assets of the trust. *Langdon v. Vermont etc. R. Co.*, 53 Vt. 228.

2. *Hervey v. Illinois Midland R. Co.*, 28 Fed. Rep. 169. See *Union Trust Co. v. Illinois etc. R. Co.*, 117 U. S. 434; *Raht v. Attrill*, 106 N. Y. 423.

3. *Snow v. Winslow*, 54 Iowa 200. A receiver was authorized by consent order without a reference, to construct an extension of a railway at a cost not to exceed an amount stated to be paid for out of surplus income, and the extension to stand pledged for such payment. The extension was built at a greater cost and then sold as a part of the entire road. It was held that the receiver acted only as agent to the consenting bondholders, and that a bondholder who had refused his consent to the extension and whose interest was expressly excepted in the consent order, was entitled to his full share of the whole proceeds of the sale under the mortgage without reference to the lien for building the extension. *Hand v. Savannah etc. R. Co.*, 17 S. Car. 169.

4. *Union Trust Co. v. Chicago etc. R. Co.*, 7 Fed. Rep. 513; *Turner v.*

essential quality of negotiable commercial paper, as they are not payable unconditionally out of any fund. Whether they are payable in full or only *pro rata*, depends upon the fact of the sufficiency of the fund under the control of the court.¹ And the fact that they are issued in excess of the amount ordered by the court,² or disposed of in a manner not in accordance with the order of the court authorizing their issue, will render them invalid.³

Certificates issued without consideration are not entitled to be paid out of any funds in the hands of the receiver, either at the suit of the payee or holder for value.⁴ Thus, where an order of the court appointing a receiver of a railroad company authorizes him to borrow such sums of money as are necessary for the further construction, equipment and final completion of the road, and to issue his certificates therefor, and that such certificates should constitute a first lien on the road, certificates issued for material contracted to be delivered but which in fact is never delivered, are void.⁵

XIV. RELATIVE PRIORITIES OF RAILROAD MORTGAGES AND EQUITIES ARISING SUBSEQUENTLY.—1. **Generally.**—When a railway mortgage is foreclosed, questions frequently arise as to the priority of claims between employees, contractors, material men, and those holding under the mortgage. A fixed legal right under a mortgage cannot, as a general rule, be impaired by any equities subsequently arising, except only the equities growing out of claims for operating expenses. This class of preferred debts includes taxes on the property;⁶ the wages of officers and employes of every

Peoria etc. R. Co., 95 Ill. 134; 1 Am. & Eng. R. Cas. 348; Central Nat. Bank v. Hazzard, 30 Fed. Rep. 484.

Where a receiver, acting under a special order of the court, issued a certificate and placed it in the hands of the payee named therein for negotiation and sale, and the same subsequently came into the hands of the petitioner, who purchased it of a third party for 40 per cent. of its par value, and with notice of the order under which it was issued, *held*, that he took it subject to all equities between the receiver and the payee, and that, as it appeared that the latter had never accounted to the receiver for the certificate or its proceeds, the petitioner was not entitled to payment. The negotiation and sale of certificates is a trust personal to the receiver; he cannot delegate it to another and relieve himself from responsibility. Union Trust Co. v. Chicago etc. R. Co., 7 Fed. Rep. 513.

1. Turner v. Peoria etc. R. Co., 95 Ill. 134; 1 Am. & Eng. R. Cas. 348.

2. Thus, where a receiver of a railroad was by order of court authorized to issue receivers' certificates to a certain amount, the proceeds to be used in operating the road, to be paid out of the receipts of the road, an issue of certificates in excess of the amount ordered, was beyond the power of the receiver, and as to such excess, the certificates were void even in the hands of an innocent holder and constituted no claim upon the money in the hands of the receiver. Newbold v. Peoria etc. R. Co., 5 Bradw. (Ill.) 367.

3. Stanton v. Alabama etc. R. Co., 31 Fed. Rep. 585.

4. Turner v. Peoria etc. R. Co., 95 Ill. 134; Union Trust Co. v. Chicago etc. R. Co., 7 Fed. Rep. 513.

5. Bank of Montreal v. Chicago etc. R. Co., 48 Iowa 518; 7 Cent. L. J. 267.

6. Farmers' L. & T. Co. v. Vicksburg etc. R. Co., 33 Fed. Rep. 778.

The amount due for a State tax upon the franchise of a corporation which is

grade employed in operating the road,¹ the cost of material and supplies furnished, which are necessary to put the road and its rolling stock in a safe condition for the transportation of persons and property, and to keep them so;² and the balances due to

in the hands of a receiver takes priority of claim upon the funds in the receiver's hands over claims of the bondholders of the corporation. *Central Trust Co. v. New York City etc. R. Co.*, 110 N. Y. 250.

Such a lien is prior to all other liens whatsoever except the lien of judicial costs. *Georgia v. Atlantic etc. R. Co.*, 3 Wood (U. S.) 434.

In *Stevens v. New York etc. R. Co.*, 13 Blatchf. (U. S.) 107, the court by Blackford, J., said: "There is no sound principle upon which the property of a person or a corporation which is placed in the hands of a receiver by a court of justice for the purposes of a suit pending in such court can be regarded as being thereby rendered exempt from the operation of the tax laws of the government within whose jurisdiction such property is situated."

Where a statute makes a lien for the taxes assessed upon the personal property of a railroad company only from and after the tax books are delivered to the collector, and the company assessed executes a valid mortgage upon the property before the tax books are received by the collector, the person holding under such a mortgage will hold the property free from any lien on the same for the taxes. *Binkert v. Wabash R. Co.*, 98 Ill. 205; 5 Am. & Eng. R. Cas. 113.

1. *Douglas v. Cline*, 12 Bush (Ky.) 603; *Skiddy v. Atlantic etc. R. Co.*, 3 Hughes (U. S.) 320; *Duncan v. Chesapeake etc. R. Co.*, 19 Am. Ry. Rep. 286.

In *New Jersey*, claims of the employes of a railroad due at the time it is placed in the hands of a receiver, are, by statute, made a lien upon all unencumbered personal effects and all moneys which may be transferred to the receiver at the time of his entering upon his duties. But the statute limits the payments to not more than two months' wages. Feb. 12, Acts 1874, p. 12; 2 Rev. Stats. 1873, p. 943, § 161.

Why the Rule Recognized in Equity.—Mr. Jones on Corp. Bonds and Mortg's, § 580, says: "The most reasonable ground upon which a chancery court can order a receiver to pay the wages

of employes of a railroad company due at the time the road is placed in the receiver's hands, is that the mortgagees, in asking for the appointment of a receiver, are seeking an equitable remedy and having only an equitable claim to the income in the receiver's hands, the court in granting their remedy may impose such conditions as may seem just."

Attorneys' Salary.—Where the annual salary of the attorney of a railroad falls due only a short time before the road is placed in the hands of a receiver, his claim against the company is entitled to priority over that of mortgage bondholders. But a claim of an attorney against a railroad, for fees earned a year and a half before the appointment of a receiver, is not entitled to any preference. *Blair v. St. Louis etc. R. Co.*, 23 Fed. Rep. 521.

Secretary of Company.—Under a statute providing that in a foreclosure sale of a railroad the court granting the foreclosure decree should provide in such decree or otherwise that the purchaser should "fully pay all sums due and owing by such foreclosed railroad company to any servant or employe of such company," it was held that the terms "servant" and "employe" did not include a secretary of such railroad company. *Wells v. Southern Minnesota R. Co.*, 1 Fed. Rep. 270.

2. *Fosdick v. Southwestern Car Co.*, 99 U. S. 256; *Addison v. Lewis*, 75 Va. 701; 9 Am. & Eng. R. Cas. 702; *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 389; *Parkhurst v. Northern Central R. Co.*, 19 Md. 472; *Hale v. Nashua etc. R. Co.*, 60 N. H. 333; *In re Kelly*, 5 Fed. Rep. 486.

The earlier cases hold a different doctrine. *Duncan v. New Orleans etc. R. Co.*, 2 Wood (U. S.) 542; *Durham v. Cincinnati etc. R. Co.*, 1 Wall. (U. S.) 254; *Galveston v. Cowdrey*, 11 Wall. (U. S.) 459; *Tommey v. Spartansburgh etc. R. Co.*, 7 Fed. Rep. 429; 1 Am. & Eng. R. Cas. 632.

In *Fosdick v. Schall*, 99 U. S. 235, where this doctrine is enunciated with great clearness, and where this distinction is recognized between railroad

mortgages and others, the court says: "The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income."

Persons furnishing to the company, car springs and spirals and supplies for the machinery department, which the receiver after his appointment continued to use, have superior equities to those of the mortgagees for such supplies. *Hale v. Frost*, 99 U. S. 389. See *Williamson v. Washington etc. R. Co.*, 33 Gratt. (Va.) 624; *Taylor v. Philadelphia etc. R. Co.*, 7 Fed. Rep. 377.

In *Mississippi*, it is provided that no mortgage of the income, future earnings, or rolling stock of a railroad corporation shall be valid against debts contracted in carrying on the business of the corporation. R. Code, 1880, § 1033.

Claims for Damages to Passengers or Property.—Those claiming damages for negligence in operating a railway have never been held as having any privilege on the income of the property, but there are many cases to the effect that no such privilege or equity exists. So a person who has recovered judgment against a receiver of a railway for injuries received by him while traveling as a passenger, or for damages to his property, is not entitled to payment out of the earnings of the road or the proceeds of its sale in preference to first mortgage bondholders. *Davenport v. Receivers*, 2 Wood (U. S.) 519; *Hiles v. Case*, 9 Biss. (U. S.) 549; *Easton v. Houston etc. R. Co.*, 38 Fed. Rep. 12; *Farmers' L. & T. Co. v. Vicksburg etc. R. Co.*, 33 Fed. Rep. 778; *Central Trust Co. v. Wabash etc. R. Co.*, 28 Fed. Rep. 71; 33 Fed. Rep. 566; *Central Trust Co. v. East Tennessee etc. R. Co.*, 30 Fed. Rep. 895; 30 Am. & Eng. R. Cas. 450; *Olyphant v. St. Louis etc. Co.*, 28 Fed. Rep. 729; *Hervey v. Illinois etc. R. Co.*, 28 Fed. Rep. 169.

A person may recover for such injuries and be entitled to payment out of the earnings of the road in preference to first mortgage bondholders, if it is so provided by the order of the court placing the road in the possession of

the receivers. *Davenport v. Receivers*, 2 Wood (U. S.) 519.

In *Gibbes v. Greenville etc. R. Co.*, 15 S. Car. 518; 9 Am. & Eng. R. Cas. 723, it was held that passengers over a railroad and the employees of a company when entitled to damages for injuries received while the road was operated by a receiver should be paid out of the fund in court realized from the earnings of the road during the receivership in preference to mortgage or other debts existing at the time of action brought.

Money Advanced.—Where a railway company was in financial trouble and its employees threatened to strike, and certain of its bondholders at the request of its officers, advanced money to pay the wages of such employees on the agreement that the money was to be refunded out of the first net earnings of the company, and afterwards the road went into the hands of a receiver—held, that the bondholders were entitled to be paid such advances in preference to the claims of the mortgagees. *Atkins v. Petersburg R. Co.*, 3 Hughes (U. S.) 307.

But where a bank loaned money to a railway company it was held on a petition of intervention filed in a suit for the foreclosure of the mortgages of the company, asking payment of the loan from the proceeds of the sale of the mortgaged property, that the bank occupied the position of a general creditor only, and the claim was not entitled to priority, provided the evidence did not show any fraud and deception and the misapplication of current income. *Penn v. Calhoun*, 121 U. S. 351.

Rent of Cars.—Although when a receiver is appointed pending foreclosure of a railroad mortgage, and both before and during such receivership improvements and equipments are made from current receipts, the income during the receivership may be charged with the claim for rent of cars, and if that is insufficient, the claim may be charged upon the proceeds of the property; yet the proceeds will not, in the absence of special circumstances, be for such rent and for claims for lease of cars, etc., which accrued more than six months prior to the appointment of the receiver. *Thomas v. Peoria etc. R. Co.*, 103 Ill. 187; 36 Am. & Eng. R. Cas. 381.

Mechanics' Liens.—A mechanic's lien, filed against a railroad, will take precedence in point of lien, to any

other railroads and lines of transportation on account of passenger tickets and freight charges.¹

mortgage executed upon the premises after the beginning of the work for which the lien is filed. *Taylor v. Burlington etc. R. Co.*, 4 Dill. (U. S.) 570; *Railroad Co. v. Meyer*, 100 U. S. 457; *Chicago etc. R. Co. v. Union R. Co.*, 108 U. S. 702; 16 Am. & Eng. R. Cas. 626; *Fox v. Seal*, 22 Wall. (U. S.) 424; *Neilson v. Iowa R. Co.*, 44 Iowa 71; *Shamokin etc. R. Co. v. Malone*, 85 Pa. St. 25; *Tyrone etc. R. Co. v. Jones*, 79 Pa. St. 60; *Coe v. New Jersey etc. R. Co.*, 31 N. J. Eq. 105; *Botsford v. New Haven etc. R. Co.*, 41 Conn. 454; *Seitz v. Union Pac. R. Co.*, 16 Kan. 133; *Boston & Co. v. Chesapeake etc. R. Co.*, 12 Am. & Eng. R. Cas. 263. See MECHANICS' LIEN, vol 15, p. 86.

Rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors as against any contract between the furnisher of the property and the railroad company, containing a stipulation that the title to the property shall not pass till the property is paid for, and reserving to the vendor the right to remove the property. *Porter v. Pittsburgh etc. R. Co.*, 122 U. S. 267; 30 Am. & Eng. R. Cas. 495.

In some cases, however, it has been held that a mechanics' lien for work done subsequent to a pre-existing and duly recorded mortgage, has priority of lien. *Brooks v. Burlington etc. R. Co.*, 101 U. S. 443; *Meyer v. Hornby*, 101 U. S. 728.

In other cases, it is held that a mechanic's lien upon a completed railway, is not paramount to the lien of a mortgage executed after the commencement and before the completion of the road. *Bear v. Burlington etc. R. Co.*, 48 Iowa 619; *Tommey v. Spartanburg etc. Co.*, 1 Am. & Eng. R. Cas. 632.

A mechanic's lien filed before the appointment of a receiver will also take precedence of receiver's certificates, notwithstanding the fact that such certificates are by the decree of the court made a first lien upon the road. *Snow v. Winslow*, 54 Iowa 200.

A lien filed within six months of last delivery has priority to trust created in *interim* and is not affected by agreement that contractor should have lien on rails till payment, and that posses-

sion of company should be possession of contractor. *Chicago & Alton R. Co. v. Union Rolling Mill Co.*, 108 U. S. 702; 16 Am. & Eng. R. Cas. 626.

1. *Easton v. Houston etc. R. Co.*, 38 Fed. Rep. 12; *Miltenberger v. Logansport R. Co.*, 106 U. S. 286; 1 Sup. Ct. Rep. 140; *Farmers' L. & T. Co. v. Vicksburg etc. R. Co.*, 33 Fed. Rep. 778. See also *Metropolitan Trust Co. v. Tonawanda R. Co.*, 41 N. Y. 80; *Douglas v. Cline*, 12 Bush (Ky.) 608; *Jesup v. Atlantic etc. R. Co.*, 3 Woods (U. S.) 441; *Ketchum v. Pacific R. Co.*, 3 Cent. L. J. 337.

In *Miltenberger v. Railroad Co.*, 106 U. S. 286; 1 Sup. Ct. Rep. 140, the court by BLATCHFORD, J., said: "It is easy to see that the payment of unpaid debts for operating expenses accrued within ninety days, due by a railroad company suddenly deprived of the control of its property due to operatives in its employ, whose cessation from work simultaneously is to be depreciated in the interest both of the property and of the public, and the payment of limited amounts due to other connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result in the case of non-payment, the general consequence involving largely also the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property, in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien."

The rule charging operating expenses of a railroad, debts due from it to connecting lines growing out of an interchange of business, debts due for the occupation of leased lines, and generally, debts created under special circumstances which make an equity in favor of the unsecured debtor, upon the gross income of the road before a fund arises for the payment of mortgage interest, is not applicable to a fund realized from a sale of the road under foreclosure of a mortgage; and, as a general rule, unsecured debts of the company cannot, in such case, take precedence over

The rule that claims upon the gross earnings of a railroad company for supplies and labor have priority over all liens under mortgages, applies only to a debt for operating expenses,¹ and not to a debt for original construction.² Claims for advances made for the original construction of a railroad will be postponed in equity to the lien of the mortgage bondholders, unless such advances were made in consequence of the requests, promises, and acts of all the bondholders.³ When a court of chancery appoints a receiver of railroad property it may impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgage property as may under the circumstances of the particular case appear to be reasonable.⁴ If no such provision be made in the order appointing the receiver, a court of equity may, at any time during the progress of the cause, direct the payment.⁵ But so long as the road remains in the possession of the company the mortgagees of the mortgage covering the earnings of the road have no lien upon such earnings. When

debts secured by prior and express liens, in the distribution of the proceeds of the sale of the mortgaged property. *St. Louis etc. R. Co. v. Cleveland etc. R. Co.*, 125 U. S. 658; 33 Am. & Eng. R. Cas. 16.

1. *Porter v. Pittsburgh Bessemer Steel Co.*, 120 U. S. 649; 30 Am. & Eng. R. Cas. 472; *aff'd* on new hearing, 122 U. S. 267; 30 Am. & Eng. R. Cas. 495; *Cowdry v. Galveston etc. R. Co.*, 93 U. S. 352; *Wood v. Guarantee Trust etc. Co.*, 128 U. S. 416.

There are, however, exceptions to this rule in cases where the bondholders have obtained a decree of foreclosure and instead of making a sale of the property enter into an arrangement among themselves with the consent of all parties in interest by which the entire property is transferred by a lease to another company under an arrangement whereby the rental is to go to the bondholders and the surplus to the lessor company without making any provision for the payment of the floating debts of the company and the holders of unsecured notes given for the construction of the company's road intervene after the foreclosure decree and pray that these debts be established as equitable liens upon the property paramount to the lien of the mortgage. Under these circumstances the court will grant relief. *Farmers' L. & T. Co. v. Missouri etc. R. Co.*, 21 Fed. Rep. 264.

2. *Hervey v. Illinois etc. R. Co.*, 28 Fed. Rep. 169; *Hiles v. Case*, 14 Fed.

Rep. 141; *Central Trust Co. v. East Tennessee etc. R. Co.*, 30 Fed. Rep. 895; *Central Trust Co. v. Wabash etc. R. Co.*, 28 Fed. Rep. 871; *Olyphant v. St. Louis Ore etc. Co.*, 28 Fed. Rep. 729; *Dexterville Mfg. Co. v. Receiver*, 4 Fed. Rep. 873; *In re Kelly*, 5 Fed. Rep. 846; *Davenport v. Receivers*, 2 Woods (U. S.) 519. *Compare Hale v. Nashua etc. R. Co.*, 60 N. H. 333.

In *Reyburn v. Consumers' Gas etc. Co.*, 29 Fed. Rep. 564, the court by *BLDGGETT, J.*, said: "The material for the building or construction of the works, in theory, at least, is supposed to be paid for out of the capital stock, or bonds secured by the mortgage upon the property. It is from this source that companies of this character raise the money with which to construct their works, and they depend upon the earnings or income after the works are constructed to pay for their operating labor and supplies, and pay interest upon their bonds, and dividends to their shareholders."

3. *In re Kelly*, 5 Fed. Rep. 846.

4. *Fosdick v. Schall*, 99 U. S. 235; *Union Trust Co. v. Souther*, 107 U. S. 591; *Miltenerberger v. Logansport R. Co.*, 106 U. S. 286; *Thomas v. Peoria etc. R. Co.*, 26 Am. & Eng. R. Cas. 381; *Addison v. Lewis*, 75 Va. 701; 9 Am. & Eng. R. Cas. 702.

5. *Fosdick v. Schall*, 99 U. S. 235; *Poland v. Lamoille Valley R. Co.*, 52 Vt. 144; *Farmers' L. & T. Co. v. Vicksburg etc. R. Co.*, 33 Fed. Rep. 777.

the mortgagor is suffered after default to remain in possession, and incurs debts in operating the road, the mortgagees cannot take possession of the property through receivers and assert their mortgage in preference to debts for expenses of operating the road, especially if the mortgage itself provides that the mortgagor shall remain in possession and apply the income of the road to the payment of current expenses.¹

While the property is under the administration of the court, only the income is subject to the payment of unsecured claims which the court may deem entitled to an equitable priority.² If the income is not sufficient to meet all demands for operating expenses, claims against a railroad corporation cannot be declared liens against the property, unless it be shown that the current earnings of the corporation have been used for the benefit of the mortgaged creditors. If current earnings are thus used for the benefit of mortgaged creditors, before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.³ While ordinarily the power to pay claims for operating

1. *Williamson v. Washington City etc. R. Co.*, 33 Gratt. (Va.) 624; 1 Am. & Eng. R. Cas. 498; *Turner v. Indianapolis etc. R. Co.*, 8 Biss. (U. S.) 315; *Lehigh etc. R. Co. v. Central R. Co.*, 34 N. J. Eq. 88.

A mortgage provided among other things that, until default, and while the mortgagors remained in possession and operated the roads and took the income, as aforesaid, they should apply the income "to the payment of the current expenses of the road . . . or dispose of the same for the lawful uses" of the mortgagors. The net earnings were in part expended in making a new road to the enhancement of the value of the mortgaged property; and the chattels of the several roads were lessened in value by use in the making of income. *Held*, that, as by the terms of the mortgages the mortgagors were bound to pay the current expenses from the current earnings, the mortgagees took their security burdened with that trust; that the mortgagees, out of possession, had no right to earnings superior to the mortgagors; and that the receivers should be ordered to apply the net income first to the discharge of debts that were for such expenses. *Poland v. Lamaille Valley R. Co.*, 52 Vt. 144; 4 Am. & Eng. R. Cas. 410.

2. *Taylor v. Philadelphia etc. R. Co.*, 7 Fed. Rep. 377; *Hand v. Savannah etc. R. Co.*, 17 S. Car. 495; 12 Am.

& Eng. R. Cas. 534; *Blair v. St. Louis etc. R. Co.*, 25 Fed. Rep. 232.

3. *U. S. Trust Co. v. New York*, 25 Fed. Rep. 800; *Birmingham v. Bowen*, 111 U. S. 776; 17 Am. & Eng. R. Cas. 308; *Fosdick v. Shall*, 99 U. S. 253; *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258; *Addison v. Lewis*, 75 Va. 701; 9 Am. & Eng. R. Cas. 702.

If the earnings are diverted to the payment of interest on receivers' certificates made payable out of the corpus of the mortgaged property or to the payment of costs, or allowances in the foreclosure suit, or to any other matter not properly operating expenses, they must be returned to the current earnings fund, and applied to the payment of claims made payable therefrom. *Taylor v. Philadelphia etc. R. Co.*, 7 Fed. Rep. 377; *Fosdick v. Schall*, 99 U. S. 235; *Burnham v. Bowen*, 111 U. S. 783; 17 Am. & Eng. R. Cas. 308; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434; *Miltenberger v. Logansport R. Co.*, 106 U. S. 286, 311; *Union Trust Co. v. Morrison*, 125 U. S. 591; *St. Louis etc. R. Co. v. Cleveland etc. R. Co.*, 125 U. S. 658; 33 Am. & Eng. R. Cas. 16; *Wood v. Guarantee Trust etc. Co.*, 128 U. S. 416; *Easton v. Houston etc. R. Co.*, 38 Fed. Rep. 12; *U. S. Trust Co. v. New York etc. R. Co.*, 25 Fed. Rep. 797, 800; *Calhoun v. St. Louis etc. R. Co.*, 9 Biss. (U. S.) 330; *Farmers' L. & T. Co. v. Vicksburg etc. R. Co.*, 33 Fed. Rep. 778.

expenses in preference to other equitable liens is confined to the appropriation of the income of the receivership, cases may arise that will require the use of the proceeds of the sale of the mortgaged property in the same way; as when, before the appointment of the receiver, or in the administration of the cause, income applicable to the payment of old debts for current expenses is taken and used to make permanent improvements in the fixed property, or to buy additional equipment.¹ If there is likely to be a long delay before the claims for operating expenses can be met from the income, the court may authorize the receiver to issue certificates of indebtedness to the holders of such claims, bearing interest, and made payable out of funds applicable to such purpose, at such dates as may afterwards be fixed by the receivers.²

The courts in favoring creditors who have furnished labor and supplies to the extent of allowing them an equitable lien, take as a measure by which to determine the time within which this class of claim shall be protected, the usual term of credit upon which these companies purchase their supplies and do their business.³ In fixing a time within which such claims will be allowed

This doctrine of restoration of the funds rests not upon any ground of a supposed lien of the supply or labor creditor upon the earnings of the road, but upon the idea that the officers of the company are, in a sense, trustees of these earnings for the benefit of the different claims of creditors, and if they give to one class of creditors that which properly belonged to another, the court may, upon an adjustment of accounts, so use the income in its hands as to restore, if practicable, the parties to their original rights. *Addison v. Lewis*, 75 Va. 701; 9 Am. & Eng. R. Cas. 702.

CHIEF JUSTICE WAITE, in the case of *Fosdick v. Schall*, 9 Otto 251, thus states the doctrine: "The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage credit-

ors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees."

1. *Thomas v. Peoria etc. R. Co.*, 36 Am. & Eng. R. Cas. 281; *Miltenberger v. Logansport R. Co.*, 106 U. S. 386; *U. S. Trust Co. v. New York etc. R. Co.*, 25 Fed. Rep. 797; *Easton v. Houston etc. R. Co.*, 33 Fed. Rep. 12.

2. *Jones on Cor. & Mortg. Bonds*, § 607; *Taylor v. Philadelphia etc. R. Co.*, 7 Fed. Rep. 377.

3. *Farmers' L. & T. Co. v. Vicksburg etc. R. Co.*, 33 Fed. Rep. 778; *Dow v. Memphis etc. R. Co.*, 20 Fed. Rep. 260; *Scott v. Clinton etc. R. Co.*, 6 Biss. (U. S.) 739; *In re Kelly*, 5 Fed. Rep. 846; *Blair v. St. Louis etc. R. Co.*, 22 Fed. Rep. 471; *Reyburn v. Consumers' Gas, Fuel, and Light Co.*, 29 Fed. Rep. 561.

Continuous Contracts.—Material-men furnished supplies for repairing the railroad from time to time, under continuous verbal contract made, after default in the payment of the companies bonded interest, and which was not

and ordered paid, the Federal courts adopt by analogy the rule of the State statutes in relation to liens on railroads for work done and supplies and material furnished.¹

2. Equities Arising Under Contracts.—Contracts made by a railroad company after the execution of a mortgage and without the consent of the mortgagees and without a positive statute which enters into the mortgage contract, constitute no lien upon the property or franchise of the corporation superior to that of the mortgage. Such contracts are not binding upon the receivers, and they may properly refuse to appropriate the use of the property and the earnings of the road to the payment of debts thus previously contracted.² But if the receiver ratifies a contract previously made with the company the rights under such contract are not affected by the foreclosure proceedings.³

If a railroad company executes a mortgage on its road, franchises, etc., and afterwards occupies land for its uses the landowner's claim for damages for the land thus taken is paramount to a mortgage given before the damages had been assessed.⁴

terminated until the appointment of a receiver, more than two years after the first supplies were furnished. *Held* that, notwithstanding the statute of frauds, the material-men were, under the circumstances, entitled to judgment for the balance due them, and to a lien superior to that of the mortgage creditors, for the amount due on the earnings of the road. *Blair v. St. Louis etc. R. Co.*, 22 Fed. Rep. 769. See also *U. S. Trust Co. v. New York etc. R. Co.*, 25 Fed. Rep. 797.

1. *Turner v. Indianapolis etc. R. Co.*, 8 Biss. (U. S.) 315.

2. *Ellis v. Boston etc. R. Co.*, 117 Mass. 17; *Hale v. Nashua etc. R. Co.*, 60 N. H. 333; *Newport etc. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673; *In re Atlantic etc. R. Co.*, 3 Hughes (U. S.) 320. See *Tommey v. Sparkenburg etc. R. Co.*, 4 Hughes (U. S.) 640; *Elmira Steel Rolling Mills Co. v. Erie R. Co.*, 26 N. J. Eq. 284; *Denniston v. Chicago etc. R. Co.*, 4 Biss. (U. S.) 414.

A receiver cannot be compelled to perform a contract for transportation made by the company before the execution of the mortgage of its property unless the contract is a lien upon the property and the mortgagee had notice of it. *Southern Express Co. v. Western North Carolina R. Co.*, 99 U. S. 191.

3. *Western Union Tel. Co. v. Atlantic etc. Tel. Co.*, 7 Biss. (U. S.) 367.

4. *Western Pa. R. Co. v. Johnson*, 59 Pa. St. 290.

The claim of a lot owner for damages resulting from the construction and maintenance on the street in front of his lot of a railroad mounted on trestle-work, is paramount to the claims of the railroad company's mortgage creditors. And this paramount right is not waived by allowing the railroad company to construct its railroad on the street without first making compensation or giving security according to the constitutional requirement. *Mercantile Trust Co. v. Pittsburgh etc. R. Co.*, 29 Fed. Rep. 72.

The constitution of a State provided that the municipal and other corporations vested with the privilege of taking private property for public use shall make just compensation therefor or give security for such compensation. A railroad company executed a mortgage upon its property, and subsequently entered upon land without paying therefor or giving security for the land taken. The landowner recovered a judgment for damages against the railroad company which the company failed to satisfy. The company became insolvent and its property and franchises were sold under the mortgage. *Held*, that the sale did not divest the estate of the owner of land so taken but that he could recover the amount of the judgment for damages against the purchaser at such foreclosure sale. *Buffalo etc. R. Co. v.*

XV. REORGANIZATION.—1. Generally.—The stockholders and unsecured creditors of a railroad corporation frequently have the power to embarrass and delay proceedings for the foreclosure of the mortgage and sale of the property. Difficulties arising in this way may be obviated by schemes of reorganization.¹ A scheme of reorganization is an arrangement between a company and its creditors, with provisions for settling and defining their rights. To be wholly effective, the reorganization must either be made with the consent of all the original bondholders, or it must be made after a foreclosure which has cut off all the liens of such bondholders upon the property, because it cannot be enforced by a majority, however large, upon a minority, except by virtue of a statute existing prior to the charter of the corporation.²

Harvey, 107 Pa. St. 319; Philadelphia etc. R. Co. v. Cooper, 105 Pa. St. 239.

A railroad company, unable to agree with the owners of lands for right of way, gave a bond and took possession for railroad purposes. Subsequently the railroad and property were sold under proceedings of foreclosure upon a mortgage. *Held*, that in a proceeding by *scire facias* against the purchasers to compel the payment of land damages, that the purchaser took a clear title, and that the owner of the land was thrown back upon the bond for his said damages. *Fries v. Southern Pa. R. etc. Co.*, 85 Pa. St. 73.

1. *Sage v. Central R. Co.*, 99 U. S. 334; *McIntosh v. Flint etc. R. Co.*, 34 Fed. Rep. 582; 36 Am. & Eng. R. Cas. 340.

2. *Hollister v. Stewart*, 111 N. Y. 644; *Canada So. R. Co. v. Gebhard* 109 U. S. 527.

Plaintiff, who was a member of the board of managers of a navigation company, held certain mortgage bonds issued by it and guaranteed by defendant, a railroad company. Owing to the financial embarrassment of the defendant, it was proposed to effect a financial reorganization of defendant's indebtedness. The board of managers of the navigation company accordingly recommended its bondholders to accept a proposition by which the outstanding obligations were to be deposited with a board of "reconstruction trustees," and new obligations were to be issued instead. Plaintiff, as one of the managers of the navigation company, opposed the scheme, and never deposited any of the bonds held by him, or agreed to receive others in exchange therefor, but the circulars and communications issued by the board of trustees contained no notice of plaintiff's opposi-

tion. *Held*, that plaintiff's failure to notify the holders of the other obligations that he was opposed to the scheme did not stop him from enforcing the defendant's liability under its guaranty. *Philadelphia etc. R. Co. v. Love*, 125 Pa. St. 488; 38 Am. & Eng. R. Cas. 618.

The Consolidated Railroad Company of Vermont was formed by the organization of the bondholders of the Vermont Central Railroad Company after the foreclosure of the mortgage on the road, and the appointment of a receiver in a proceeding in the State court of Vermont. The holder of a large amount of the bonds, which were not surrendered into the reorganization, filed a bill in the circuit court of the United States to compel the Consolidated Railroad Company to account with him for the railroad property, to which the company pleaded that the road was in the hands of a receiver appointed by and accountable to the chancery court of the State having jurisdiction. *Held*, on demurrer, that the plea was not sufficient. *Brooks v. Vermont Cent. R. Co.*, 22 Fed. Rep. 211; 17 Am. & Eng. R. Cas. 276.

A scheme of reorganization which contemplates the substitution of three mortgages for a first mortgage and some other obligations of the company, one of the mortgages being made a first lien on all the property of the company, is not binding upon the first mortgage bondholder who has never assented thereto, and the trustees under the first mortgage cannot divert to the new securities funds pledged by the first mortgage. *Hollister v. Stewart*, 111 N. Y. 644; 38 Am. & Eng. R. Cas. 599.

A railroad company having become

2. Priority of Mortgages Over Preferred Stock.—The lien of a mortgage is prior to that of a preferred stockholder.¹ The holder of preferred stock has no priority of lien to mortgages on the property of the company, unless some specific agreement to that effect be shown.² So the vendors of a railroad who receive preferred stock in the purchasing company as the price thereof, are not entitled to be paid out of proceeds of said road at a foreclosure sale in preference to mortgages created thereon subsequent to the purchase.³ What mortgage interest may be paid by the company before payment of the interest on its preferred stock must depend on the construction to be given the conditions attached to such stock. Whatever rights attach to the preferred stock when issued continue to adhere to it. If at the time of issue only interest on then existing mortgages was to be paid before interest on preferred stock, subsequent mortgage indebtedness will not affect that stock nor the legal right of its holders to payment of interest before payment of interest on mortgages given for such subsequent indebtedness; otherwise, however, if it should be held that interest on all mortgages of the corporations, whether for indebtedness prior or subsequent to the issue of such preferred stock, was first to be paid from its earnings.⁴

The holder of preferred stock is entitled to have the full amount of his accruing profits before anything is divided among the ordinary shareholders. If the profits accrued when the dividend is declared are insufficient to furnish the stipulated amount, the deficiency is a charge upon subsequent profits. It is not, however, a guaranty in any other sense than that preferred stockholders should be paid their dividends out of the profits of the company. The profits of the company is the only fund to which they can look. If there are no dividends there are no profits.⁵

insolvent and unable to pay its debts, certain of the bondholders and other creditors agreed that they would purchase the road, etc., at any sale that might be made thereof, and would organize a new company; that the new company should execute a first mortgage on the road to the amount of the then existing first mortgage on the road to secure the bonds of the new company; the bonds under the old mortgage to be exchanged for the new bonds. The subscribers to the agreement agreed to surrender their bonds, with all the coupons thereon, whenever they should be required so to do, and to receive in lieu thereof the new bonds. The plaintiff, a bondholder, signed this agreement, and received notice to surrender his bonds, but failed to do so until after the purchase of the road and the formation of the new company. *Held*, that not hav-

ing complied with the terms of the contract, he had no right to claim any benefits under it, or to insist on the delivery of new bonds. *Carpenter v. Catlin*, 44 Barb. (N. Y.) 75.

1. *Branch v. Atlantic etc. R. Co.*, 3 Wood (U. S.) 481.

2. *King v. Ohio etc. R. Co.*, 9 Biss. (U. S.) 278.

3. *Branch v. Atlantic etc. R. Co.*, 3 Wood (U. S.) 481.

4. *Thompson v. Erie R. Co.*, 42 How. Pr. (N. Y.) 68; 11 Abb. Pr. N. S. (N. Y.) 188; *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

5. *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181; *Lehigh Coal etc. Co. v. Central R. Co.*, 34 N. J. Eq. 88; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Chaffee v. Rutland R. Co.*, 55 Vt. 110; *Taft v. Hartford etc. R. Co.*, 8 R. I. 310; *Stevens v. South Devon R. Co.*, 13 Beav. 48; 9 Hare 313; *Matthews v.*

Unless the directors declare a dividend preferred stockholders are not entitled as of right to dividends payable out of the net profits accruing in any particular year.¹ Whether a dividend should be declared is a matter of discretion with the directors.² See OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 17, p. 107.

XVI. FORECLOSURE SALES.—Where a railroad company mortgages its road to secure the interest and principal of bonds, the whole may be sold on default of the payment of interest before the principal is due.³ The failure to pay any installment of interest will authorize a foreclosure and sale of the entire road, though the mortgage contains no provision making the whole debt due upon the default in payment of such installment, and no provision authorizing a sale of the whole property covered by the

Great Northern R. Co., 5 Jur., N. S. 284; *In re* London India Rubber Co., 37 L. J. Ch. 235; *Crawford v. North Eastern R. Co.*, 3 Jur., N. S. 1093; 3 Kay & J. 723; *Smith v. Cork etc. R. Co.*, Ir. R., 3 Eq. 356; *aff'd*, Ir. R., 5 Eq. 65. In this case the prior cases are reviewed at length. *Henry v. Great Northern R. Co.*, 1 De G. & J. 606, per Lord Cranworth, Lord Chancellor; 4 K. & J. 1.

Dividends or preferred stock can only be paid out of the profits; and this is so even when the stock is issued under a guaranty that a dividend of a certain sum shall be paid annually. *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181.

1. *Jones on Corp. Bonds & Mortg.*, § 631; *Warren v. King*, 108 U. S. 389; *New York etc. R. Co. v. Nickals*, 119 U. S. 296. See *Williston v. Michigan etc. R. Co.*, 13 Allen (Mass.) 400; *Barnard v. Vermont etc. R. Co.*, 7 Allen (Mass.) 512; *Chaffee v. Rutland R. Co.*, 55 Vt. 110; *Culver v. Reno Real Estate Co.*, 91 Pa. St. 367; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Elkins v. Camden etc. R. Co.*, 36 N. J. Eq. 233; *Boardman v. Lake Shore etc. R. Co.*, 84 N. Y. 157; *Richardson v. Vermont etc. R. Co.*, 44 Vt. 613; *Dent v. London Tramway Co.*, L. R., 16 Ch. Div. 344.

2. An insolvent railroad company was reorganized by means of a foreclosure, etc. It was agreed that preferred stock should be issued to an amount equal to the preferred stock of the old corporation dividends, to be non-cumulative, at the rate of six per cent. per annum, but dependent on the profits of each particular year as declared by the board of directors. *Held*, that holders of the preferred

stock could not compel the declaration of a dividend, even where there were profits, unless the condition of affairs as a whole justified it, this, in the first instance, being a matter determinable by the directors. *New York, Lake Erie etc. R. Co. v. Nickals*, 119 U. S. 296.

3. *Wilmer v. Atlanta, etc., R. Co.*, 2 Wood (U. S.) 447. See 2 *Jones on Mortgages*, §§ 1181, 1459, 1478, 1616-1619; *Credit Co. v. Arkansas etc. R. Co.*, 15 Fed. Rep. 52; *Farmers' L. & T. Co. v. Oregon etc. R. Co.*, 24 Fed. Rep. 407; *Chicago etc. R. Co. v. Fosdick*, 106 U. S. 47.

In *Tillinghast v. Troy etc. R. Co.*, 48 Hun (N. Y.) 425, the court by Learned, P. J., said: "From the nature of the property, however, there cannot be a foreclosure to enforce a part only of the mortgage debt. If the road were a divisible thing, it might be possible to sell enough of the mortgage property to satisfy those bondholders who desire the foreclosure. But that cannot be. A foreclosure and sale must sell the railroad as a whole and divide the proceeds *pro rata*."

So in *Wilmer v. Atlanta etc. R. Co.*, 2 Wood (U. S.) 453, the court by Wood, C. J., said: "That where a mortgage or deed of trust is given to secure the interest and principal of notes or bonds, and the mortgage property cannot be sold in parts without injury to its value, the whole may be sold on default of the payment of interest before the principal is due, is sustained by the following authorities: *Salman v. Calggett*, 3 Bland's Ch. (Md.) 125 and other cases there cited; *Seaton v. Twyford*, 11 Law Rep. Eq. Cas. 591; *Dunham v. Cincinnati etc. R. Co.*, 1

mortgage.¹ This rule, however, is applicable only where the property is not susceptible of division. So in a suit to foreclose a mortgage upon a railroad and its franchises, which contains no provision that the principal should become due upon the failure to pay interest, a sale should be ordered of so much as might satisfy the amount due if the property is divisible.²

Engines and cars put upon the road and necessary to keep up its equipment and do its business, pass to the purchaser.³ So where there has been a judicial sale of railroad property under a

Wall. (U. S.) 254; *Olcott v. Bynum*, 17 Wall. (U. S.) 44; *Pope v. Durant*, 26 Iowa 233."

To allow a railroad to be cut up into fragments, and separate portions, sold at different sales, in the different counties through which it passes, to different purchasers, would not only sacrifice the rights and interests of creditors, but defeat the objects and intentions of the legislature in granting the charter. *Macon etc. R. Co. v. Parker*, 9 Ga. 377.

Statutes.—In some of the States special provision has been made by statute in regard to the sale of the entire property. See *Statutes Ind.*, 1 R. S. 1876, p. 728, ch. 21, § 1; *Act Mar.* 3, 1865; N. J. R. S. 1877, p. 922, § 77; *Kan. Laws* 1876, ch. 108, § 1; *Dassler's Stats.* 1876, § 4625; *Ky. Laws* 1876, ch. 447, § 1; N. Y. *Laws* 1876, ch. 446, p. 482.

Consolidated Road.—Where a railroad in the hands of a court of equity is the property of the company constituted by the consolidation of three railroad companies, all of which had, before the consolidation, issued their bonds and executed mortgages on their property to secure them, the court may direct the property of the consolidated company to be sold as a whole and afterwards fix the amount to be paid to the several holders of the bonds and mortgages of the respective roads. *Gilbert v. Washington etc. R. Co.*, 33 Gratt. (Va.) 586; 1 *Am. & Eng. R. Cas.* 473. See *Farmers' L. & T. Co. v. Newman*, 127 U. S. 649.

Sale of Incomplete Road.—If a mortgage is given by a railway company upon its entire road to secure bonds issued by it, and it procures the grading of only a part of the road in the middle, and then abandons the work, leaving each end of the road unfinished, and another company organizes and completes the road, on bill to foreclose the mortgage given by the first

company, it is erroneous to decree a sale of the middle portion of the road, leaving the two ends worthless. If any foreclosure can be had the entire road must be sold, and the proceeds distributed as between the bondholders of the original company and the new company in the proportion which the work done by the first company bears to the cost or value of the entire road as completed. But if the original company had no legal title to any of the right of way but only contracts for a small portion thereof to be conveyed upon conditions which it never performs, or has agreed to perform, and the new company is organized which builds a road and acquires a legal title to most of the right of way and is equitably entitled to the balance, no decree of foreclosure can be sustained under the mortgage as against the new company for the sale of its property. *Chicago etc. R. Co. v. Loewenthal*, 93 Ill. 433.

1. *Goodman v. Cincinnati etc. R. Co.*, 2 *Disney (Ohio)* 176; *West Branch Bank v. Chester*, 11 Pa. St. 282.

It appeared that the mortgagor was insolvent; that an execution purchaser under a junior incumbrance would do nothing to discharge the interest; that the operation of the road by the trustee would result in a loss; that the trustee had no proceeds with which to make repairs, and that the road if unused would necessarily decay. *Held*, that the court had power to order a sale of the property, although the mortgage did not, in terms, authorize a sale upon default in the payment of interest, and the bonds had not yet matured. *McLane v. Placerville etc. R. Co.*, 66 Cal. 606.

2. *Bardstown etc. R. Co. v. Metcalfe*, 4 *Metc. (Ky.)* 199. See *Campbell v. Texas etc. R. Co.*, 2 *Wood (U. S.)* 263.

3. *Strange v. Montgomery etc. R. Co.*, 3 *Wood (U. S.)* 613.

mortgage authorized by law covering its franchises, the franchises necessary to the use and enjoyment of the railroad pass to the purchaser.¹ A grant of authority to a railroad company to sell or mortgage its property and franchises, enables the company to sell or mortgage not only those rights and franchises which are essential to the use of the property as a railroad, but also those which are incidental without being essential. Thus, a purchaser under a sale of the company's property and franchises pursuant to such authority, would acquire the power of exercising the power of eminent domain to compel the construction of the railroad and to build branch lines, if that was one of the franchises of the company owning the road.² But, where a corporation has no power given it by its charter to mortgage its franchise, such mortgage cannot, of course, be effected, nor can the franchise be sold under a foreclosure decree.³

Nothing will pass not directed to be sold by the decree,⁴ nor will personal privileges, like the exemption from taxation, pass to purchasers from a railroad company at a foreclosure sale.⁵

1. *New Orleans etc. R. Co. v. De Lamore*, 114 U. S. 501.

The court in this says: "It follows that if the franchises of a railroad corporation essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property, upon the bankruptcy of the company, carries the franchises, and they may be sold and passed to the purchaser at the bankruptcy sale."

This was also assumed to be the law by the opinion of the court pronounced by Mr. Justice Matthews in the case of *Memphis R. Co. v. Commissioners*, 112 U. S. 609, when it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it and the franchise of maintaining and operating it as such." See also *Hall v. Sullivan R. Co.*, 21 Law Rep. 138; *Galveston R. v. Cowdrey*, 11 Wall. (U. S.) 459.

2. *North Carolina, etc. R. Co. v. North Carolina Cent. R. Co.*, 83 N. Car. 489; *Morawetz Corp.* (2d. ed.) § 934.

3. *Atkinson v. Marietta etc. R. Co.*, 15 Ohio St. 21.

4. *Osterberg v. Union Trust Co.*, 93 U. S. 424.

5. *Trask v. Maguire*, 18 Wall. (U.

S.) 391; *Morgan v. Louisiana*, 93 U. S. 217; *Memphis etc. R. Co. v. Gaines*, 97 U. S. 697; *East Tenn. etc. R. Co. v. Hamblen Co.*, 102 U. S. 273; 2 Am. & Eng. R. Cas. 652; *Wilson v. Gaines*, 103 U. S. 417; 6 Am. & Eng. R. Cas. 637; *Louisville & N. R. Co. v. Palmes*, 13 Am. & Eng. R. Cas. 380; *Memphis etc. R. Co. v. Berry*, 112 U. S. 609; *Chesapeake etc. R. Co. v. Miller*, 114 U. S. 176.

But the legislature may, of course, unless restricted by the provisions of the State constitution, confer immunity from taxation upon the corporation formed by the purchasers of a railroad at a foreclosure sale. Such a result may be inferred from the terms of a general act granting to the new corporation the rights, powers, and privileges of the old one, where, from the context or surrounding circumstances such intent may be inferred. *Humphrey v. Pegues*, 16 Wall. (U. S.) 244; *Atlantic etc. R. Co. v. Allen*, 15 Fla. 637; *State v. Winona etc. R. Co.*, 21 Minn. 315; *State v. South Minn. R. Co.*, 21 Minn. 344; *Louisville etc. R. Co. v. Gaines*, 3 Fed. Rep. 266; *Nicholls v. New Haven etc. R. Co.*, 42 Conn. 103.

But a general grant to the new company of the rights, powers, and privileges of the old one will not exempt it from taxation where such an intent does not clearly appear. *Maine Cent. R. Co. v. Maine*, 95 U. S. 499; *Central R. etc., Co. v. Georgia*, 92 U. S. 655;

Officers acting under a decree of sale are usually invested with a reasonable discretion as to the manner of its exercise which they are not at liberty to overlook or disregard. They should adopt all necessary and proper means to fulfill the directions given to them, but they should, at the same time, never lose sight of the fact that, unless they are restricted by the terms of the decree, the time and manner of effecting the sale are in the first instance vested in their sound discretion.¹ The usual practice undoubtedly is that the officer in selling the property acts under the advice of the solicitor of the complainant, but it cannot be admitted that his advice is, under all circumstances, obligatory upon the officer.²

The marshal or sheriff may postpone a sale even after a bid has been made, nor can the bidder in such case claim that the property has been knocked down to him.³ But if a mistake is made by the marshal or sheriff in selling the property, which is of a material character, the sale is void, nor can it be validated

Atlantic etc. R. Co. v. Georgia, 98 U. S. 359; Mobile etc. R. Co. v. Steiner, 61 Ala. 559; St. Paul etc. R. Co. v. Parcher, 14 Minn. 297.

1. Blossom v. Milwaukee etc. R. Co., 3 Wall. (U. S.) 196.

The court heretofore rendered a decree of foreclosure of a railway mortgage in favor of the plaintiff, as the trustee for all the bondholders; certain bondholders, dissatisfied with the decree, appealed to the supreme court. *Sage v. Central R. Co.*, 93 U. S. 412. The supreme court refused to dismiss the appeal, which is still pending in that court, but vacated the *supersedeas*; certain bondholders, in March 1877, applied for an order to compel the trustee to sell, under the decree, pending the appeal, against its judgment of what was best for all the bondholders, and the court refused to interfere with the discretion of the trustee. The same bondholders then applied to the supreme court for a *mandamus* to compel the circuit court to order the trustee to sell pending the appeal, which the supreme court (March 27, 1877), refused. The same bondholders now (May term, 1877) renew their application for an order to the trustee to cause the special master to execute the decree, notwithstanding the pending appeal and the protest of other bondholders. *Held*, that individual bondholders, not parties to the decree, had no legal right to have the decree executed, pending the appeal, against the judgment of the trustee as to what was for the best interests of all the bondholders; but that

the trustee was at liberty to execute the decree or not, pending the appeal, as in its judgment was best for all the *cestuis que trustent*. *Farmers' L. & T. Co.*, 4 Dill (U. S.) 533.

Statutes.—The time and manner of making sales of railroads in all cases of foreclosure of mortgages or deeds of trust are provided for by statute. Kan. Laws of 1876, ch. 111; *Dassler's Stats.* 1876, §§ 4627, 4631.

2. Blossom v. Milwaukee etc. R. Co., 3 Wall. (U. S.) 196. In this case the court by Clifford, J., said: "Granting that solicitors may properly advise the officer, still it must be borne in mind that the authority and discretion in making the sale are to a certain extent primarily vested in the officer designated in the decree. Unreasonable directions of the solicitor are not obligatory and should not be followed, as if the solicitor should direct the property to be struck off at great sacrifice when but a single bidder attended the sale. Under such circumstances the officer might well refuse to do as he was directed, and he might be justified in postponing the sale to a future day to prevent the sacrifice of the property. Every such officer has a right to exercise a reasonable discretion to adjourn such a sale, and all that can be required of him is, that he should have proper qualification; use due diligence in ascertaining the circumstances, and act in good faith and with an honest intention to perform his duty."

3. Blossom v. Milwaukee etc. R. Co., 3 Wall. (U. S.) 197.

of the fraud was first obtained, or should give a satisfactory reason why it was not sooner obtained.¹

A sale made to directors of a corporation who have combined to obtain the company's property for themselves at a sacrifice, and have by their efforts defeated a sale for a larger sum in order that they might become the purchasers for a smaller amount, will be set aside.² So a trustee in possession who becomes a purchaser at a foreclosure sale will be required to yield the property to the mortgagor corporation upon being reimbursed for the amount of his bid with interest thereon.³ But a trustee to whom the mortgage has been executed and by whom the foreclosure proceeding has been instituted, has the right and power to bid at the sale so as to protect the interests of the bondholders.⁴

A foreclosure sale of the property of a railroad company will not be set aside because the purchasers were bondholders and creditors of the company who had entered into an agreement to make the purchase and to reorganize the company.⁵ Creditors who enter into such agreements are *bona fide* purchasers and take the property clear of any trust in favor of other creditors.⁶ So a purchase in the name of the solicitor of one whose property is sold, is not necessarily in and of itself invalid when made pursuant to a decree in a foreclosure suit.⁷

Where it is shown that all the bondholders assented to the purchase, the sale will be valid.⁸ So where a railroad mortgage is foreclosed and bought for the benefit of the bondholders, most

must also be brought within a reasonable time. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 537.

1. *Haywood v. Eliot Nat. Bank*, 96 U. S. 617.

2. *Jackson v. Ludeing*, 21 Wall. (U. S.) 661.

Where directors procured a mortgage to be foreclosed on a railroad for a much larger sum than was actually due, by fraudulent combination with the purchaser, held, that the latter must be held liable as trustee, to creditors, for the value of the property he purchased on the sale of the road, after deducting the amount due him at the day of sale. *Drury v. Milwaukee etc. R. Co.*, 7 Wall. (U. S.) 299.

Compensation for Repairs.—In Louisiana, where a railroad, in a complete state of dilapidation and ruin, was sold under a mortgage, under circumstances importing some fraud in the purchasers which induced the court to set the sale aside and order a resale, such purchasers, though deemed possessors in bad faith, are entitled by the spirit of article 508 of the Civil Code, to com-

pensation for reconstructing and repairing the road and putting it in working order. *Jackson v. Vicksburg etc. R. Co.*, 99 U. S. 513.

3. *Racine etc. R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331; *Kitchen v. St. Louis etc. R. Co.*, 69 Mo. 224; *Ashhurst's Appeal*, 60 Pa. St. 290.

4. *James v. Cowing*, 82 N. Y. 449; 2 Am. & Eng. R. Cas. 336.

5. *Thornton v. Wabash Co.*, 81 N. Y. 462.

The bondholders and stockholders of a railroad company may unite for the purchase of the property at a sale made in good faith to prevent a sacrifice thereof. *Pennsylvania Transp. Company's Appeal*, 101 Pa. St. 576.

6. *Vose v. Cowdrey*, 49 N. Y. 236; *Wetmore v. St. Paul etc. R. Co.*, 1 McCrary (U. S.) 466; *Kropholer v. St. Paul etc. R. Co.*, 1 McCrary (U. S.) 299; *Chicago etc. R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Ashhurst's Appeal*, 60 Pa. St. 290.

7. *Pacific R. Co. v. Ketchum*, 101 U. S. 289.

8. *Barnes v. Chicago etc. R. Co.*, 122 U. S. 1.

of whom unite in organizing and carrying on a new corporation, and afterwards certain creditors by judgment subsequent to the mortgage, succeed in obtaining a decree on a bill to set aside the foreclosure and subject the property to the payment of their judgments, a decree will render the foreclosure invalid only as to the creditors who filed the bill, and the bondholders who voluntarily took stock in the new company cannot again claim under the mortgage, nor can the trustee under the mortgage maintain a new bill of foreclosure for their benefit.¹ A master's sale will not be set aside on account of the inadequacy of the bid merely by showing that the property has not realized its full value. The price must be so inadequate as to show that it is not the result of fair dealings and an honest purchase.² But a deceptive notice of a sale under a railroad mortgage calculated to destroy all competition among the bidders and to exclude from the purchase every one except those engaged in the perpetration of the fraud, will be sufficient grounds for setting aside the sale.³

XVII. RIGHTS OF PURCHASERS.—A judicial sale upon mortgages executed by a railroad corporation does not invest purchasers with any corporate capacity.⁴ If a new company is organized, the purchasers are not regarded as continuing the old corporation.⁵ They are not liable for debts of the old company.⁶ The

1. *James v. Milwaukee etc. R. Co.*, 6 Wall. (U. S.) 752.

2. *Turner v. Indianapolis etc. R. Co.*, 8 Biss. (U. S.) 380.

3. *James v. Milwaukee etc. R. Co.*, 6 Wall. (U. S.) 752; *Barnes v. Chicago etc. R. Co.*, 122 U. S. 1; 30 Am. & Eng. R. Cas. 453; *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

In a suit under a railroad mortgage where the amount of bonds in the hands of the *bona fide* holders are less than \$200,000, and the notice of sale set forth that the mortgage debt was \$2,000,000, and that \$70,000 interest was due, the sale could not be upheld without sanctioning the grossest fraud and injustice. *James v. Milwaukee etc. R. Co.*, 6 Wall. (U. S.) 752.

4. *Western Pa. R. Co. v. Johnson*, 59 Pa. St. 290; *Atkinson v. Marietta etc. R. Co.*, 15 Ohio St. 21. See *Bruffett v. Great Western R. Co.*, 25 Ill. 353; *Com. v. Tenth Mass. Turnpike Corp.*, 5 Cush. (Mass.) 509; *Mendonhall v. Westchester etc. R. Co.*, 36 Pa. St. 145; *State v. Rives*, 5 Ired. (N. Car.) 297.

5. *Smith v. Chicago etc. R. Co.*, 18 Wis. 17; *Vilas v. Milwaukee etc. R. Co.*, 17 Wis. 497; *State v. Sherman*, 22 Ohio St. 411; *Memphis etc. R. Co. v. Central Pass. R. Co.*, 52 Pa. St. 506.

6. *Cook v. Detroit etc. R. Co.* 43 Mich. 349; 9 Am. & Eng. R. Cas. 443; *Cooper v. Corbin*, 105 Ill. 224; 13 Am. & Eng. R. Cas. 394; *Lake Erie etc. R. Co. v. Griffin*, 92 Ind. 487; *Taylor v. Atlantic etc. R. Co.*, 57 How. Pr. (N. Y.) 36; *North Henderson R. Co. v. Vooreum*, 28 N. J. Eq. 450; *Rhine v. Hayes*, 62 Tex. 42; *Menasha v. Milwaukee etc. R. Co.*, 52 Wis. 414; 5 Am. & Eng. R. Cas. 300; *Secombe v. Milwaukee etc. R. Co.*, 2 Dill. (U. S.) 469; *Hopkins v. St. Paul etc. R. Co.*, 2 Dill. (U. S.) 396; *Chesapeake etc. R. Co. v. Greist*, 85 Ky. 619; 30 Am. & Eng. R. Cas. 149, note 155; *Hammond v. Port Royal etc. R. Co.*, 15 S. Car. 10; 11 Am. & Eng. R. Cas. 352. There has been some difficulty in determining what is to be included in "debts," within the meaning of the above rule. There can be no doubt, however, that if a railway company executes a mortgage upon its road, franchises, etc., and afterwards occupies land for its uses and damages are assessed, it has no interest in such land on which the mortgage can operate, and a sale under the mortgage would not convey the title nor extinguish the lien for the damages. *Western Pa. R. Co. v. Johnston*, 59 Pa. St. 290. And such a sale, before the damages to the

new company takes what it purchases subject to no liens or

landowner are paid or secured, will not divest his right to recover compensation for the occupancy of his land from the purchaser under the mortgage. *Western Pa. R. Co. v. Johnston*, 59 Pa. St. 290; *White v. Nashville etc. R. Co.*, 7 Heisk. (Tenn.) 518.

In a *Wisconsin* case the complaint, in substance, averred that plaintiff, in 1859, obtained judgment against the S. & M. R. Co., for damages for land taken by it for its road; that in 1861 the property and franchises of that company were sold under a mortgage or trust deed; that the purchasers took with notice of the existence and non-payment of said judgment; that they subsequently organized and became the company here made defendant which is operating the road built by said S. & M. Co., claiming to own the same and its appurtenances; that, in continuation of the appropriation of plaintiff's said land made by the last-named company, defendant entered upon the same, and now holds, and ever since 1861 has held it, to its own exclusive use and benefit, without plaintiff's consent; that plaintiff's said judgment is a valid subsisting one, wholly unpaid; and that the S. & M. Co., ever since the mortgage sale aforesaid has been wholly insolvent and has no existence in fact, but has been wholly merged in the defendant. *Held*, that plaintiff has a remedy in equity to compel the defendant to make compensation for the land, or stop running cars over it; but defendant is not liable in an action at law for a debt upon the judgment. *Gilman v. Sheboygan etc. R. Co.*, 37 Wis. 317; 40 Wis. 653; *Pfeifer v. Sheboygan etc. R. Co.*, 18 Wis. 155, distinguished.

And in *Gillison v. Savannah etc. R. Co.*, 7 S. Car. 173, it appeared that the charter of C, a railway company, authorized it to acquire lands by statutory proceedings, the land to "vest in said company in fee simple as soon as the valuation thereof may be paid, or tendered and refused." In 1860 C commenced proceedings to acquire title to a parcel of A's land. It was valued, and C appealed from the valuation, but did not prosecute the appeal. C took possession of the land, and having become insolvent, in 1866 all its property was sold and purchased by S, another and a distinct rail-

way company, which thereupon took possession of the land. In 1872, A commenced his action against S to have the valuation paid or the land restored to him; *held*, that he was entitled to the relief he demanded.

The fact that a judgment against a railway company for taking land was obtained two years before the foreclosure sale and that the road had been operated over the land during that time and that no further steps were taken by suit to enforce payment of the damages until the new company had been occupying the land for thirteen years, does not constitute a waiver of the owner's right to compensation. *Gilman v. Sheboygan etc. R. Co.*, 40 Wis. 653.

Where a mortgage given by a railroad company is foreclosed, and all the property rights, franchises, and effects of such company are duly sold under the decree of foreclosure, and a new company is thereupon organized under the laws of this State, for the purpose of owning and operating the line of railway previously owned by the old company, with all its franchises, rights and property, the new railway company is not liable at law for the general debts of the old company, except such debt or debts as it may assume. But where the old company has appropriated land for the purposes of its railroad, and a judgment has been rendered against it for the value of the land appropriated or condemned, which judgment is unpaid, if the new company enters upon and occupies such land, it will be liable in equity for the payment of such judgment upon the principle that it has adopted and ratified the original appropriation. *Lake Erie etc. R. Co. v. Griffin*, 92 Ind. 487; 17 Am. & Eng. R. Cas. 235.

New Company Liable for Assumed Debts. — Where a mortgage given by a railroad company is foreclosed, and all the property, rights, franchises and effects of such company are duly sold under the decree of foreclosure, and a new company is thereupon organized under the laws of this State, for the purpose of owning and operating the line of railway previously owned by the old company, with all its franchises, rights and property, the new railway company is not liable at law for the general debts of the old com-

claims save such as may be paramount to the mortgage under which the sale is made.¹ Although the purchasers upon a sale under a mortgage are not vested with the rights, franchises, powers, privileges and immunities which the corporation possessed before such sale,² yet there are, however, reorganization acts in many of the States which make the purchasers a body corporate with all the rights and privileges of the old company.³

The legislature has full power to authorize the bondholders, by the acquiescence of the majority, to reorganize as a new corporation with the rights of the old corporation. And when a new corporation is thus organized, it becomes an instrumentality for carrying into effect the original design in creating the first corporation and devoting the property to the only use which the law of its creation permits.⁴ But the legislature has no power to release or transfer to the new corporation the debts of the old corporation. It cannot release or discharge the old corporation from their legal liabilities to individuals, whether incurred by contract, forfeiture, or penalty.⁵

A purchaser under a sale by judicial process simply directing a sale of the debtor's property, takes the property subject to any prior liens and incumbrances existing upon it, with a right, nevertheless, to contest the validity of apparent incumbrances

pany, except such debt or debts as it may assume. *Lake Erie etc. R. Co. v. Griffin*, 92 Ind. 487.

1. *Jones on Corp. Bonds & Mortg.*, § 671; *Morgan Co. v. Thomas*, 76 Ill. 120.

2. *Wellsborough etc. R. Co. v. Griffin*, 57 Pa. St. 417; *People v. Cook*, 110 N. Y. 443; 36 Am. & Eng. R. Cas. 256; *Metz v. Buffalo etc. R. Co.*, 58 N. Y. 61.

In *Gulf etc. R. Co. v. Morris*, 67 Tex. 700, the court by Stayton, A. J., said: "These mortgages may be foreclosed through the courts, or sales may be made under powers contained in such mortgages, and title to the property will pass. They may become indebted, in the course of their business, and their property, including franchise, subjected to sale under judicial process to to pay such indebtedness. But in such cases the corporation continues, and the purchasers become in effect new stockholders, the corporation property, so purchased, however, being relieved from liability for debts not creating a prior incumbrance on the property sold. These are the means through which the laws of this State authorize the sale of railroads."

3. *People v. Cook*, 110 N. Y. 443; 36 Am. & Eng. R. Cas. 256.

See *Alabama Code*, 1886, §§ 1596-1598, 2052; *Arkansas Dig. Sts.* 1884, §§ 5455, 5457; *Florida Dig. of Laws* 1881, p. 259; *Georgia Code* 1882, § 1689 (v.); *Illinois 2 Ann. Sts.* 1885, p. 1907; *Indiana*, 2 R. S. 188, §§ 393-398, 3946; *Iowa Code* 1888, § 1086; *Kansas Comp. Laws* 1885, ch. 84, §§ 51, 52, 53; *Kentucky G. S.* 1881, pp. 957, 1004; *Maine R. S.* 1884, ch. 51, §§ 93, 94, 105-107; *Maryland Pub. Gen. Laws* 1888, art. 23, § 187; *Michigan*, 1 Annot. Sts. 1882, §§ 3314, 3351; *Minnesota G. S.* 1878, ch. 34, § 87; *Mississippi Laws* 1877, ch. 46; *Laws 1876*, ch. 112; *R. Code* 1880, § 1038; *New Jersey*, 2 R. S. 1877, p. 944, § 165; *Supp.* 1888, p. 844, § 86; *New York*, 3 R. S. 1889, pp. 1781, 1787, 1791; *North Carolina Code* 1883, ch. 49, § 1936; *Ohio*, 1 R. S. 1880, §§ 3393-3399; *South Carolina G. S.* 1882, §§ 1420-1424; *Tennessee Code* 1884, § 1253; *Texas*, *Paschal's Dig.* 1866, p. 820, arts. 4912, 4916; *Utah*, 2 Comp. Laws 1888, § 2573; *Vermont R. Laws* 1880, §§ 3461-3474; *Virginia Code* 1887, § 1233; *West Virginia Code* 1887, ch. 54, § 7273; *Wisconsin R. S.* 1878, § 828.

4. *Gates v. Boston etc. R. Co.*, 53 Conn. 333.

5. *Buffett v. Great Western R. Co.*, 25 Ill. 353; *Hatcher v. Toledo etc. R. Co.*, 62 Ill. 477.

either with respect to their legal existence or the amount due upon them.¹ If a purchaser has knowledge of a lien of another upon the property, he is not a purchaser without notice, and therefore takes the property subject to such lien.² But he is not bound to look beyond what appears upon the face of the record in the foreclosure proceedings. Thus, in a suit to foreclose a mortgage, brought against a railroad company, where third parties intervene and seek to enforce a claim for materials furnished or used in the construction of the road against the earnings of the road, in the hands of the receiver, the purchaser is not bound to anticipate such a claim in case the earnings of the road should not satisfy the claim of intervenors.³

XVIII. PROCEEDINGS IN BANKRUPTCY AND INSOLVENCY AGAINST RAILROAD COMPANIES.—The bankrupt law applies to railway companies;⁴ and they are also subjected to compulsory insolvency proceedings under the State insolvent laws as much as natural persons.⁵

No vote or consent of the corporators is necessary to authorize counsel to appear for a corporation to an adjudication of bankruptcy, nor to admit acts of bankruptcy when involuntary proceedings against it have been commenced by a creditor. When involuntary proceedings are brought against a company, the usual course is adopted and matters proceed as in ordinary cases where legal measures are instituted against corporations.⁶ The petition and order to show cause is served by delivering a copy to the head or principal officers of the corporation, or by leaving the order at the principal place of business of the corporation.⁷ See SERVICE OF PROCESS.

Where the stockholders of a bankrupt railroad company purchase in good faith, all the outstanding floating indebtedness of

1. So a purchaser at a sale by a receiver whose conditions of sale state that the property will be sold "subject to all legal liens and incumbrances thereon," may contest the validity of a prior mortgage upon the premises. *Hackensack Water Co. v. Dekay*, 36 N. J. Eq. 548.

2. *Western Union Tel. Co. v. Burlington etc. R. Co.*, 11 Fed. Rep. 1.

3. *Hale v. Burlington etc. R. Co.*, 13 Fed. Rep. 203.

4. *New Orleans etc. R. Co. v. Delamare*, 114 U. S. 501; *Adams v. Boston etc. R. Co.*, 4 Nat. Bank. Reg. 314; *Alabama etc. R. Co. v. Jones*, 5 Nat. Bank. Reg. 97; *Sweatt v. Boston etc. R. Co.*, 3 Cliff. (U. S.) 332; 5 Nat. Bank. Reg. 234; *Factors' etc. Ins. Co. v. Murphy*, 111 U. S. 738; *Winter v. Iowa etc. R. Co.*, 2 Dill. (U. S.) 487; 7 Nat. Bank. Reg. 289, 291; *In re California Pac. R. Co.*, 3 Sway. (U. S.) 240.

5. *Platt v. New York etc. R. Co.*, 26 Conn. 544.

"The rights which supervene upon the mortgage or other specific lien accompanied with possession before proceedings in bankruptcy, are very different, from those arising from proceedings in State courts in cases of general insolvency. A mere insolvent proceeding or a proceeding of that nature, and possession of the bankrupt property taken in pursuance thereof, is antagonistical and repugnant to the bankrupt law, and may be avoided by regular proceedings in bankruptcy." Per Bradley, C. J., in *Davis v. Railroad Co.*, 1 Wood (U. S.) 661.

6. *Jones on Corp. Bonds & Mortg.*, § 701; *Leiter v. Republic F. Ins. Co.*, 7 Biss. (U. S.) 26.

7. *In re California Pac. R. Co.*, 3 Sway. (U. S.) 240.

the company, except a few minor claims of the creditors, and those representing these few claims desire such a result, they should be allowed to have the bankrupt proceedings dismissed on giving proper security for the payment of the objecting creditors.¹

RAILROADS.—(For cross-references see note 1, p. 777.)

- I. Introduction, 777.
- II. Definition, 777.
- III. Legal Status of Railroads and Railroad Corporations, 780.
- IV. Railroad Corporations, 785.
 1. Creation and Organization, 785.
 2. Of the Charter, 789.
 3. Domicile, Citizenship, and Residence, 791.
 4. Corporate Existence, 798.
 5. Capital Stock of the Corporation—Its Creation—Subscriptions to—Issuance of Shares—Rights of Shareholders, etc. (See MUNICIPAL SECURITIES, vol. 16, p. 1204; STOCK; STOCKHOLDERS), 803.
 6. Corporate Direction and Control—Officers and Agents of the Corporation (See OFFICERS AND AGENTS, vol. 17, p. 39, et seq.), 803.
 7. Suits by and Against the Corporation (See CORPORATIONS, vol. 4, p. 274 et seq.; FOREIGN CORPORATIONS, vol. 8, p. 375), 803.
 8. Consolidation (See CORPORATIONS, vol. 4, p. 272 et seq.), 803.
 9. Dissolution of the Corporation (See CORPORATIONS, vol. 4, p. 294, et seq.; FOREIGN CORPORATIONS, vol. 8, p. 404, et seq.), 803.
- V. Corporate Powers, 803.
 1. Power of Eminent Domain (See EMINENT DOMAIN, vol. 6, pp. 518, 530, et seq.), 805.
 2. Power to Issue Bonds and Negotiable Securities, to Contract Debts, etc. (See RAILROAD SECURITIES; CORPORATIONS, vol. 4, pp. 223, 229), 805.
 3. Power to Construct Lateral or Branch Roads (See LATERAL OR BRANCH RAILROADS, vol. 12, p. 940, et seq.), 805.
 4. Powers as to Real Estate, 806.
 5. Powers as to Stock (See also STOCK; STOCKHOLDERS), 810.
 6. Power as to Connections with Other Roads—Traffic Arrangements, 812.
 7. Power to Contract, 815.
 - (a) Contracts to Farm Pools (See RAILROAD POOLS), 817.
 - (b) Contracts Concerning the Location of Stations, 817.
 - (c) Contracts with Other Railroads, 818.
 - (d) Various Other Contracts, 820.
 8. Power to Make Reasonable Rules and Regulations, 820.
 9. Miscellaneous Powers, 323.
- VI. Location, 826.
 1. Power of Company to Choose, 826.
 2. Conflicting Grants of Location, 831.
 3. Description of Location—Plans, etc., 832.
 4. Termini, 833.
 5. Property in Location, 834.
 6. Abandonment of Location or Right of Way, 836.
 7. Contracts to Influence Location, 837.
 8. Generally, 838.
- VII. Right of Way, 839.
 1. Acquisition by Right of Eminent Domain (See EMINENT DOMAIN, vol. 6, p. 509, et seq.), 841.
 2. Acquisition by Public Grant (See GRANTS, vol. 9, pp. 48, 60; PUBLIC LANDS, vol. 19), 841. [842.]
 3. Acquisition by Dedication,

1. *In re Indianapolis etc. R. Co.*, 5 Biss. (U. S.) 287.

4. *Acquisition by Purchase or Private Grant*, 842.
 5. *Acquisition by License or Implied Grant*, 858.
 6. *Width of Way*, 861.
- VIII. Construction and Operation of the Road**, 862.
1. *Liability for Injuries Caused by Construction*, 862.
 2. *Highway Crossings*, 865.
 3. *Railroads Crossing Each Other*, 867.
 4. *Construction of Fences, Cattle-Guards, Culverts, etc.* (See FENCES, vol. 7, p. 906; SURFACE WATERS; WATER AND WATER-COURSES), 870.
 5. *Bridges* (See also BRIDGES, vol. 2, p. 540, *et seq.*), 870.
 6. *Construction Contracts*, 872.
 7. *Services and Material*, 879.
 8. *Operation of the Road—Extent of Care Exercised, etc.*, 880.
- IX. Railroads in Streets and Highways—Elevated Railroads**, (See EMINENT DOMAIN, vol. 6, pp. 534, 552-3; HIGHWAYS, vol. 9, p. 408; STREETS), 882.
- X. Rolling Stock and Similar Property—Whether Realty or Personality**, 882.
- XI. State Regulation of Railroads**, 884.
1. *Is an Exercise of Police Power*, 885.
 2. *Regulation of Freight Charges and Passenger Rates* (See FREIGHT, vol. 8, pp. 906-925; TICKETS AND FARES), 885.
 3. *Railroad Commissions* (See RAILROAD COMMISSIONERS), 885.
 4. *As to Speed of Trains*, 885.
 5. *As to Crossings, Signals, etc.*, 886.
 6. *As to Fencing Tracks*, 888.
 7. *As to Formation of Pools*, 888.
 8. *Miscellaneous Instances*, 888.
 9. *Limitations — Effect of Charter as a Contract, etc.*, 891.
- XII. Federal Control of Railroads**, 894.
- XIII. Lease of Railroads**, 895.
1. *Authority to Lease*, 895.
 2. *Effect of Lease*, 897.
3. *Relative Liability of Lessor and Lessee*, 899.
- XIV. Railroads as Common Carriers**, 903.
1. *Rights, Duties and Liabilities as Carriers of Goods* (See CARRIERS OF GOODS, vol. 2, p. 770), 903.
 2. *As Carriers of Passengers* (See also CARRIERS OF PASSENGERS, vol. 2, p. 738, *et seq.*), 903.
 - (a) *Expulsion of Passengers*, 903.
 - (1) *Right to Expel*, 903.
 - (2) *Manner and Place of Expulsion*, 907.
 - (3) *Damages for Wrongful Expulsion*, 910.
 - (b) *Liability for Loss of Baggage*, 912.
- XV. Liability for the Creation or Maintenance of Nuisances**, 921.
1. *Generally*, 921.
 2. *Effect of Legislative Grant as Affecting Liability*, 923.
- XVI. Liability to Indictment**, 926.
- XVII. Crimes Against Railroads**, 928.
- XVIII. Liability for Torts**, 930.
1. *For Negligent Injury Generally* (See NEGLIGENCE, vol. 16, p. 386, *et seq.*; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15; COMPARATIVE NEGLIGENCE, vol. 3, p. 367), 930.
 2. *Liability for Injuries to Servants and Employes* (See FELLOW SERVANTS, vol. 7, p. 821, *et seq.*; MASTER AND SERVANT, vol. 14, p. 84, *et seq.*), 930.
 3. *Liability for Fires Caused by the Operation of the Road* (See FIRES BY OPERATION OF RAILWAYS, vol. 8, p. 1, *et seq.*), 930.
 4. *Liability for Injuries Caused from Failure to Fence Track* (See FENCES, vol. 7, p. 906, *et seq.*), 930.
 5. *Liability for Injuries at Crossings* (See CROSSINGS, vol. 4, p. 906), 931.
 6. *Liability for Wrongful Acts or Defaults of Its Servants* (See MASTER AND SERVANT, vol. 17, pp. 805, 815), 931.

- | | |
|--|--|
| <p>7. <i>Liability Where One Company Uses the Track of Another</i>, 931.</p> <p>8. <i>Where Road Is Operated by Trustees or Receiver</i>, 932.</p> <p>9. <i>Liability for Injuries to Trespassers</i>, 933.</p> <p> (a) <i>Who Are Trespassers</i>, 933.</p> <p> (b) <i>Duty Owing to Them</i>, 935.</p> <p>10. <i>Stock-Killing Cases</i>, 938.</p> <p>11. <i>Measure of Damages</i>, 942.</p> <p>XIX. Mortgages, Bonds and Debentures (See RAILROAD SECURITIES), 942.</p> | <p>XX. Municipal Subscriptions (See MUNICIPAL SECURITIES, vol. 15, p. 1204, <i>et seq.</i>), 942.</p> <p>XXI. Receivers (See RECEIVERS), 942.</p> <p>XXII. Injunction Against Railroads (See INJUNCTION, vol. 10, p. 969), 942.</p> <p>XXIII. Mandamus (See MANDAMUS, vol. 14, p. 158), 942.</p> <p>XXIV. Taxation of Railroads (See TAXATION), 942.</p> <p>XXV. Stations (See STATIONS), 942.</p> <p>XXVI. Tickets and Fares (See TICKETS AND FARES), 942.</p> |
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I. INTRODUCTORY.—A complete treatment of the law of railroads must involve a discussion of many legal subjects intimately connected with it; such, for example, as the law of carriers, of corporations, of negligence, etc. This article, however, will be confined to a treatment of the law relating peculiarly to railroads and not discussed elsewhere. But in order for a logical presentation of the whole subject, every topic usually classified under this title has been included in the analysis, such subdivisions as have been treated elsewhere, being made to consist merely of a cross-reference.¹ The subject of street railways constitutes a separate article.

II. DEFINITION.—No precise definition of the word "railroad" may be given; its meaning wherever found depends entirely upon the connection in which it is used. It may in some connections have a broad and comprehensive meaning, embracing not only the road-bed, but also all side tracks, rolling stock, station houses, etc., which belong to the railroad company, and may be even used to designate the corporation itself; while in others its meaning is much more narrow, including nothing more than the mere road-bed.²

1. Cross-References.—General reference may be made to CARRIERS OF GOODS, vol. 2, p. 770; CARRIERS OF PASSENGERS, vol. 2, p. 738; CORPORATIONS, vol. 4, p. 184; EMINENT DOMAIN, vol. 6, p. 509; EXPRESS COMPANIES, vol. 7, p. 539; FELLOW SERVANTS, vol. 7, p. 821; FOREIGN CORPORATIONS, vol. 8, p. 329; FRACTIONS, vol. 8, p. 584; FREIGHT, vol. 8, p. 900; LATERAL RAILROADS, vol. 12, p. 940; NEGLIGENCE, vol. 16, p. 386; OFFICERS OF PRIVATE CORPORATIONS, vol. 17, p. 39; RAILROAD COMMISSIONERS; RAILROAD POOLS; RECEIVERS; SLEEPING CARS; STOCK; STOCKHOLDERS; TICKETS AND FARES; WATER AND WATER COURSES.

2. What Is Included in the Term Railroad or Railway.—See generally for definition of the term "railroad," Anderson's L. Dict.; 2 Bouvier's L. Dict.

A statute of *Indiana* authorized the State board of equalization to assess taxes upon railway property. Under this it was held that the term "railway track" included the right of way with all the improvements upon it. *Pfaff v. Terre Haute etc. R. Co.*, 108 Ind. 144.

In *Central etc. R. Co. v. Twenty-Third St. R. Co.*, 54 How. Pr. (N. Y.) 168, it was said that iron tracks or rails securely fastened to the soil, whether of a street or otherwise, constitute a "railroad," irrespective of the propelling

power by which vehicles were transported thereon.

There is a distinction between "railway" and "railway station." A station is no part of a railway, nor are offices, warehouses, or other property which are ancillary to its working; but sidings, turntables, and so much of the platform as is to be considered as the side of the railway, do form part of it. *South Wales R. Co. v. Local Board of Health*, 24 L. J. M. C. 30; 4 E. & B. 189; 82 E. C. L. 188.

Under *New Jersey* Rev. St. p. 925, providing that any "railroad" constructed under this act shall not exceed one hundred feet in width—held, that the term "railroad" was not limited to the roadbed and tracks, but included all necessary appurtenances. *State v. Hudson Terminal R. Co.*, 46 N. J. L. 289. See also *Seymour v. Canandaigua*, etc. R. Co., 25 Barb. (N. Y.) 284; *Sharpless v. Mayor etc. of Philadelphia*, 21 Pa. 169.

In *Calhoun v. Memphis R. Co.*, 2 Flip. (U. S.) 45; 9 Cent. Law Jour. 66, where the expression "all the other property of such railroad" occurred, it was held that the word railroad there, as it frequently does, meant the railroad company.

In another case it is said that "railroad" *ex vi termini* includes sidings, branches and like accessories. *Black v. Philadelphia etc. R. Co.*, 58 Pa. St. 252; *Lake Superior etc. R. Co. v. U. S.*, 12 Ct. of Cl. 54; 93 U. S. 442; 25 Am. Law Reg. 648, and cases cited; *Cleveland etc. R. Co. v. Speer*, 56 Pa. St. 335.

In *Lake Superior etc. R. Co. v. U. S.*, 93 U. S. 442, it is said that when in an act of Congress a railroad is referred to in its charter as a road as a permanent structure and designated and required to be a public highway, the term railroad cannot be extended to embrace the rolling stock or other personalty of the company; that the reference in such case is to the immovable structure stretching across the country, graded and railed for the use of the locomotive and its train of cars.

Again it is said that "road" or "railroad" will include not only the principal railroads but all adjuncts. *St. John v. Erie R. Co.*, 22 Wall. (U. S.) 148.

Under an act providing for the recovery of damages for injuries received by one "lawfully engaged on or about a railway," it was held that one engaged in a rolling mill to haul ashes from the

furnace to a cinder pile on the opposite side of a railroad switch, who was killed while moving some cars that blocked his way, was not within the act. *Richter v. Pennsylvania Co.*, 104 Pa. St. 511.

Whether "Railroad" Includes Street Railways.—It has often been made a question whether the general term "railroad" includes horse or street railways, or is confined to those run by steam. There can be no definite rule stated; the meaning of the word must depend upon the context and the general intent of the statute in which it is used. Thus, an act giving certain powers to "railroads" was held to embrace horse railways in the case of *Chicago v. Evans*, 24 Ill. 52.

A statute making the "proprietors of any railroad liable for injuries caused by the negligence of its servants, etc." was held to include horse railways. *Johnson v. Louisville City R. Co.*, 10 Bush (Ky.) 231.

Where the legislature enacted that no other railroads than that of a certain corporation should be constructed within certain prescribed limits, and that any railroad which might be constructed in any direction should connect with the road of such comorator on reasonable terms, it was held that the term "railroad" did not comprise street railways, and that an injunction could not be granted restraining the construction of a street railway or requiring the connection of such a railway with the road in question. *Lotsville etc. R. Co. v. Louisville etc. Co.*, 2 Duv. (Ky.) 175; 2 Abbott's L. Dict. Railroad. See also *Money Penny v. Sixth Ave. R. Co.*, 4 Abb. Pr., N. S. (N. Y.) 357.

Under § 1957 of Code of Washington, giving a laborer's lien upon a "railroad" or "any other structure," and the land upon which it is erected, laborers cannot have a lien upon a street cable railway, since there can be no lien upon the land, the fee of the street being in the city. *Front St. Cable R. Co. v. Johnson* (Wash. 1891), 25 Pac. Rep. 1084.

"Railroads" include street railroads, in a statute prohibiting the obstruction of railroad tracks. *Price v. State*, 74 Ga. 378.

Dummy Lines.—The *Alabama* Code (1886), § 1173 provides: "Unless clearly otherwise apparent from the context the term 'railroad company,' as used in this chapter, includes any person or

corporation owning or operating a railroad." *Held*, that a "dummy line" between Birmingham and Ensley City, organized under the above act, was a "railroad," within § 1145, which requires all trains to stop within 100 feet of where two "railroads" cross each other. *Birmingham Mineral R. Co. v. Jacobs* (Aia. 1891), 9 So. Rep. 320.

A "dummy" railway laid in the streets of a city, and engaged exclusively in carrying passengers, is a "railroad," within *Tennessee Code*, § 1298, which provides that "every railroad shall keep . . . some person upon the locomotive always upon the lookout ahead; and when any . . . obstruction appears upon the road, the alarm whistle shall be sounded, . . . and every possible means employed to . . . prevent an accident." *Katzenberger v. Lawo* (Tenn. 1891), 16 S. W. Rep. 611.

Roadbed and Roadway.—The "roadbed" is the bed or foundation upon which the superstructure of the railroad rests. The "roadway" includes all that and whatever other ground the company is allowed on which to construct its roadbed and lay its track. As applied to ordinary roads, the two words mean the same thing, but not in case of railroads. *San Francisco v. Central Pac. R. Co.*, 63 Cal. 469; 118 U. S. 413.

Under English Statutes.—For particular definitions of "railroad" or "railway" under English statutes, see *South Wales R. Co. v. Local Board of Health*, 24 L. J., M. C. 34; 4 El. & B. 189; 82 E. C. L. 189; *Southeastern R. Co. v. Railway Com'rs*, 50 L. J., Q. B. 211; 6 Q. B. Div. 586; *Reg. v. Newport Dock Co.*, 31 L. J., M. C. 266; *Stroud's Jud. Dict.* 645 and cases cited.

Road with Its Appendages.—This phrase occurring in a railroad charter has been held not to include the equipments, cars, engines, or other personal property of the railroad company, but to apply solely to the real estate. *State Treasurer v. Somerville etc. R. Co.*, 28 N. J. L. 21; *APPENDAGES*, vol. 1, p. 630.

Railroad Corporation.—In the case of *Union Trust Co. v. Kendall*, 20 Kan. 515, it is held that the corporation which has possession, control and management of, and is engaged in the business of running and operating a railroad in that State is a "railroad corporation," within the Laws of 1874, providing for the liability of

railroads for all stock killed, etc. And this, although such corporation is so engaged in the execution and discharge of a trust for the benefit of the bond and stockholders of the corporation which built and own the road, and is not itself the absolute owner thereof. See also *Tracy v. Troy etc. R. Co.*, 38 N. Y. 433; *Clement v. Canfield*, 28 Vt. 302.

A company may be a railroad corporation within the meaning of the statutes, although authorized to do other kinds of business than transportation by railroad. *Kentucky Imp. Co. v. Slack*, 100 U. S. 648; *Randolph Co. v. Post*, 93 U. S. 502.

Tennessee Code, §§ 1166, 1167, provides a penalty for the failure of "railroad companies" to sound the whistle when there are obstructions on the track. *Held*, not to apply to contractors engaged in constructing a road. *Griggs v. Houston*, 104 U. S. 553.

"Proprietors" of a railroad does not include a company having a mere temporary right to run over the tracks of another company subject to its control. *Lake Shore etc. R. Co. v. Kastt*, 11 Ill. App. 536. *Compare Hall v. Brown*, 54 N. H. 495.

But in *McKnight v. Iowa etc. R. Construction Co.*, 43 Iowa 406, it is said that a company which is engaged in the construction of a railway, and to that end is running trains laden with gravel, is "operating a railroad" within the meaning of *Iowa Code*, § 1307, providing for the liability of such companies to their employees.

See for definition of "railroad company" as used in particular English statutes, *Great Western R. Co. v. Central Wales R. Co.*, 52 L. J., Q. B. 211; 10 Q. B. Div. 231; *Exmouth Docks Co.*, 43 L. J. Ch. 110; *L. R. 17 Eq. 181*; *In re Brenthford etc. Tr. Co.*, 53 L. J. Ch. 624; 26 Ch. Div. 527.

Cars.—A contract by a railroad company provided that a certain elevator should have the handling of all through grain that should be received by the cars of said railroad company. It was held by the words "cars of said railroad company" was meant the cars used by the company in transporting grain over its road, and not the cars actually belonging to it. *Richmond v. Dubuque etc. R. Co.*, 26 Iowa 191.

In an act providing for liability for injuries occasioned by the running of "cars or engines" the term "cars"

There is no distinction to be made between the words "railroad" and "railway," for though, in their common acceptance, they may be used to convey different meanings, the distinction is not observed in law and the words are ordinarily used indiscriminately.¹

III. LEGAL STATUS OF RAILROADS AND RAILROAD CORPORATIONS.—

A railroad, although in some sense private property, owned and operated by private corporations or individuals, is yet to be regarded as a *quasi* public highway, as an institution in which the

includes hand cars. *Thomas v. Georgia R. etc. Co.*, 38 Ga. 222.

Connecting Road.—For definition of a connecting road in a particular case see *Mayor etc. of Baltimore v. Baltimore etc. R. Co.*, 21 Md. 50.

The term "railroad connection" without qualification, means either such a union of tracks as to admit the passage of cars from one road to another, or such an intersection of roads as will admit the convenient interchange of freight and passengers at the point of intersection. Therefore two roads may "connect" with each other even though a difference of gauge prevents the running of common cars. *Philadelphia etc. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

Tracks.—In *Delaware etc. Canal Co. v. Whitehall*, 90 N. Y. 21; 10 Am. & Eng. R. Cas. 227, under the provisions of an act regulating "the construction of roads and streets across railroad tracks," the word "track" is held to signify the entire roadbed, including turnout and switches, or other contrivances used for passing engines or cars from one line of rails to another, or for public traffic purposes.

1. "**Railroad**" and "**Railway**." Thus in *Chicago etc. R. Co. v. Johnson*, 89 Ind. 88; 13 Am. & Eng. R. Cas. 181, where a judgment by default was taken against a railway company, while the summons and return were against a railroad company, it was held that the difference was purely immaterial. The same principle is upheld in *Georgia Pac. R. Co. v. Probst*, 83 Ala. 518.

So also the variance was considered immaterial where the citation was issued as against a railroad company which in its charter was designated a railway company. *Galveston etc. R. Co. v. Donahoe*, 56 Tex. 162; 9 Am. & Eng. R. Cas. 287; *Central etc. R. Co. v. Morris*, 68 Tex. 49; 28 Am. & Eng.

R. Cas. 50; *Mobile etc. R. Co. v. Yeates*, 67 Ala. 164.

Likewise where the charter name was railway company, and the name in the indictment was railroad company, the variance was held unimportant. *State v. Brin*, 30 Minn. 522, the court, by Berry, J., saying: "Railroad," and "railway" are used interchangeably. They are as nearly exact synonyms as any two words in the language." See also *Anderson's Law Dict. Railroad*; 1 Wood's Ry. Law 1.

In *East Tennessee etc. R. Co. v. Mahoney* (Tenn. 1891), 15 S. W. Rep. 652, it was held that after a trial upon the merits, a declaration against the defendants might be amended so as to read "Railway Co." instead of "Railroad Co."

In the case of *Gyger v. Philadelphia R. Co.*, 136 Pa. St. 96; 46 Am. & Eng. R. Cas. 229, it is said: "It is undoubtedly true, as we have several times decided, that the words railroad and railway are synonymous, and in all ordinary circumstances they are to be treated without distinction as to meaning." *Hestonville etc. R. Co. v. Philadelphia*, 89 Pa. St. 210.

But in the case of *Munkers v. Kansas City etc. R. Co.*, 60 Mo. 334, the distinction laid down by a leading lexicographer was followed: viz., that the word "railroad" should be confined to the highway in which the railway is laid and the word "railway" to the rails when laid. The circumstances of the case were, that there was an agreement relinquishing to the company a right of way one hundred feet wide over a tract of land situated in two sections of a township, the "railroad" to be located "on the section line." It was held that the company would not forfeit its right to the land merely because its track was not laid immediately on and along the section line, provided it was constructed within the limits of the one hundred feet, and that this strip embraced that line.

public have an easement closely similar to that possessed in public highways.¹

1. **Railroads as Public Highways.**—In the case of *Olcott v. Fond du Lac Co.*, 16 Wall. (U. S.) 678, the court by Strong, J., said: "Whether the use of a railroad is a public or private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private, the use is public. So turnpikes, bridges, ferries and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*." *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 495; 11 Pet. (U. S.) 419.

So also it is held that although built and operated by private corporations, railroads are in one sense public works. They are for the accommodation of the public and are allowed and protected in their franchises by the public law. *Worcester v. Western R. Co.*, 4 Met. (Mass.) 564.

Again, in the case of *Holladay v. Davis*, 5 Oregon 40, it is said that they are *quasi* public; that is, they are public to such an extent that the public interest is involved in their being rightfully located, and that in consequence of this a contract to influence the location by personal benefit to the locator is void as against public policy. *Holladay v. Patterson*, 5 Oregon 177; 1 Rorer on Railroads 1, *et seq.*

And the doctrine of the text is also set forth very clearly in the case of *Newburyport Turnpike Co. v. Eastern R. Co.*, 23 Pick. (Mass.) 326; *Com. v. Wilkinson*, 16 Pick. (Mass.) 175. See also *Pierce on Railroads*, p. 2; 1 Rorer on Railroads, p. 4; *Gibson v. Mason*, 5 Nev. 283; *Stewart v. Erie etc. Transp. Co.*, 17 Minn. 372; *Central etc. R. Co. v. Rockafellow*, 17 Ill. 541; *Davidson v. Ramsey Co.*, 18 Minn. 482; *Weir v. St. Paul etc. R. Co.*, 18 Minn. 155; *Burlington etc. R. Co. v. Spearman*, 12 Iowa 117 (in which case it was said: "The roadbed and depot grounds are not held as an easement of the public by the company as agents of the State"); *Bradley v. New York etc. R. Co.*, 21 Conn. 294 (similar language

used); *Mayor etc. of Baltimore v. Baltimore etc. R. Co.*, 21 Md. 50.

In a *New York* case it is said that the ground upon which private property may be taken for railroad uses is primarily that such railroads are "highways" or "improved public ways." *In re Niagara Falls etc. R. Co.*, 108 N. Y. 375. And it was held in that case that a road which could only be operated in summer, which was solely to enable summer visitors to see the Falls better, and along whose route there could be no habitations, traffic or business, was not a public highway, and therefore could not be entitled to the right of eminent domain.

Railroads are not private affairs but public improvements, and it is the right and duty of the State to advance the commerce and promote the welfare of the people by making or causing them to be made at the public expense. *Sharpless v. Mayor etc. of Philadelphia*, 21 Pa. St. 147; 59 Am. Dec. 759.

In *Nevada*, railroads are denominated "public improvements," although built by private corporations. *Gibson v. Mason*, 5 Nev. 283.

A railroad is not a public highway so as to render an obstruction thereto a public nuisance. *Stoneback v. Thomas Iron Co.* (Pa. 1886), 4 Atl. Rep. 721.

In *New Jersey* it is said that railroads constructed under the general railroad law of that State become *ipso facto*, public, because the public have the right of passage thereon, by paying reasonable and uniform tolls; and this regardless of the motives of their projectors or the generality of their probable use. *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531.

But the people cannot maintain an equitable action to compel a railroad company to operate a part of its route which it has abandoned. The only remedy is by *mandamus*, *quo warranto* or indictment. *People v. Albany etc. R. Co.*, 24 N. Y. 261.

A railroad which legally forfeits its charter, remains what it was, a public highway. The corporation loses its franchise, which passes to the State. *Erie etc. R. Co. v. Casey*, 26 Pa. St. 287.

That a railroad is ordinarily such a public use as will justify the taking of private property in order for its construction is now beyond question.¹ That it is such a public use as that other governmental aid may be granted in its behalf has sometimes been questioned, but this also is now generally conceded.²

The status of any particular railroad as to whether it constitutes a public use is a question which, like all other political questions, addresses itself peculiarly to the consideration of the legislative department of the government and not to the judicial, and a decision once made will not be disturbed by the courts, except in extraordinary instances.³

The right to own and operate railways is not confined to

Constitutional and Statutory Provisions.—In some instances railroads have been declared by statute to be public highways. The early legislation concerning railroads contemplated railroad tracks upon which private persons might run their own carriages or cars upon the proper payment of toll, etc., the railroad company to furnish the locomotive power. See *Pierce on Railroads* 2; *Com. v. Fitchburg R. Co.*, 12 Gray (Mass.) 180. Thus in 1846 a statute was passed in *Pennsylvania*, granting a charter to the Pennsylvania Railroad Company, and declaring that that railroad should be a public highway, subject upon certain terms to the use of persons generally owning and using their own cars, the company furnishing the road and motive power for hauling the cars. See *Trunick v. Smith*, 63 Pa. St. 18. And by the constitutions of many of the States, railroads are declared to be public highways; in others, to be common carriers free to all persons for the transportation of themselves and their property. See *Stimson's Am. Stat. Law*, § 460, citing the constitutions of *Pennsylvania*, *Illinois*, *Nebraska*, *West Virginia*, *Missouri*, *Arkansas*, *Texas*, *California*, *Colorado*, (art. 15, § 4); *Alabama*, *Louisiana*. See also *Const. of Mississippi* (1890), § 180. And by the *Nebraska* constitution it is provided that the liability of railways as common carriers can never be limited. *Nebraska Const.* 1875, art. 11, § 4. See also *Beach on Railways*, §§ 22, 23.

But it has been held that such a constitutional provision does not prevent the raising of the question as to the character of a railroad in a proceeding by it to condemn land. *Denver R. etc. Co. v. Union Pac. R. Co.*, 34 Fed. Rep. 386; 33 Am. & Eng. R. Cas. 104, note.

A grant of land was made to a railroad company by Congress, and a provision was made in the grant that the said railroad should be a public highway for the use of the government, free of toll, for the transportation of property or troops of the government. It was held that this secured to the government the free use of the railway and track, but not the right to use the rolling stock, except upon payment of the usual charges. *Lake Superior etc. R. Co. v. U. S.*, 93 U. S. 442.

1. See *EMINENT DOMAIN*, vol. 6, p. 524-5; *Cooley's Const. Lim.* (4th ed.) 665, *et seq.*

The only question that arises in this connection is as to what extent the right of eminent domain is to be exercised in behalf of railroads. See this noticed in *EMINENT DOMAIN*, vol. 6, p. 525.

2. This subject has also been discussed elsewhere. See *MUNICIPAL SECURITIES*, vol. 15, p. 1242, *et seq.* Also *Sharpless v. Mayor etc. of Philadelphia*, 21 Pa. St. 169; 59 Am. Dec. 759; Opinion of the Judges, 58 Me. 590.

3. 1 *Rorer on Railroads*, 4; *Contra Costa R. Co. v. Moss*, 23 Cal. 323; *State v. Noyes*, 47 Me. 189; *Cooley's Const. Lim.* (4th ed.) 538; 4 *Minor's Insts.* (2nd ed.) [22] 27; *People v. Smith*, 21 N. Y. 597; *Beekman v. Saratoga etc. R. Co.*, 3 Paige (N. Y.) 45; 22 Am. Dec. 679, 686, note; *Varick v. Smith*, 5 Paige (N. Y.) 137; *Spring v. Russel*, 7 Me. 202; *Dillon's Mun. Corp.*, § 465; *Cooley's Const. Lim.* (4th ed.) 538; *EMINENT DOMAIN*, vol. 6, p. 516 and cases cited.

See also *MUNICIPAL SECURITIES*, vol. 16, p. 1242; *Hill v. Memphis*, 134 U. S. 198; *Young v. Clarendon*, 132 U. S. 340.

private corporations, but may be owned by private individuals or by public corporations as well. Practically, however, all railroads are the property of private corporations acting under charters from the State in which their road is located, instances of railroads belonging to private individuals being rare.¹

From the status of railroads as public highways it follows that railroad corporations, although in some respects private corporations, are not altogether so, nor are they created solely for the pecuniary advancement and profit of the stockholders. Being possessed of extraordinary and unusual corporate powers they also assume especial obligations involving great public interests.²

1. **Right of Private Individuals to Own and Operate a Railroad**—Thus a private individual may construct and operate a railroad on his own land or on the land of another where he has obtained a right of way by purchase or reservation; but he becomes liable for all nuisances arising from the operation of his road. *Bank of Middlebury v. Edgerton*, 30 Vt. 182; *Pierce on Railroads* (2nd ed.) 2; *Henderson v. Ogden City R. Co.* (Utah, 1891), 26 Pac. Rep. 286; 46 Am. & Eng. R. Cas. 95; *Dand v. Kingscote*, 6 M. & W. 174; *Farrin v. Vansittart*, 1 Eng. R. & C. 602; *Stewart's Appeal*, 56 Pa. St. 413; *Wilson v. Cunningham*, 3 Cal. 241; *Southern Pac. R. Co. v. Orton*, 32 Fed. Rep. 457; *Hall v. Brown*, 54 N. H. 495. But a private person cannot take by transfer from a railroad corporation the charter right to build a railroad and to invade the premises of others. *Stewart's Appeal*, 56 Pa. St. 413.

And as is well said in *State v. Boston etc. R. Co.*, 25 Vt. 433, "the right to build and run a railroad and to take tolls or fares is a franchise of the prerogative character, which no person can legally exercise without some special grant of the legislature."

2. See *Mayor etc. of Baltimore v. Baltimore etc. R. Co.*, 21 Md. 50; *Stewart v. Erie etc. Transp. Co.*, 17 Minn. 372; *Davidson v. Ramsey Co.*, 18 Minn. 482; *Gibson v. Mason*, 5 Nev. 283; *Thomas v. West Jersey R. Co.*, 101 U. S. 71.

Thus in the case of *State v. McIver*, 2 S. Car. 25, it is held that although railroad corporations are private corporations, yet they and their officers, when incorporated by law, are so far public that their duties and obligations in reference to the allowance of transfer on their books of their capital stock may be enforced against them,

and they may be compelled to allow such transfer to be made, when there is a right in the applicant to have such transfer made; and that a *mandamus* is the proper remedy in such case. *Georgia R. etc. Co. v. Smith*, 128 U. S. 174; 35 Am. & Eng. R. Cas. 511; *Sweatt v. Boston etc. R. Co.*, 3 Cliff. (U. S.) 339.

Railroad Companies as Private Corporations.—Railroad companies are private corporations in that they are built, owned, and operated by private individuals, who, by reason of their pecuniary interests therein and the privileges conferred upon them by charters, acquire vested rights not subject to control by the State. *Pierce v. Com.*, 104 Pa. St. 150; *Sweatt v. Boston etc. R. Co.*, 3 Cliff. (U. S.) 339; *Beach on Railways*, § 23; *Donnahey v. State*, 8 Smed. & M. (Miss.) 661; *Thorpe v. Rutland etc. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625; *Sloan v. Pacific R. Co.*, 61 Mo. 24.

Though, as regards its right of eminent domain, a railroad company is to be considered a *quasi* public corporation, yet in all its other powers, functions and capacities it is essentially a private corporation, not distinguishable from any other of that name or character. *Whiting v. Sheboygan etc. R. Co.*, 25 Wis. 167.

Nor does the corporation lose its private character by reason of the State being a shareholder. *Moore v. Schoppert*, 22 W. Va. 282; *Marshall v. Western etc. R. Co.*, 92 N. Car. 322; *Annapolis etc. R. Co. v. Anne Arundel Co.*, 103 U. S. 1; 2 Am. & Eng. R. Cas. 422; 1 Minor's Insts. (3rd ed.) 546; CORPORATIONS, vol. 4, p. 187, note and cases cited. Nor by being an agent of the government, *e. g.*, carrier of mails, etc. *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5.

Railroads are not ordinarily legal monopolies. In order to render them such, there must be an exclusive privilege conferred upon them for conducting that particular business between the particular points or places of terminus and intermediate places, such as will prevent all other persons, corporate or natural, from carrying on the same business there for compensation.¹

Railroad Companies as Quasi Public Corporations.—But these corporations created and endowed with special privileges by the State, not with the view of promoting the private advantages of the stockholders, but rather in the interest of the public, are to be regarded as *quasi* public corporations subject to special control by the government. Thus it is said in *Beach on Railways*, § 23: "In that they derive certain prerogative franchises from the sovereign power, such as the right of eminent domain, and the right to levy tolls for the carriage of passengers and freight, in return for which concessions the State retains over them a power of supervision not exercised over strictly private corporations—they are to be considered public corporations." See also *Newburyport Turnpike Co. v. Eastern R. Co.*, 23 Pick. (Mass.) 326; *Worcester v. Western R. Co.*, 4 Met. (Mass.) 554. And see *McCoy v. Cincinnati etc. R. Co.*, 13 Fed. Rep. 3; 6 Am. & Eng. R. Cas. 621.

A railroad corporation is not necessarily a public corporation such as may use a city's street, because it is connected with a grain elevator which is public in so far as that its charges may be regulated by law. *Mikesell v. Durkee*, 36 Kan. 97.

Railroad Companies as "Persons."—Railroad companies are "persons" within the meaning of the 14th Amendment forbidding a State to deny to any person the equal protection of its laws. *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394; 24 Am. & Eng. R. Cas. 523; *San Mater Co. v. Southern Pac. R. Co.*, 7 Sawy. (U. S.) 517.

1. Railroads Not Monopolies.—*Pierce on Railroads* 452—3; 1 *Rorer on Railroads* 9; *Charles River Bridge v. Warren Bridge*, 6 Pick. (Mass.) 376; 11 Pet. (U. S.) 419; *Metropolitan R. Co. v. Highland St. R. Co.*, 118 Mass. 290; *Baltimore etc. R. Co. v. State*, 45 Md. 596; *Erie R. Co. v. Delaware etc. R. Co.*, 21 N. J. Eq. 283.

But there are instances in which railroad companies have been granted

an exclusive right to operate a railroad between certain points, and such grants are within the power of the legislature. *In re Philadelphia etc. R. Co.*, 6 Whart. (Pa.) 46; 36 Am. Dec. 202; *Mohawk Bridge Co. v. Utica etc. R. Co.*, 6 Paige (N. Y.) 555, note; *Boston etc. R. Co. v. Salem etc. R. Co.*, 2 Gray (Mass.) 1; *Pennsylvania R. Co. v. National etc. R. Co.*, 23 N. J. Eq. 441; *Mich. Cent. R. Co. v. Michigan Southern R. Co.*, 4 Mich. 361; *Lake Shore etc. R. Co. v. Chicago etc. R. Co.*, 97 Ill. 506; 1 *Wood's Railway Law*, 26-27.

An exclusive grant of the right to operate a railroad between two places secures a corporation not only against a single railroad running directly between them, but also against a combination of railroads owned by one or more corporations, and pursuing the same or a circuitous line which will practically establish a rival route. *Pierce on Railroads* 454; *Pontchartrain R. Co. v. New Orleans etc. R. Co.*, 11 La. Ann. 253. Compare *Pennsylvania R. Co. v. National etc. R. Co.*, 23 N. J. Eq. 441; 24 N. J. Eq. 562. An exclusive grant never exists by implication; it must always be express. *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 419.

Where the purpose of the exclusive grant is to protect through traffic between certain places from competition, it will not exclude grants for enterprises which will compete only between intermediate points. *Pontchartrain R. Co. v. New Orleans etc. R. Co.*, 11 La. Ann. 253. See also *Delaware etc. Canal Co. v. Camden etc. R. Co.*, 16 N. J. Eq. 321; 18 N. J. Eq. 546.

The grant of an exclusive right to maintain a railroad for carrying freight and passengers by steam does not exclude a street railway from carrying only passengers by horse power. *Louisville etc. R. Co. v. Louisville City R. Co.*, 2 Duv. (Ky.) 175. Nor is the grant of an exclusive right to carry passengers violated by a subsequent grant of a right to carry freight.

IV. RAILROAD CORPORATIONS.—The status of such corporations, as private or public, has already been seen. The doctrines applicable to the creation and organization of corporations generally have also been discussed in a previous article.¹ There remains to be considered here, however, certain matters which apply peculiarly to railroad corporations.

1. Creation and Organization.—At an early period, railroad corporations were created by special acts of legislature, by which charters were granted, in which were enumerated the powers, duties, and liabilities of the corporation. But in order to secure uniformity in the powers conferred, to prevent the grant of special and exclusive privileges, and to secure to the State the right to alter, amend, or repeal the charter at pleasure, it has become an almost universal rule that such corporations are created by general laws, this rule being provided for by the constitutions of many of the States and by the statutes of others.²

Richmond etc. R. Co. v. Louisa R. Co., 13 How. (U. S.) 77.

See also as to the exact limits of the points between which the exclusive grant is given in certain cases, Macon v. Macon etc. R. Co., 7 Ga. 221; Mohawk Bridge Co. v. Utica etc. R. Co., 6 Paige (N. Y.) 554; Pontchartrain R. Co. v. Lafayette etc. R. Co., 10 La. Ann. 741.

A grant of the exclusive right to operate a railroad between Boston and Lowell was held not to be infringed by an act authorizing the construction of a railroad from Boston to a point not within five miles of Lowell. Boston etc. R. Co. v. Boston etc. R. Co., 5 Cush. (Mass.) 375.

But though railroads are not ordinarily monopolies, it must be remembered that all franchises are in their nature exclusive, except as against the government, and where a railroad has been chartered by the government, and a competing line is established without legislative authority, such competing road may be enjoined in equity. Raritan etc. R. Co. v. Delaware etc. Canal Co., 18 N. J. Eq. 546; 3 Blackstone's Com. 219; Newburgh etc. Turnpike Co. v. Miller, 5 Johns. Ch. (N. Y.) 101. See also INJUNCTION, vol. 10, p. 967, 969; Torrey v. Camden etc. R. Co., 18 N. J. Eq. 293; Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19.

Construction of Exclusive Grants.—It is a well known rule that grants of exclusive rights are always to receive a strict construction. Charles River Bridge v. Warren Bridge, 11 Pet. (U.

S.) 419; Pierce on Railroads 455; Lafayette Plank Road Co. v. New Albany etc. R. Co., 13 Ind. 90.

A charter gave a company "the exclusive right of transportation or conveyance of persons, merchandise and produce . . . provided that the charge shall not exceed" a certain rate. It was held that by this the State did not guarantee the exclusive right to charge the maximum rates named. Georgia R. & B. Co. v. Smith, 70 Ga. 694; 9 Am. & Eng. R. Cas. 385.

Jurisdiction.—No State court or circuit court of the United States, within one State, has jurisdiction of a bill in equity brought by a railroad corporation claiming the exclusive right under a charter from the legislature of another State, to construct a railroad over a certain line in such other State, to restrain another corporation from constructing a railroad interfering with the plaintiff's right. Northern Indiana R. Co. v. Michigan etc. R. Co., 15 How. (U. S.) 233.

1. *Supra*, this title, *Legal Status*, etc.; CORPORATIONS, vol. 4, p. 192, *et seq.*

2. The constitutions of *New York*, *New Jersey*, *Pennsylvania*, *Illinois*, *Wisconsin*, *Nebraska*, *Indiana*, *Missouri*, *Colorado*, *Mississippi* (1890, § 90), *Louisiana*, and *Arkansas* forbid the passage of any special act granting to any person or corporation the right to lay down railroad tracks. Stimson's Am. Stat. Law, § 395; 1 Morawitz on Priv. Corp. § 12; San Francisco v. Spring Valley Water Works, 48 Cal. 493. In *Virginia*, the matter is

The organization is usually brought about by persons known as "promoters," and the incorporation is effected afterwards by compliance with the general statutory requirements concerning railroad corporations in the State in which the corporation is to exist.¹ The usual manner of proceeding is this: A certain number of persons, usually not less than a stated number, sign articles of association, which name persons to act as provisional directors, and set forth particular descriptions of the enterprise, *i. e.*, the name of the corporation, the route along which the road is to be built, the termini, and the amount of capital stock, of which each person signing is to take a certain amount, paying a prescribed per cent. in cash to the directors or to the treasurer.² When the

regulated by statute. See 1 Minor's Insts. (3rd ed.) (509) 567; Davies v. Creighton, 33 Gratt. (Va.) 702.

Such provisions do not prohibit the legislature from passing a special act, changing the name of an existing corporation or giving it power to purchase additional property. Wallace v. Loomis, 97 U. S. 146. Nor is a special act enabling a railway company to take a new name and to extend its road an act renewing or extending its charter, or creating a new corporation. Attorney Gen'l v. Joy, 55 Mich. 94. See also for particular cases, Hodges v. Baltimore etc. R. Co., 58 Md. 603; 10 Am. & Eng. R. Cas. 270; Haunnett v. Little Rock etc. R. Co., 20 Ark. 207; Southern Pac. R. Co. v. Orton, 6 Sawy. (U. S.) 157. General laws as used in this connection mean laws passed governing the formation, etc., not of corporations generally, but of railroad corporations. See New York act 1850, Birdseye's Laws Stat. etc. of N. Y., p. 2401. See also *In re Brooklyn* etc. R. Co., 75 N. Y. 335; *In re New York El. R. Co.*, 70 N. Y. 327.

For the reasons which induced the present tendency to constitutional provisions against special legislation, see Morawitz on Priv. Corp. (2d. ed.), § 12, and the reasoning adopted in *Atkinson v. Marietta* etc. R. Co., 15 Ohio St. 29; *San Francisco v. Spring Valley Water Works*, 48 Cal. 511.

The charter of the M. & C. road did not authorize it to mortgage or sell its corporate franchises; therefore, a judicial sale upon mortgages executed by it would not invest the purchaser with any corporate capacity whatever. A "special act" of the legislature undertaking to give such an effect to the sale, and authorizing the purchaser to reorganize, create a new stock, and elect

another board of directors, is, in substance and legal effect, an attempt to create a corporation and confer corporate powers, and is therefore in conflict with the constitutional provision against the creation of a corporation by special act. *Atchinson v. Marietta* etc. R. Co., 15 Ohio St. 21.

1. **Promoters.**—Promoters are not peculiar to railroad corporations. As to their powers, liabilities, etc., see CORPORATIONS, vol. 4, p. 201; *Beach on Railways*, § 1, *et seq.*; *Little Rock* etc. R. Co. v. Perry, 37 Ark. 164; 9 Am. & Eng. R. Cas. 610, note; *Munson v. Syracuse* etc. R. Co., 103 N. Y. 58; 29 Am. & Eng. R. Cas. 77; *Braddock v. Philadelphia* etc. R. Co., 45 N. J. L. 363; 16 Am. & Eng. R. Cas. 436.

2. **Subscribers to Articles.**—In *New York*, the requirement is that not less than twenty-five shall sign the articles of association. *Birdseye's* Stat. of N. Y., p. 2401. In *Illinois*, five or more persons are required, and in *New Jersey* not less than seven. See *Allman v. Havanna* etc. R. Co., 88 Ill. 521; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 485.

Non-residents are not excluded by a general law authorizing any number of persons not less than seven to form a corporation to construct a railroad, unless it is expressly so provided. *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; 32 N. J. Eq. 755.

Articles of Association.—Several copies of these articles signed by different subscribers will be treated as one set. *Lake Ontario* etc. R. Co. v. Mason, 16 N. Y. 451.

In *California*, it is required that the articles shall set forth the amount subscribed and by whom. The liability of stockholders at the date of the

filing is limited to those named in the articles, and to the amounts specified therein. *Monterey v. Hildredth*, 53 Cal. 123.

Filing or Recording Articles.—Until the proper filing of the articles a railroad corporation is not properly formed, and before such filing a subscriber, having the articles in his possession, may alter and reduce his subscription to any extent he pleases. *Burt v. Earrar*, 24 Barb. (N. Y.) 518; 8 So. Law Rev., N. S. 530.

The filing of the articles of association in the office of the Secretary of State is notice to the State at the time of the manner of organization; and after eight or nine years have elapsed it is too late for the State to file an information against the company for defective organization. *State v. Bailey*, 19 Ind. 452.

Where the articles are filed and the Secretary of State has issued the certificate required, the corporation, upon user, becomes one *de facto*, and neither the eligibility of the directors nor the existence of the corporation can be collaterally attacked. *Cincinnati etc. R. Co. v. Danville etc. R. Co.*, 75 Ill. 113.

Naming Directors.—In *Eakright v. Logansport etc. R. Co.*, 13 Ind. 404, it was held that the omission of the names of the directors in the articles would not defeat the corporate existence.

But the contrary is held in *New York*, and a subscription to articles where the names of the directors were left blank, is inoperative; and it is not made binding by the insertion of such names without the subscriber's consent. *Dutchess etc. R. Co. v. Mabbett*, 58 N. Y. 397; *Troy etc. R. Co. v. Tibbitts*, 18 Barb. (N. Y.) 297.

Payment.—A *California* act (Stats. 1861, p. 607) providing for the incorporation of railroad companies, required at least \$1,000 per mile to be subscribed and ten per cent. thereof in cash actually and in good faith to be paid in before incorporation. It is held that a payment of said ten per cent. could not be made in a check on a bank drawn by a person who had not, on deposit, funds sufficient to meet it, even though it appeared that such check would have been paid if presented. *People v. Chambers*, 42 Cal. 201. In this case it was also held that the payment in cash of the ten per cent. of the amount subscribed was a condition precedent without which the sub-

scribers would have no power to incorporate. See also *People v. Stockton etc. R. Co.*, 45 Cal. 306. Compare *Mitchell v. Rome R. Co.*, 17 Ga. 574.

Under a very similar provision in *New York*, it is held that if \$1,000 of stock for every mile of the proposed road is subscribed and ten per cent. thereon is paid in good faith before the articles are filed, that is sufficient, and that it is not material that there are some subscriptions upon which the ten per cent. has not been paid. *Ogdensburg etc. R. Co. v. Frost*, 21 Barb. (N. Y.) 542.

See also generally *Boston etc. R. Co. v. Midland R. Co.*, 1 Gray (Mass.) 340; *Lyon v. Ewings*, 17 Wis. 61.

Subscription.—The subscription of a firm name is a proper compliance with a statute requiring the subscriber to sign "his name." *Ogdensburg etc. R. Co. v. Frost*, 21 Barb. (N. Y.) 541.

The *New York* act required that at least one thousand dollars for every mile of road to be built should be subscribed, and ten per cent. of this amount paid up. It was held that it was a sufficient compliance with this requirement if a sum in gross had been subscribed and ten per cent. paid, equal to one thousand dollars for every mile. *Lake Ontario etc. R. Co. v. Mason*, 16 N. Y. 451; *Buffalo etc. R. Co. v. Hatch*, 20 N. Y. 157. Conditional subscriptions may in some cases be valid. *New Albany etc. R. Co. v. McCormick*, 10 Ind. 499.

See generally *Stock; Stockholders*.

Description of the Enterprise.—Where an estimate of the length of the road is required, an approximate one is sufficient. *Buffalo etc. R. Co. v. Hatch*, 20 N. Y. 157.

Under *New York* Laws 1850, ch. 140, § 22, the map to be filed of the railroad route must show the land taken; a single line not indicating the width of the route, nor whether it represents the center or side, will not sustain a petition to condemn. *In re Boston etc. R. Co.*, 10 Abb. N. Cas. (N. Y.) 104.

Where the articles were defective in not definitely stating the termini of the road, or the counties through which it was to pass, such defects are immaterial after the road has been put in operation, and the company recognized by legislation. *Cayuga Lake R. Co. v. Kyle*, 5 Thomp. & C. (N. Y.) 659; 64 N. Y. 185; *Pierce on Railroads* 6.

In the case of *People v. Cheeseman*, 7 Colo. 376, the articles of incorpora-

requisite amount of stock has been taken, and the whole, or a prescribed part, paid in, the articles are to be filed in the office of some officer, usually the Secretary of State, and the subscribers and stockholders then become a corporation possessed of all the rights, powers, and liabilities which belong to corporations.¹ It seems that a substantial compliance with the statute is sufficient, and that corporate existence will not be defeated by slight omissions or incorrect descriptions;² though the articles will not bind the subscribers unless complete in substance.³ And all defects in the process of organization and formation may be cured by

tion declared an intention to create a company "for the purpose of locating, building, owning, and maintaining a union depot for railroads in the city of Denver. . . . and for the location, building and maintaining of as many different lines of railroad in said depot to the exterior boundaries of the city of Denver as may be necessary for the accommodation and use of the different railroad companies making said city a point of delivery for freight and passengers."

It was held that this language did not indicate an attempt to create an ordinary railroad company, and that therefore the corporation created could not act as such.

Description of the Route.—By the general railroad law of *Maryland*, it is required that the certificate of incorporation of a railroad company shall state the names of the termini of the road, and the county or counties, city or cities, through which it is to pass. It was held that it is a sufficient compliance with these requirements if the termini be fixed in the State of Maryland with reasonable certainty, and that the cities through which the road is to pass be specified; and the fact that the certificate describes the route of the road as running partly through the State of West Virginia, does not invalidate the incorporation under the general law of Maryland, its termini being in that State. *Piedmont etc. R. Co. v. Speelman*, 67 Md. 260; 30 Am. & Eng. R. Cas. 316. See also *infra* this title, *Location and its subdivisions*.

Where the articles are defective in not specifying with sufficient certainty the terminus of the road but are properly filed, such filing is constructive notice to the State of the defect and a failure by the State to take advantage thereof for eight years will

destroy its right to proceed by *quo warranto* thereafter. *State v. Bailey*, 19 Ind. 452.

1. CORPORATIONS, vol. 4, p. 192, *et seq.*; *Pierce on Railroads* 3, *et seq.*; *Laws of New York* (1850) ch. 140; *Clarkson v. Hudson River R. Co.*, 12 N. Y. 304.

2. *People v. Stockton etc. R. Co.*, 45 Cal. 306. In this case there was an omission of the words "in good faith" in a portion of the affidavit that payment of ten per cent. of the value of the stock subscribed had been paid in. See also *Mokelumne Hill Canal etc. Co. v. Woodbury*, 14 Cal. 424; *Pierce on Railroads* (2nd ed.) 4; 1 *Wood on Railways* 24; *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506.

Thus where the affidavit required by statute to be annexed to the articles did not contain the allegation required, viz., "that it is intended in good faith to construct or to maintain and operate the road mentioned in the articles of association," but all other provisions were properly complied with, it was held that the corporation was one *de facto* and that its stockholders could not object that it was not strictly one *de jure*. *Buffalo etc. R. Co. v. Eary*, 26 N. Y. 75.

And where the affidavit omitted to state in terms that the ten per cent. upon subscriptions had been paid "in good faith to the directors," but implied that the payment was so made, it was held that the omission was immaterial. *Buffalo etc. R. Co. v. Hatch*, 20 N. Y. 157.

3. *Dutchess etc. R. Co. v. Mabbett*, 58 N. Y. 397; *Monterey etc. R. Co. v. Hildreth*, 53 Cal. 123.

Must be a Substantial Compliance.—There must be at least a substantial compliance with the statutory requirements, else the subscribers acquire no right to constitute themselves a corporation. *People v. Chambers*, 42 Cal.

legislative recognition,¹ except that such recognition cannot create a corporation where one *de facto* did not exist.²

2. Of the Charter.—The articles of association or incorporation when properly filed and recorded, together with the general law providing for the formation of corporations, constitute the charter of a corporation, defining its rights, privileges and liabilities.³ If the corporation is created by a special act, as is sometimes the case, the special act constitutes in itself the charter of the corporation. When once there is an acceptance of the charter, it becomes a contract between the State and the corporation, the obligation of which cannot be impaired by legislation—except where the right is expressly reserved.⁴ But until

209; *Eaton v. Aspinwall*, 19 N. Y. 119; *People v. Chesebrough*, 7 Colo. 376; 16 Am. & Eng. R. Cas. 400; *infra*, this title, *Corporate Existence*.

1. Effect of Legislative Recognition.—*McAuley v. Columbus etc. R. Co.*, 83 Ill. 348; *McCartney v. Chicago etc. R. Co.*, 112 Ill. 611; 29 Am. & Eng. R. Cas. 326; *Black River etc. R. Co. v. Barnard*, 31 Barb. (N. Y.) 258; *Baltimore etc. R. Co. v. Marshall Co.*, 3 W. Va. 319; *Cowell v. Colorado Springs Co.*, 3 Colo. 82; 100 U. S. 55; *Mead v. New York etc. R. Co.*, 45 Conn. 199; *Illinois etc. R. Co. v. Cook*, 29 Ill. 237; *Atlantic etc. R. Co. v. St. Louis*, 3 Mo. App. 315; *aff'd* 66 Mo. 228; *Pierce on Railroads*, p. 7, note; 1 Wood's R. Y. Law 23.

The legislature has the same right to ratify and confirm an irregularly organized corporate body that it has to create a new one. *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621.

2. Attorney Gen'l v. Chicago etc. R. Co., 35 Wis. 602.

3. See 1 Rorer on Railroads 13; *Pierce on Railroads* 3; *Cincinnati etc. R. Co. v. Danville etc. R. Co.*, 75 Ill. 113.

The charter of a railroad company cannot be attacked collaterally for bad faith in obtaining it. *Garrett v. Dillsburg etc. R. Co.*, 78 Pa. St. 465.

4. Charter as a Contract.—*Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Bruffett v. Great Western R. Co.*, 25 Ill. 310; *Philadelphia etc. R. Co. v. Bowers*, 4 Houst. (Del.) 506. See this subject discussed in all its bearings in *CORPORATIONS*, vol. 4, p. 209; *FRANCHISES*, vol. 8, p. 520. The charter does not become such a contract until it is accepted. *State v. Baltimore etc. R. Co.*, 12 Gill. & J. (Md.) 399; *Pierce on Railroads* 450.

There is one point in this connection not usually brought out; it is that mentioned by Chief Justice Waite in the case of *Stone v. Mississippi*, 101 U. S. 814, viz: that it is not the charter of a private corporation that is protected, but only any contract the charter may contain. If there is no contract therein there is nothing in the grant on which the constitution can act. There is always an inquiry in this class of cases whether or not a contract has been actually entered into.

It is a principle bearing its correctness on its face that a general law reserving the power to amend or repeal all charters granted does not apply to charters granted prior to its passage. It was not a part of the contract of those charters and cannot be invoked to justify an impairment of the charter contract. See this point held in *State v. Augusta etc. R. Co.*, 54 Ga. 401.

A clause in a railroad charter authorizing the corporation to construct their road "in such direction as they shall deem best to connect with the termination of the city railroad" is a revocable license, and not a contract which is infringed by the taking up of a portion of the track of the city railroad, so as to prevent the connection. *Southwark R. Co. v. Philadelphia*, 47 Pa. St. 314.

The charter is not only a contract between the State and the corporation but it constitutes a contract between the corporation and a subscriber to the capital stock. *Mississippi etc. R. Co. v. Cross*, 20 Ark. 443. So that any violation of this charter is an infringement of this contract and will release the subscriber. See also *STOCKHOLDERS*.

But a provision in the charter for a forfeiture in case a certain section

there is an acceptance by the contemplated corporators, either express or implied, no rights or liabilities accrue to the corporators as a corporation.¹ The acceptance may be either express or implied. It may be and is implied in all cases for the formation of corporations under general laws, from the application of the corporators for a charter.² It may also be implied when acts are done in pursuance of a charter, which would otherwise be unlawful,³ or from an assumption of authority thereby granted,⁴ and where grants beneficial to a corporation are made it will be presumed that they have been accepted by it when nothing appears to the contrary, just as in the case of similar grants to a natural person.⁵

The right to alter, amend, or repeal the charter under certain conditions is usually reserved by the State; in such cases the reserved power is part of the contract, and the assent of the corporation is not necessary to render the alterations or amendments binding.⁶

of the road should not be completed within a specified time is not of the essence of this contract between the corporation and its subscribers. *San Antonio v. Jones*, 28 Tex. 19.

The charter also constitutes a contract between the several members of the corporation. *New Orleans etc. R. Co. v. Harris*, 27 Miss. 517; *Zabriskie v. Hackensack etc. R. Co.*, 18 N. J. Eq. 178; 90 Am. Dec. 617.

Charter Granted on Condition.—

Where a charter of a railroad company is granted on condition that it shall secure the consent of the city before it can exercise its franchise, the road cannot be built without such consent. Where the consent was never obtained a charter to a new company giving authority to construct such railway is not a law impairing the obligation of a contract. *People's R. Co. v. Memphis R. Co.*, 10 Wall. (U. S.) 38. See also *Walker v. Devaux*, 4 Paige (N. Y.) 251.

Failure to perform conditions subsequent annexed to grants of land to a railroad company have been condoned in particular cases—such, for example, where the existence of civil war or other similar circumstance prevents performance. See *Davis v. Gray*, 16 Wall. (U. S.) 203; *Columbus v. Columbus etc. R. Co.*, 37 Ind. 294.

1. *Pierce on Railroads* 5; *CORPORATIONS*, vol. 4, p. 193; 1 *Rorer on Railroads* 19; 2 *Kent's Com.* (2d ed.) 277; *State v. Dawson*, 22 Ind. 272; *State v. Baltimore etc. R. Co.*, 12 Gill & J. (Md.)

399; *Mississippi Society etc. v. Musgrove*, 44 Miss. 820.

The acceptance must be unconditional and complete. *Angell & A. on Corp.*, § 88. See also as to acceptance in case of condition precedent, *Lyons v. Orange etc. R. Co.*, 32 Md. 18. Before the acceptance of a grant is made it may be withdrawn at any time, although no power of repeal is reserved in the grant. 1 *Wood's Railway Law*, and cases cited.

2. 1 *Rorer on Railroads*, p. 19; *Pierce on Railroads*, p. 5; *Beach on Railways*, § 28; *Hawes v. Anglo Saxon Petroleum Co.*, 101 Mass. 385; *State v. Dawson*, 16 Ind. 40.

Express Acceptance.—See *CORPORATIONS*, vol. 4, p. 193; *Hudson v. Carman*, 41 Me. 84.

3. *Atlantic etc. R. Co. v. St. Louis*, 3 Mo. App. 315; 66 Mo. 228; *Kenton Co. Ct. v. Bank Lick Turnp. Co.*, 10 Bush (Ky.) 529; *Cincinnati etc. R. Co. v. Cole*, 29 Ohio St. 126.

4. 1 *Rorer on Railroads*, p. 19, and cases cited; *Bangor etc. R. Co. v. Smith*, 47 Me. 34; *Goodin v. Evans*, 18 Ohio St. 150; 1 *Wood on Railways*, p. 21; *Illinois River R. Co. v. Zimmer*, 20 Ill. 655; *Lyons v. Orange etc. R. Co.*, 32 Md. 18; *Gifford v. New Jersey R. Co.*, 10 N. J. Eq. 171.

5. *Bangor etc. R. Co. v. Smith*, 47 Me. 34; *Pierce on Railroads*, p. 5. 1 *Rorer on Railroads*, p. 19; *Coffin v. Collins*, 17 Me. 442.

6. **Amendments to the Charter—Reserved Power.**—*Pierce on Railroads*

The charter defines the powers of the corporation and is the measure of such powers. Where a conflict exists between charter provisions and those of a general law, the former prevails as to the government of the corporation unless such general law was intended as an amendment or modification of the charter.¹

3. Domicile, Citizenship and Residence.—The general doctrines concerning the domicile, citizenship and residence of corporations apply as well to railroad corporations as to others, and these have

456-7; *Stone v. Wisconsin*, 94 U. S. 181; *FRANCHISES*, vol. 8, p. 627, *et seq.*

And even where this power is not reserved an amendment may become valid by the assent, expressed or implied, of the corporation. *Mobile etc. R. Co. v. Steiner*, 61 Ala. 559; *Snead v. Indianapolis etc. R. Co.*, 11 Ind. 104; *Pierce on Railroads* 449; *Bangor etc. R. Co. v. Smith*, 47 Me. 34.

In all cases of railroad corporations formed under general laws, the power of amendment or appeal expressed there as reserved to the State will become a part of the corporation's charter. *Stone v. Wisconsin*, 94 U. S. 181.

Although the charter of an incorporated company may be altered by the procurement of the company, in furtherance of the designs and objects of the company, yet due regard must be had, in all such cases, to the inviolability of private contracts. The assent of subscribers must be obtained to any amendment of the charter which materially or essentially alters the original contract of the parties. *Winter v. Muscogee R. Co.*, 11 Ga. 438.

The alteration of a railroad charter, subject to amendment, alteration or repeal, by extending the time for the completion of the road, is no alteration of the contract with a subscriber to its stock. *Agricultural Branch R. Co. v. Winchester*, 13 Allen (Mass.) 29.

A reservation in the charter of a company of the right to authorize other railway companies to enter upon and use its tracks extends to a branch road purchased from another company whose charter contained no such reservation; and this although since the purchase the legislature had enacted that the purchasing company "shall have all the powers and privileges and be subject to all the duties, restrictions and liabilities" set forth in the latter charter. *Lexington etc. R. Co. v. Fitchburg R. Co.*, 14 Gray (Mass.) 266.

Repeal.—The repeal of a general law authorizing the formation of railroad

corporations does not affect corporations already existing which were created under it. *Donworth v. Coolbaugh*, 5 Iowa 300; *Bewick v. Alpena Harbor Co.*, 39 Mich. 700; *Freehold Mut. L. Assoc. v. Brown*, 29 N. J. Eq. 121.

A special charter may be repealed by a general law. *State v. Comr's etc.*, 37 N. J. L. 228; *aff'd* 38 N. J. L. 472.

Under its power to repeal the legislature may provide a judicial proceeding for dissolving a corporation and winding up its affairs on account of its abandonment of its business. And it is no defense to such a proceeding that the abandonment was not voluntary or that the corporation has charters from other States. Such a proceeding affects only franchises granted by the State authorizing it. *Pierce on Railroads*, p. 10; *Hart v. Boston etc. R. Co.*, 40 Conn. 524; *Com. v. Pittsburg etc. R. Co.*, 58 Pa. St. 26.

1. See *CORPORATIONS*, vol. 4, p. 207.

Where the charter of a railroad corporation contains a provision as to the manner of condemning land for its right of way, the method pointed out by such provision, and not that prescribed by the general law, must be followed. *Norfolk Southern R. Co. v. Ely*, 95 N. Car. 77.

Construction of Charters.—Other leading cases than those cited in which the charters of particular railroad corporations have been construed, are *Richmond etc. R. Co. v. Louisa R. Co.*, 13 How. (U. S.) 71; *Pennock v. Coe*, 23 How. (U. S.) 117; *Nicholson v. New York etc. R. Co.*, 22 Conn. 74; *Danbury etc. R. Co. v. Wilson*, 22 Conn. 435; *Norwich etc. R. Co. v. Killingly*, 25 Conn. 402; *Johnson v. Pensacola etc. R. Co.*, 9 Fla. 299; *Florida etc. R. Co. v. Pensacola etc. R. Co.*, 10 Fla. 145; *People v. Logan Co.*, 45 Ill. 162; *Prather v. Jeffersonville etc. R. Co.*, 52 Ind. 16; *Edward v. Lawrenceburgh etc. R. Co.*, 7 Ind. 711; *Newcastle etc. R. Co. v. Peru etc. R. Co.*, 3 Ind. 464;

been presented elsewhere.¹ The domicile of a railway corporation is always within the State creating it; its particular location depends upon the language of the statute.² For purposes of jurisdiction a corporation is always a citizen of the State creating it.³

State *v.* Noyes, 47 Me. 189; Lowell etc. R. Co. *v.* Boston etc. R. Co., 7 Gray (Mass.) 27; Boston R. Co. *v.* Boston etc. R. Co., 5 Cush. (Mass.) 375; Boston etc. R. Co. *v.* Salem etc. R. Co., 2 Gray (Mass.) 1; Michigan Cent. R. Co. *v.* Michigan Southern R. Co., 4 Mich. 361; State *v.* Southern Minn. R. Co., 18 Minn. 40; Ross *v.* Elizabethtown etc. R. Co., 20 N. J. L. 230; Pennsylvania R. Co. *v.* National R. Co., 23 N. J. Eq. 441; State *v.* Wilton R. Co., 19 N. H. 521; Tillitson *v.* Hudson River R. Co., 9 N. Y. 575; 15 Barb. (N. Y.) 406; Johnson *v.* Hudson River R. Co., 49 N. Y. 455; Coy *v.* Utica etc. R. Co., 23 Barb. (N. Y.) 643; Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9; Miller *v.* Canal Com'rs, 21 Pa. St. 23; Mayor etc. of Pittsburg *v.* Pennsylvania R. Co., 48 Pa. St. 355; Pennsylvania R. Co. *v.* First German Lutheran Congregation, 53 Pa. St. 445; Hughes *v.* Providence etc. R. Co., 2 R. I. 493; Vermont etc. R. Co. *v.* Clays, 21 Vt. 30; White River Turnpike Co. *v.* Vermont etc. R. Co., 21 Vt. 590; Haswell *v.* Vermont Cent. R. Co., 23 Vt. 228; Quimby *v.* Vermont Cent. R. Co., 23 Vt. 387.

1. CORPORATIONS, vol. 4, p. 206; FOREIGN CORPORATIONS, vol. 8, p. 330; DOMICILE, vol. 5, p. 857; CONFLICT OF LAWS, vol. 3, pp. 573, 642. See also Pierce on Railroads, 14 *et seq.*; Rorer on Railroads, p. 64, *et seq.*; Louisville etc. R. Co. *v.* Letson, 2 How. (U. S.) 497.

The question of citizenship arises in determining the jurisdiction of suits by and against corporations. The places of a corporation's domicile and of its citizenship are practically the same, being always in the State creating the corporation. See CORPORATIONS, vol. 3, p. 206; Pierce on Railroads p. 16, *et seq.*

Meaning of "Citizenship" as Here Used.—It is well understood that a corporation is not a "citizen" within the meaning of the provisions of the Federal Constitution respecting the privileges and immunities of the citizens of the several States. Chicago etc. R. Co. *v.* Whitton, 13 Wall. (U. S.) 270; Paul

v. Virginia, 8 Wall. (U. S.) 177; Liverpool etc. Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; FOREIGN CORPORATIONS, vol. 8, p. 265-6. But for the purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the State creating the corporation. FOREIGN CORPORATIONS, vol. 8, p. 367.

So that wherever in this section the word "citizen" or "citizenship" occurs as referring to corporations, it is used with these qualifications.

2. **Domicile.**—Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519; CORPORATIONS, vol. 4, p. 206; Pierce on Railroads, p. 14; 1 Wood's Ry. Law, p. 28 *et seq.*; Paul *v.* Virginia, 8 Wall. (U. S.) 168; 1 Rorer on Railroads pp. 64-65.

A railroad corporation cannot migrate and change its domicile to another State than that of its creation without special legislative authority. Aspinwall *v.* Ohio etc. R. Co., 20 Ind. 492; Baltimore etc. R. Co. *v.* Glenn, 28 Md. 287.

The "home" of a corporation must be taken to be that place which is occupied as such—where its profits come home to it, whence orders emanate, and where the chief officers of the company are to be found. Adams *v.* Great Western R. Co., 6 H. & N. 404.

Residence and domicile are by no means synonymous, since, as will be seen, a corporation may have a residence in several States and in several places in the same State, while it can have only one domicile.

3. **A "Citizen" of the Creating State.**—For all purposes of Federal jurisdiction a railroad corporation is a citizen of the State creating it. It may or may not have its chief office and carry on its business in such State. The one criterion is, what State created it. See Connor *v.* Vicksburg etc. R. Co., 36 Fed. Rep. 273; 35 Am. & Eng. R. Cas. 696; Pacific R. Co. *v.* Missouri Pac. R. Co., 23 Fed. Rep. 565; 20 Am. & Eng. R. Cas. 590; Chicago etc. R. Co. *v.* Whitton, 13 Wall. (U. S.) 270; Louisville etc. R. Co. *v.* Letson, 2 How. (U. S.) 497; Marshall

In case of railroad corporations it frequently occurs that the corporation is incorporated in one State and has a mere license to build and operate its road through the territory of another. In such case the corporation is a citizen only of the State which created it, and is foreign so far as regards that State from which it has only a mere license.¹ And where a corporation is chartered in one State, and a statute is passed in a sister State authorizing such corporation to extend its road there, and to exercise within

v. Baltimore etc. R. Co., 16 How. (U. S.) 314.

The citizenship of the members composing the corporation does not in the least affect the citizenship of the corporation. It is an absolute and conclusive presumption that they are all citizens of the creating State. *Hatch v. Chicago etc. R. Co.*, 6 Blatchf. (U. S.) 105; *Minnett v. Milwaukee etc. R. Co.*, 3 Dill. (U. S.) 460; *Baltimore etc. R. Co. v. Cary*, 28 Ohio St. 208; *Ohio etc. R. Co. v. Wheeler*, 1 Black (U. S.) 286; *Baltimore etc. R. Co. v. Harris*, 12 Wall. (U. S.) 65.

1. Thus, in the case of *Goodlett v. Louisville, etc. R. Co.*, 122 U. S. 391; 33 Am. & Eng. R. Cas. 1, the Louisville and Nashville Railroad Company was a corporation created by Kentucky and having from Tennessee a license to construct a railroad within its limits and between certain points and to exert there some of its corporate powers. It was held that the corporation was not a citizen of Tennessee and that, therefore, an action against it by a citizen of Tennessee was removable into the Federal courts. See also *Pennsylvania etc. R. Co. v. St. Louis etc. R. Co.*, 118 U. S. 290; 24 Am. & Eng. R. Cas. 58; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5; 4 Am. & Eng. R. Cas. 105; *Callahan v. Louisville, etc. R. Co.*, 11 Fed. Rep. 536; *Myers v. Murray*, 43 Fed. Rep. 695; *Williams v. Missouri etc. R. Co.*, 3 Dill. (U. S.) 267; *Baltimore etc. R. Co. v. Cary*, 28 Ohio St. 208; *Allegheny Co. v. Cleveland etc. R. Co.*, 51 Pa. St. 228.

A different doctrine is laid down in *Pierce on Railroads*, p. 15, but it will be observed that the authorities for his rule are two Virginia cases (*Baltimore etc. R. Co. v. Wightman*, 29 Gratt. (Va.) 431; 26 Am. Rep. 384; *Baltimore etc. R. Co. v. Noell*, 32 Gratt. (Va.) 394, both of which were reversed in the Federal Supreme Court in *Baltimore etc. R. Co. v. Koontz*, 104 U. S. 5.

Effect of Leasing as to Citizenship.—

The fact that a railroad corporation leases a railroad chartered by a certain State does not make such corporation a citizen of that State. *Callahan v. Louisville etc. R. Co.*, 11 Fed. Rep. 536; 6 Am. & Eng. R. Cas. 594; *Baltimore etc. R. Co. v. Koontz*, 104 U. S. 5; 4 Am. & Eng. R. Cas. 105. See also *Brownell v. Troy etc. R. Co.*, 3 Fed. Rep. 761.

But a foreign company purchasing the franchises and property of a domestic company assuming its liabilities and becoming merged and consolidated with it becomes a citizen of the State. *Angier v. East Tennessee etc. R. Co.*, 74 Ga. 634; 20 Am. & Eng. R. Cas. 618.

A corporation leasing and operating a railroad in a State other than that of its creation does not become a citizen of such State, but has a mere express or implied license, in the absence of actual incorporation. *Williams v. Missouri etc. R. Co.*, 3 Dill. (U. S.) 267; *Baltimore etc. R. Co. v. Cary*, 28 Ohio St. 208.

And a railroad company which has leased its property under a perpetual lease to a corporation of a foreign State, does not thereby become a citizen of such foreign State. *Crane v. Chicago etc. R. Co.*, 20 Fed. Rep. 402; 17 Am. & Eng. R. Cas. 174.

Foreign Corporation Filing Copy of Its Charter, etc.—Under an *Iowa* statute which gives foreign railroad companies, which have filed copies of their charters with the Secretary of State, the same rights and privileges as domestic railroad corporations, a foreign railroad company cannot claim the rights of a domestic corporation without first showing that it has filed a copy of its charter. *State v. Chicago etc. R. Co.*, 80 Iowa 586.

Interstate Consolidation.—As to the citizenship of a corporation formed by the consolidation of several corporations each of a different State, see *CORPORATIONS*, vol. 4, p. 272; *Peik v. Chicago etc. R. Co.*, 94 U. S. 164.

its borders the same rights and privileges which belong to it in the State of its creation, such statute does not make the corporation a citizen of the latter State, but confers upon it a mere license.¹ A State, however, may confer citizenship upon a corporation of another State; the question as to whether it does so or not is one of legislative intent, and where it is plain that the legislature intended to incorporate the company and make it a citizen, its citizenship will not be denied.² A corporation by accepting the benefits accruing under the license assumes all the obligations necessarily accompanying it, and becomes liable to answer the claims of citizens of the licensing State as if a domestic corporation. It does not, however, surrender its right to have causes in

1. The case of *Baltimore etc. R. Co. v. Harris*, 12 Wall. (U. S.) 65, affords an illustration of this. The State of Maryland incorporated the Baltimore & Ohio Railroad Company, and subsequently the State of Virginia by a statute, which set out at large the Maryland act, declared that the "same rights and privileges shall be and are hereby granted to the aforesaid company in the territory of Virginia as are granted to it within the territory of Maryland," the company to be subject to the same penalties and obligations as were imposed by the Maryland act, and the same rights, privileges and immunities being secured to Virginia and her citizens, except as to lateral roads. Concerning the question whether the legislature of Virginia and of Congress created a new corporation the court said: "In both, the original Maryland act of incorporation is referred to, but neither, expressly or by implication, created a new corporation. The company was chartered to construct a road in Virginia as well as in Maryland. The latter could not be done without the consent of Virginia. That consent was given upon the terms which she thought necessary to prescribe. . . . The permission was broad and comprehensive in its scope, but it was a license and nothing more." See also *Missouri etc. R. Co. v. Texas etc. R. Co.*, 10 Fed. Rep. 497; 6 Am. & Eng. R. Cas. 597; *Baltimore etc. R. Co. v. Cary*, 28 Ohio St. 208; *Erie R. Co. v. Stringer*, 32 Ohio St. 468; *State v. Delaware etc. R. Co.*, 30 N. J. L. 473; 31 N. J. L. 531; *Pierce on Railroads* p. 20; *Williams v. Missouri etc. R. Co.*, 3 Dill. (U. S.) 267.

The question is, however, always one of legislative intent, and where the plain purpose of the legislature is to

adopt a foreign corporation, it becomes for all purposes of jurisdiction a citizen of the State adopting it. *Uphoff v. Chicago etc. R. Co.*, 5 Fed. Rep. 545; *Pierce on Railroads*, 19 *et seq.*; 1 Wood's Ry. Law 31; *Baltimore etc. R. Co. v. Harris*, 12 Wall. (U. S.) 65.

Consult here *Mead v. New York etc. R. Co.*, 45 Conn. 198. *Compare Allegheny Co. v. Cleveland etc. R. Co.*, 51 Pa. St. 288; *Baltimore etc. R. Co. v. Wightman*, 29 Gratt. (Va.) 431, neither of which cases, however, are any longer of weight.

2. *Memphis etc. R. Co. v. Alabama*, 107 U. S. 581; 13 Am. & Eng. R. Cas. 172; *Goodlett v. Louisville etc. R. Co.*, 122 U. S. 391; 33 Am. & Eng. R. Cas. 1.

It is undoubted that a State by appropriate legislation may make a corporation created by another State its citizen. And when the effect of the legislation is to adopt a foreign corporation, such corporation becomes a citizen, as well as the State adopting it, as of that to which it owes its original charter. *Pittsburgh etc. R. Co. v. Baltimore etc. R. Co.*, 17 W. Va. 812; 10 Am. & Eng. R. Cas. 444; *Henen v. Baltimore etc. R. Co.*, 17 W. Va. 881; 9 Am. & Eng. R. Cas. 496; *Arapahoe Co. v. Kansas Pac. R. Co.*, 4 Dill. (U. S.) 277; *Uphoff v. Chicago etc. R. Co.*, 5 Fed. Rep. 545; *Ohio etc. R. Co. v. Wheeler*, 1 Black (U. S.) 286.

It is often difficult to distinguish whether the effect of State legislation is to make a corporation a citizen or merely to extend to it a license. Where the act of a State provides for the organization and incorporation of a company, it thereby becomes a corporation of that State and is a citizen thereof, although some persons with the same powers and objects have been incorpo-

which it is a party transferred to the Federal courts, whenever it is sued by a citizen of a State other than that of which it is itself a citizen.¹

rated by the same name in another State. But when the act does not create the corporation anew, but recognizes it as already existing by the laws of another State, and extends to it like powers as are given to it by the laws of the State incorporating it, it is to be regarded as a mere license enlarging the field of operation of the company; and such company on extending its operations under such an act does not become a citizen of that State, but goes there as the corporation of another State, liable to be sued in the State embracing the new field of its operations, but deprived of none of its qualities or rights as a corporation of another State. *Missouri etc. R. Co. v. Texas etc. R. Co.*, 10 Fed. Rep. 497. See also *Pittsburgh etc. R. Co. v. Baltimore etc. R. Co.*, 17 W. Va. 812; 10 Am. & Eng. R. Cas. 444; *Henen v. Baltimore etc. R. Co.*, 17 W. Va. 881; 9 Am. & Eng. R. Cas. 496; *Baltimore etc. R. Co. v. Harris*, 12 Wall. (U. S.) 65.

1. Right to Remove Causes Into Federal Courts.—*Baltimore etc. R. Co. v. Harris*, 12 Wall. (U. S.) 65 and cases; *Austin v. New York etc. R. Co.*, 25 N. J. L. 381; *Ohio etc. R. Co. v. Wheeler*, 1 Black (U. S.) 297; *Louisville etc. R. Co. v. Letson*, 2 How. (U. S.) 497; *Marshall v. Baltimore etc. R. Co.*, 16 How. (U. S.) 329; *Missouri etc. R. Co. v. Texas etc. R. Co.*, 10 Fed. Rep. 497; *Texas etc. R. Co. v. McAllister*, 59 Tex. 349; 12 Am. & Eng. R. Cas. 289; *Union Pac. R. Co. v. Meyers*, 115 U. S. 1; 20 Am. & Eng. R. Cas. 324. Compare *Baltimore etc. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655; 65 Am. Dec. 308; *Pittsburgh etc. R. Co. v. Baltimore etc. R. Co.*, 17 W. Va. 812. See also REMOVAL OF CAUSES, where the subject is fully treated.

The mere fact that a railway corporation created by one State has an office and transacts a great portion of its business within another State, does not domesticate it in that State and deprive it of its right to remove its causes into the Federal courts. And a plaintiff cannot by joining as nominal defendants citizens of the same State as himself, deprive the corporation of its privilege to have the cause removed to the Federal court. *Hatch v. Chicago etc. R. Co.*, 6 Blatchf. (U. S.) 107; *Baltimore etc. R.*

Co. v. Cary, 28 Ohio St. 208; *Erie R. Co. v. Stringer*, 32 Ohio St. 468.

Since it is within the discretion of every State to allow or prohibit foreign corporations to carry on their business within its jurisdiction, it may prescribe such conditions as it shall see fit. One of which may be that the corporation shall consent to be sued there. And this consent is presumed from the fact of its doing business there. 1 Minor's Inst. (3rd. ed.) 579; *Baltimore etc. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655; *Milnor v. New York etc. R. Co.* 53 N. Y. 365.

Thus it is said in the leading case of *Pittsburgh etc. R. Co. v. Baltimore etc. R. Co.*, 17 W. Va. 812; 10 Am. & Eng. R. Cas. 446, in speaking of the right of a citizen of West Virginia to sue the *Baltimore & Ohio Railroad* in that State: "Now is it possible that after this company has been for over half a century nurtured by the two Virginias, been permitted in their courts to condemn the lands of their citizens for its purposes, permitted to have nearly four hundred miles of their territory to lay its track, build station houses, hotels, and whatever else was requisite for its convenience, and barter and traffic with their citizens, it can be tolerated in the assertion that it is a stranger to the State granting all these rights, that as to all business transacted and all its liabilities incurred, it is not compelled to submit to the jurisdiction of the courts of the State granting all the favors it has received, but that it can drag the citizens of the State hundreds of miles from their homes to litigate their rights in the courts of another government."

In the case of *Milnor v. New York etc. R. Co.*, 53 N. Y. 363, the court by Church, C. J., said: "When the defendant sought and obtained permission of the legislature to continue its line into and transact business in this State, it must be deemed, as to its contracts made here, to possess the powers and be subject to all the liabilities of similar corporations created by this State as adjudicated by our courts. It should not be permitted to make a contract valid here and enforceable according to our decisions, and then when its interests dictate, set up the decisions of

Where the corporation is chartered under the laws of several States, it becomes a citizen of each, and its domicile is in each of the States creating it.¹ In such case, although the corporation is the same in each State and in reality only one corporate body, yet for the purposes of jurisdiction the fiction is maintained that in each of the States there is a separate and distinct corporation.²

another State holding a want of power as an excuse for its violation."

So also it is said in *Baltimore etc. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655: "It would be a startling proposition if in all such cases citizens of Virginia and others should be denied all remedy in her courts for causes of action arising under contracts and acts entered into or done within her territory, and should be turned over to the courts and laws of a sister State to seek redress."

This language is quoted with approval, in *Baltimore etc. R. Co. v. Harris*, 12 Wall. (U. S.) 65. But it must be understood that no State can impose upon a foreign corporation a condition that it shall not remove causes against it into the Federal courts. Statutes of one State enacting that a corporation organized in another State shall not transact business within its limits, unless it stipulates in advance that it will not remove into the Federal courts any suit which may be commenced against it by a citizen of the former State, have several times been decided to be an obstruction to the rights of citizens of one State to remove their causes under certain conditions into the Federal courts, and repugnant to the constitution and laws of the United States. And an agreement by a corporation in conformity to such a statute is void and of no effect. *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Erie R. Co. v. Stringer*, 32 Ohio St. 468; *Baltimore etc. R. Co. v. Cary*, 28 Ohio St. 208. Compare *Baltimore etc. R. Co. v. Wightman*, 29 Gratt. (Va.) 436; *Baltimore etc. R. Co. v. Noell*, 32 Gratt. (Va.) 397; *Railway Pass. Assur. Co. v. Pierce*, 27 Ohio St. 155.

And notwithstanding the decisions of the courts of Virginia it has been distinctly held that the Baltimore and Ohio R. Co. has the right to remove causes against it by citizens of Virginia, to the Federal courts. *Baltimore etc. R. Co. v. Koontz*, 104 U. S. 5.

1. *Chicago etc. R. Co. v. Chicago*

etc. R. Co., 6 Biss. (U. S.) 219; *Quincy R. etc. Co. v. Adams Co.*, 88 Ill. 615.

A railroad company chartered by and carrying on its business in two or more States, though the capital be a unit, and there is only one set of stockholders, and one board of directors, is for all purposes of local government, a domestic corporation in each State subject to its laws as to all matters not within the exclusive control of Congress. *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; *Graham v. Boston etc. R. Co.*, 118 U. S. 161; *Clark v. Barnard*, 108 U. S. 436.

Consolidation.—A railroad company created by the laws of any State remains a citizen of that State, although it may have been consolidated with a corporation of another State by consent of both States. *Muller v. Dows*, 49 U. S. 444.

2. *Indianapolis etc. R. Co. v. Vance*, 96 U. S. 457; *Horne v. Boston etc. R. Co.*, 18 Fed. Rep. 50; 12 Am. & Eng. R. Cas. 287; *Ohio etc. R. Co. v. Wheeler*, 1 Black (U. S.) 286; *Chicago etc. R. Co. v. Whitton*, 13 Wall. (U. S.) 270; *Chicago etc. R. Co. v. Lake Shore etc. R. Co.*, 5 Fed. Rep. 19; *Uphoff v. Chicago etc. R. Co.*, 5 Fed. Rep. 545; *Aspinwall v. Ohio etc. R. Co.*, 20 Ind. 492; *Pacific R. Co. v. Missouri Pac. R. Co.*, 23 Fed. Rep. 565; 20 Am. & Eng. R. Cas. 590.

See also 1 Rorer on Railroads 68; 1 Wood's Ry. Law 30, 31. Compare *Pierce on Railroads* 19.

A corporation is a citizen of the State creating or incorporating it, and it cannot deny such citizenship by alleging that it is also a citizen of another State. *Memphis etc. R. Co. v. Alabama*, 107 U. S. 581; *Ohio etc. R. Co. v. Wheeler*, 1 Black (U. S.) 286.

So that a corporation chartered by two States cannot be sued in the Federal courts for a tort committed in either against a citizen of either State, even though the plaintiff is a citizen of one State and the tort is committed in another. *Burger v. Grand Rapids etc. R. Co.*, 22 Fed. Rep. 561; 20 Am. & Eng. R. Cas. 607.

The same is true as regards the power of taxation of the several States.¹ In all other respects, however, the fiction is not observed, and a corporation is recognized as a single body politic, though a citizen of more than one State.²

The residence of a corporation is properly at the place at which its principal office is located,³ but it is an almost universal rule that within the State where it is chartered a railroad corporation is a resident in any county, city, or town through which its road passes, or in which it has an office or place of business, at least so far as regards the locality of suits against it, and the service of process in such suits.⁴

1. In such case the tax is apportioned by taking the whole income or value of the franchise, and the length of the road in the State. *Pierce on Railroads* (2nd ed.) p. 21; *Delaware Railroad Tax Cases*, 18 Wall. (U. S.) 206; *State Railroad Tax Cases*, 92 U. S. 581; TAXATION.

Venue of Suits Against Corporations Created by the United States.—The Union Pacific Railway Company and the Texas Pacific Railway Company, and other railway corporations created by the United States government are corporations of the United States, and not of any particular State, even though certain State and territorial corporations have been consolidated with them. Such corporations have a right, therefore, to have all causes against them removed into the Federal courts, on the ground that such causes are those "arising under some law of Congress." *Union Pac. R. Co. v. Myers*, 115 U. S. 1.

See also *U. S. v. Union Pac. R. Co.*, 98 U. S. 569.

Within the meaning of the *Missouri* damage act (1870) the Atlantic and Pacific Railroad though chartered by Congress, is "a corporation of another State." *Smith v. Pacific R. Co.*, 61 Mo. 17.

2. "The fiction which makes two or three corporations out of what is in fact one, is established only for the purpose of giving each State its legitimate control over the charters which it grants; the acts and neglects of the corporation are done by it as a whole." *Horne v. Boston etc. R. Co.*, 18 Fed. Rep. 50. See also CORPORATIONS, vol. 4, p. 207, note 3.

In *Baltimore etc. R. Co. v. Harris*, 12 Wall. (U. S.), the court by Justice Wayne said: "We see no reason why several States cannot by competent

legislation unite in creating the same corporation, or in combining several pre-existing corporations into one." See also *Philadelphia etc. R. Co. v. Maryland*, 10 How. (U. S.) 392 (opinion of Taney, C. J.).

3. *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *Androscoggin etc. R. Co. v. Stevens*, 28 Me. 434.

And a company may therefore be sued in the county where its principal office is, even though no part of the road lies in the county. *Bristol v. Chicago etc. R. Co.*, 15 Ill. 436.

4. **Residence.**—Many cases sustain the doctrine of the text. See *Glaize v. South Carolina R. Co.*, 1 Strobb. (S. Car.) 72; *Bristol v. Chicago etc. R. Co.*, 15 Ill. 436; *Chicago etc. R. Co. v. Bank*, 82 Ill. 493; *Dixon v. Hannibal etc. R. Co.*, 31 Mo. 409; *Slavens v. South Pac. R. Co.*, 51 Mo. 308; *Baldwin v. Mississippi etc. R. Co.*, 5 Iowa 518; *Richardson v. Burlington etc. R. Co.*, 8 Iowa 260; *Hills v. Richmond etc. R. Co.*, 37 Fed. Rep. 660; 37 Am. & Eng. R. Cas. 44 (principal office of lessor and lessee); *Belden v. New York etc. R. Co.*, 15 How. Pr. (N. Y.) 17; *Sherwood v. Saratoga etc. R. Co.*, 15 Barb. (N. Y.) 650 (should be treated as an inhabitant and freeholder in each county where its track is laid); *Pond v. Hudson River R. Co.*, 17 How. Pr. (N. Y.) 543 (company not to be deemed a non-resident of a county through which its road passes, so as to be liable to be sued on short summons); *Louisville etc. R. Co. v. Letson*, 2 How. (U. S.) 497; *U. S. v. Union Pac. R. Co.*, 98 U. S. 569; *Davis v. Central R. Co.*, 17 Ga. 323; 1 Minor's Insts. (3rd ed.) p. (520) 581; Ang. & Ames on Corp. (10th ed.), § 107.

This is made the rule by statute in some States. See *Slavens v. South Pac. R. Co.*, 51 Mo. 308; *Dixon v.*

4. Corporate Existence.—A railroad corporation may exist as one *de facto* and *de jure*, even though there may have been irregularities in the process of its formation and incorporation, unless, however, some essential condition of existence has been neglected.¹ Proof of corporate existence is made by producing the charter, and by evidence of user of the franchises granted under

Hannibal etc. R. Co., 31 Mo. 409; Houston etc. R. Co. v. Ford, 53 Tex. 364; New Albany etc. R. Co. v. Haskell, 11 Ind. 301; 1 Rorer on Railroads 67; Androscoggin R. Co. v. Stevens, 28 Me. 434; Thomas v. Georgia R. etc. Co., 38 Ga. 222; Davis v. Central R. Co., 17 Ga. 323; *Virginia Code* (1887), §§ 3220-3225; 13 Va. L. J. 746-7.

See as to a qualification of the general rule under *Georgia Code*, §§ 746, 2988, 2994; *Clark v. Chapman*, 45 Ga. 486.

Service of process on leased road under *Georgia Code*, § 3369, see *Atlanta etc. R. Co. v. Harrison*, 76 Ga. 756; *Hills v. Richmond etc. R. Co.*, 37 Fed. Rep. 660; 37 Am. & Eng. R. Cas. 44.

Neither the principal place of business of a corporation nor the place where its officers reside, is necessarily the place of residence of the corporation. *California Southern R. Co. v. Southern Pac. R. Co.*, 65 Cal. 394; 17 Am. & Eng. R. Cas. 172. See also *Hatch v. Chicago etc. R. Co.*, 6 Blatchf. (U S.) 105.

In Actions by the Corporation.—The residence of a railway company is limited to its line of road, and in actions or suits instituted in its favor is to be considered as being at that point on the road where the principal office is and the center of its business operations is situated. The residence of the corporations in no wise affects that of the corporation. *Connecticut etc. R. Co. v. Cooper*, 30 Vt. 476 (opinion by Redfield, C. J.). See also *Thorn v. Central R. Co.*, 26 N. J. L. 121.

Where a railroad passes over parts of two counties, the corporation may maintain an action of assumpsit in that county where it has an office, which is made the depository of the books and records of the company by a vote of the directors, and a place where a large share of the business is transacted, although the company may at the same time have another office in the other county, where the residue of its business is transacted, and in

which the treasurer and clerk reside. *Androscoggin etc. R. Co. v. Stevens*, 28 Me. 434.

1. *Pierce on Railroads*, p. 6; *Spartansburg etc. R. Co. v. Ezell*, 14 S. Car. 281; 6 Am. & Eng. R. Cas. 605; *Baker v. Neff*, 73 Ind. 68; *Oroville etc. R. Co. v. Plumas Co.*, 37 Cal. 354; *State v. Foulkes*, 94 Ind. 493; *Hughes v. Parker*, 19 N. H. 181.

It is well said that it is obvious that irregularities in the organization of a corporation are not necessarily fatal to its being. Organization is but the creation of an agency by which the corporate body can act. It presupposes the existence of the artificial person. *Com. v. Central Pass. R. Co.*, 52 Pa. St. 512.

Thus in an action to recover the amount of an unpaid subscription to stock, it is no defense that the articles of association were defective in not definitely stating the termini of the road, or the counties through which it was to pass, etc., the road having been put in operation and the company recognized by the legislature. *Cayuga Lake R. Co. v. Kyle*, 5 Thomp. & C. (N. Y.) 659; 64 N. Y. 185.

So also the non-payment of the installment required by law does not defeat corporate existence unless specifically made a condition precedent. *Com. v. West Chester R. Co.*, 3 Grant Cas. (Pa.) 200; *Eaton v. Aspinwall*, 19 N. Y. 119.

Equity will not restrain a corporation *de facto* from exercising its powers merely because of the bad faith in the promoters or of the irregularities in the process of formation, or of a non-user or mis-user of its powers. *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Attorney Gen'l v. Stevens*, 1 N. J. Eq. 369; 22 Am. Dec. 526. *Compare Illinois etc. R. Co. v. Cook*, 29 Ill. 237.

But no essential condition, such for example, as recording the articles of association and obtaining a certificate thereof may be omitted. *Buffalo etc. R. Co. v. Cary*, 26 N. Y. 75; *Oroville etc. R. Co. v. Plumas Co.*, 37 Cal. 354; *Hurt v. Salisbury*, 55 Mo. 310; *Lyons v.*

it.¹ Such proof is sufficient to show an existence of the corporation *de facto*, and no other proof is necessary where the corporate existence is attacked in a collateral proceeding.² And private parties by dealing with the corporation are estopped thereby to deny its existence.³ There is an exception to these rules, however, in cases where there was no law authorizing the forma-

Orange etc. R. Co., 32 Md. 18; Atlantic etc. R. Co. v. Sullivant, 5 Ohio St. 280; Powers v. Hazleton etc. R. Co., 33 Ohio St. 429.

The *California* act relating to the formation of railroad corporations required the articles in corporation to set forth the amounts subscribed, and by whom, etc. *California* Civ. Code, § 290, 293. In *Monterey etc. R. Co. v. Hildreth*, 53 Cal. 123, it is held that a failure to comply with this requirement would so defeat corporate existence as to render the corporation unable to sue.

In *Dutchess etc. R. Co. v. Mabbett*, 58 N. Y. 397, the omission to name in the articles, the directors, was held to render the subscriptions inoperative.

When Corporate Existence Begins.—The corporation has no corporate existence until the date of the filing of the charter; persons named as directors incur no responsibility as such until then. *St. Louis etc. R. Co. v. Tiernan*, 37 Kan. 606; 40 Am. & Eng. R. Cas. 525; *Hunt v. Kansas etc. Bridge Co.*, 11 Kan. 412.

1. *Com. v. Bakeman*, 105 Mass. 60; *Pierce on Railroads*, p. 8; *Ward v. Minnesota etc. R. Co.*, 119 Ill. 287; *Peoria etc. R. Co. v. Peoria etc. R. Co.*, 105 Ill. 110; *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621.

The judgment of the State court upon the question of the corporate existence of a certain corporation is conclusive in the Federal courts. *Secombe v. Milwaukee etc. R. Co.*, 23 Wall. (U. S.) 108.

In *Ohio* the method of proof is fixed by statute and is that the certificate or public record of the organization in accordance with the terms of the statute must be produced. *Atlantic etc. R. Co. v. Sullivant*, 5 Ohio St. 276; *Atkinson v. Marietta etc. R. Co.*, 15 Ohio St. 21.

Proof of legislative recognition is sufficient in all cases. *Atlantic etc. R. Co. v. St. Louis*, 66 Mo. 228; *McAuley v. Chicago etc. R. Co.*, 83 Ill. 348.

2. **Proof Necessary in Collateral Proceedings.**—*Hudson v. Green Hill Seminary*, 113 Ill. 619; *Peoria etc. R. Co. v. Peoria etc. Co.*, 105 Ill. 110; 10

Am. & Eng. R. Cas. 129; *Henry v. Centralia etc. R. Co.*, 121 Ill. 264; 30 Am. & Eng. Cas. 273; *Stout v. Zulick*, 48 N. J. L. 599; *Heaston v. Cincinnati etc. R. Co.*, 16 Ind. 275; *Swartwout v. Michigan etc. R. Co.*, 24 Mich. 394; *Garrett v. Dillsburg etc. R. Co.*, 78 Pa. St. 465 (fraud in procurement of charter cannot be set up); *Smith v. Mississippi etc. R. Co.*, 6 Smed. & M. (Miss.) 179 (same); *Paterson v. Arnold*, 45 Pa. St. 410.

No other proof is needed, because the existence of a *de facto* corporation cannot be attacked collaterally. *Reisner v. Strong*, 24 Kan. 410; 10 Am. & Eng. R. Cas. 335; *North v. State*, 107 Ind. 356; *Aurora etc. R. Co. v. Lawrenceburgh*, 56 Ind. 80; *Chicago etc. R. Co. v. Stafford Co.*, 36 Kan. 121; *Pacific Railroad Removal Cases*, 115 U. S. 1; 20 Am. & Eng. R. Cas. 324; *Chicago etc. R. Co. v. Chicago etc. R. Co.*, 112 Ill. 589; 25 Am. & Eng. R. Cas. 158.

In an action by a corporation a plea of the general issue admits the corporate existence, but if defendant pleads in abatement the corporation must prove its existence. *Pullman v. Upton*, 96 U. S. 328; *Oldtown etc. R. Co. v. Veazie*, 39 Me. 571; *Oroville etc. R. Co. v. Plumas Co.*, 37 Cal. 354; *Wilcox v. Toledo etc. R. Co.*, 43 Mich. 584; 9 Am. & Eng. R. Cas. 518.

Proof of corporate existence is addressed always to the court, not to the jury. *Ward v. Minnesota etc. R. Co.*, 119 Ill. 287.

3. **Estoppel.**—*Broadwell v. Merritt* (Mo. 1885), 1 S. W. Rep. 855; *Oregonian R. Co. v. Oregon R. etc. Co.*, 22 Fed. Rep. 245; 23 Fed. Rep. 332; 20 Am. & Eng. R. Cas. 518; *Ensley v. Cleveland etc. R. Co.*, 10 Ind. 178; *Ward v. Minnesota etc. R. Co.*, 119 Ill. 287; *Douglas Co. v. Bolles*, 94 U. S. 104; *Wilcox v. Toledo etc. R. Co.*, 43 Mich. 584; 9 Am. & Eng. R. Cas. 584; *ESTOPPEL*, vol. 7, p. 29, and cases; *CORPORATIONS*, vol. 4, p. 284, *et seq.*; *Black River etc. R. Co. v. Clarke*, 25 N. Y. 208.

So also the members of a corporation,

tion of the supposed corporation, or where the law, though existing, was unconstitutional; in such cases the charter is not voidable, but absolutely void, and may be declared to be so even in a collateral proceeding.¹

For the non-performance of the conditions provided in the statutes authorizing their creation, corporations are liable to forfeit their charter, and thus to have their existence terminated.² But it is the State, and the State alone, which has authority to take

having acted as a corporation and entered into contracts as such are estopped to deny their existence as a corporation, when sued upon such contracts. *Callender v. Hudson etc. R. Co.*, 11 Ohio St. 516; *Racine etc. R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331; *Monroe v. Fort Wayne etc. R. Co.*, 28 Mich. 271; *Montpelier etc. R. Co. v. Langdon*, 46 Vt. 284.

But the estoppel does not exist where any essential of a *de facto* existence has been omitted. *Indianapolis Furnace etc. Co.*, 46 Ind. 142.

1. *Burton v. Schildbach*, 45 Mich. 504; *Snyder v. Studebaker*, 19 Ind. 462; 81 Am. Dec. 415; *Bennett v. Black*, 19 Ind. 461 (*overruling Evansville etc. R. Co. v. Evansville*, 15 Ind. 395); *Mok v. Detroit Building etc. Assoc.*, 30 Mich. 511.

This whole matter is well explained in the opinion of the court by Worden, J., in *Snyder v. Studebaker*, 19 Ind. 464; 81 Am. Dec. 415: "Estoppel (*i. e.*, to deny the corporate existence) arises upon matter of fact only and not upon matter of law. Hence if there be no law which authorized the supposed corporation, or if the statute authorizing it be unconstitutional, the contract does not estop the party making it to dispute the existence of the corporation. But if, on the other hand, there be a law which authorized the corporation, then, whether the corporators have complied with it, so as to become duly incorporated, is a question of fact, and the party making the contract is estopped to dispute the organization or the legal existence of the corporation."

2. *In re Brooklyn El. R. Co.*, 57 Hun (N. Y.) 590; *aff'd* 125 N. Y. 434; *In re New York El. R. Co.*, 70 N. Y. 327; *Swartwout v. Michigan etc. R. Co.*, 24 Mich. 389.

Conditions Precedent.—It is manifest that before any body can exist as a corporation *de facto* all conditions precedent provided by statute must be complied with. See *Hudson v. Green*

Hill Seminary, 113 Ill. 618; *Alman v. Havanna etc. R. Co.*, 88 Ill. 52; *Lyons v. Orange etc. R. Co.*, 32 Md. 18.

Substantial compliance with statutes regulating the formation of corporations is one of these conditions always, and the failure to so comply in a material particular is ground for the impeachment of the corporate existence. *People v. Cheseman*, 7 Colo. 376; 16 Am. & Eng. R. Cas. 400.

But conditions precedent to corporate existence are matters of proof, and the failure to allege their proper performance is not ground for demurrer. *Cheraw etc. R. Co. v. White*, 14 S. Car. 51; 6 Am. & Eng. R. Cas. 605.

In *People v. Chambers*, 42 Cal. 201, it is held that the provision in regard to railroad corporations, requiring a payment of ten per cent. of the amount subscribed, and that at least 1,000 dollars per mile be subscribed, is a condition precedent to corporate existence; that payment by check is not a sufficient compliance. See also *People v. Stockton etc. R. Co.*, 45 Cal. 314. *Compare Mitchell v. Rome R. Co.*, 17 Ga. 574.

In some cases it is held that a subscription of the whole number of shares of capital stock fixed in the articles of association is a condition precedent to corporate existence. *Allman v. Havana etc. R. Co.*, 88 Ill. 521; *Swartwout v. Michigan, etc. R. Co.* 24 Mich. 388 note; *Abbott's Trial Evidence*, p. 19 § 3. But these cases were decided upon special statutory provisions, and the rule is laid down in other cases that it is no defence to an action by a corporation that such subscriptions have not been made. *Buffalo etc. R. Co. v. Cary*, 26 N. Y. 75; *Cayuga Lake R. Co. v. Kyle*, 64 N. Y. 185; *Jewett v. Valley R. Co.*, 34 Ohio St. 601; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Black River etc. R. Co. v. Clarke*, 25 N. Y. 208.

Compare, however, *Hunt v. Kansas etc. Bridge Co.*, 11 Kan. 412; *Maltby v. Northwestern Va. R. Co.*, 16 Md. 422.

advantage of such non-performance, and until it does so, corporate existence remains unimpaired; it is only after proper judicial proceedings instituted on behalf of the State to have a forfeiture declared that the corporation ceases to exist.¹

A corporation *de facto* may sue and be sued, may exercise the right of eminent domain, and may enjoy all other powers, privileges, and immunities which belong to corporations *de jure*, except as against the State.²

Neither the adoption of a new name nor a grant of new powers changes the identity of a corporation or creates a new one.³

Conditions Subsequent.—The most common instances of conditions subsequent in this connection are where the company is required to commence work on its road within a certain time. A breach of this condition is always ground for forfeiture of the charter. See *Cheraw etc. R. Co. v. White*, 14 S. Car. 51; 6 Am. & Eng. R. Cas. 605; *In re Brooklyn etc. R. Co.*, 75 N. Y. 335.

Therefore where a corporation failed to comply with a condition, in not commencing its road within the time specified, a grant to it, made after the expiration of such time, was of no effect, there being no grantee. *Greenwood etc. R. Co. v. New York etc. R. Co.*, 55 Hun (N. Y.) 606.

In *State v. Wheadon*, 39 Ind. 520, there was an act requiring that a railroad company to which an appropriation had been made by a county, should commence work upon its road in such county, in good faith, within one year from the time of the levy of the tax. This requirement was in the nature of a condition subsequent, and a failure by the company to commence work within the time stipulated operated as a release to the county from its obligation to aid. It was held also that merely by acquiring a right of way or letting contracts for the construction of the road, did not constitute a "commencing work upon its road."

1. *In re Brooklyn El. R. Co.*, 57 Hun (N. Y.) 590; 125 N. Y. 434; 46 Am. & Eng. R. Cas. 251.

In re New York El. R. Co., 70 N. Y. 327; *Cincinnati etc. R. Co. v. Clifford*, 113 Ind. 460 (ejectment suit by land owner on the ground that road was not constructed within the time limited by the charter.) In the case of *In re Brooklyn etc. R. Co.*, 75 N. Y. 335, this doctrine was recognized, but in view of the mandatory words of the statute, the charter of the company

was held to have been forfeited by its not having complied with the requirement, that the construction of the road should be begun within five years after the articles of incorporation were filed and recorded.

As to the method of procedure in such cases, whether by *quo warranto* or otherwise, see *East Line etc. R. Co. v. State*, 75 Tex. 434; 40 Am. & Eng. R. Cas. 574.

Proper Performance of Conditions a Judicial Question.—In the absence of a reserved power of repeal, the question as to whether these conditions, precedent or subsequent, have been complied with is a judicial and not a legislative question. *Pierce on Railroads*, p. 10; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358; *State v. Noyes*, 47 Me. 189.

2. 1 Wood's Ry. Law, pp. 15-19; *Reisner v. Strong*, 24 Kan. 410; 10 Am. & Eng. R. Cas. 335; *McAuley v. Chicago etc. R. Co.*, 83 Ill. 347; *Hoagland v. Cincinnati etc. R. Co.*, 18 Ind. 452; *Swartwout v. Michigan etc. R. Co.*, 24 Mich. 389; *Wilcox v. Toledo etc. R. Co.*, 43 Mich. 584; 9 Am. & Eng. R. Cas. 518; *Attorney-Gen'l v. Stevens*, 1 N. J. Eq. 369; 22 Am. Dec. 526.

A corporation running its road is to be regarded as a corporation *de facto* in suits brought by it against individuals, who cannot contest its corporate existence. *Wilcox v. Toledo etc. R. Co.*, 43 Mich. 584; 9 Am. & Eng. R. Cas. 518.

In several *Ohio* cases it is held that in a proceeding to condemn land the corporation must prove its proper formation and organization. *Powers v. Hazelton etc. R. Co.*, 33 Ohio St. 429; *Atkinson v. Marietta etc. R. Co.*, 15 Ohio St. 21; *Atlantic etc. R. Co. v. Sullivan*, 5 Ohio St. 276.

3. **Corporate Identity.**—*Meyer v. Johnston*, 64 Ala. 603; 8 Am. & Eng. R. Cas. 584.

Limitations as to the continuance of corporate existence are sometimes imposed by the charter; when no limitation is expressed, however, it seems that the corporate existence may continue indefinitely.¹

A transfer of assets from one corporation to another does not establish any legal identity between them. *Tawas etc. R. Co. v. Circuit Judge*, 44 Mich. 479; 11 Am. & Eng. R. Cas. 584; *Columbia etc. R. Co. v. Gibbes*, 24 S. Car. 60. In this latter case a company's charter declared it not subject to amendment. Afterwards an act was passed requiring railroad corporations to be taxed to meet the expense of the State railroad commission. The property of the company was sold at judicial sale and a new corporation formed under the general law. It was held that there was no legal identity between the old corporation and the new, and the latter was properly taxed to support the commission.

A railroad corporation organized by and consisting of persons who had purchased at mortgage sales, the road and other property of the M. & M. railroad company, and were endowed with the same powers and privileges as the like company is by no means identical with it, and is not liable for its debts. *Vilas v. Milwaukee R. Co.*, 17 Wis. 497; *Smith v. Chicago etc. R. Co.*, 18 Wis. 21. Compare *Pfeifer v. Sheboygan etc. R. Co.*, 18 Wis. 155.

Variations in a route over which a railroad may run do not affect the identity of a corporate body that builds it, when subsequent acts, amendatory of the original charter, give permission for a deflection from the line first projected; and the right to exemption of property from tax granted in the original charter is retained unimpaired. *Cheraw etc. R. Co. v. Anson Co.*, 88 N. Car. 519; 17 Am. & Eng. R. Cas. 431.

A railroad company which succeeds to the rights and privileges conferred upon another by its charter, becomes also subject to the same liabilities. *Montgomery etc. R. Co. v. Boring*, 51 Ga. 582.

1. Length of Corporate Existence.—See CORPORATIONS, vol. 4, p. 295; *La Grange etc. R. Co. v. Rainey*, 7 Coldw. (Tenn.) 432; *Robbins v. St. Paul etc. R. Co.*, 22 Minn. 286; *State v. Bergen Neck R. Co.* (N. J. 1890), 20 Atl. Rep. 762.

A company with a limited corporate existence does not lengthen its own term of life by purchasing the road and franchises of a company with perpetual existence. *Henderson v. Central Pass. R. Co.*, 21 Fed. Rep. 358; 20 Am. & Eng. R. Cas. 542.

Statutory Limitation to Existence.—A Colorado statute provided that railroad corporations should, in their articles of incorporation, state the term of corporate existence (in no case to exceed twenty years); the articles of a company provided for an existence of fifty years. It was held that the company could continue to exist for twenty years only. *People v. Cheseman*, 7 Colo. 379; 16 Am. & Eng. R. Cas. 400.

In the case of *Miner v. New York Cent. etc. R. Co.*, 46 Hun (N. Y.) 612, the charter of a certain company limited its existence to fifty years. It authorized the company to acquire land "for the use or accommodation of such railroad, or its appendages," also "to appropriate so much of such lands as might be necessary to its own use;" it also conferred the right to construct and maintain a railroad during its existence. It was held that the use of the land taken was not limited to the fifty years' corporate existence, but was to continue so long as it was devoted to such public purpose; and this company having been afterwards (but before its charter expired) consolidated by legislative act with another company, the original owners could not recover the land at the expiration of fifty years.

A Massachusetts statute (Stat. 1830, ch. 81) reserved to the legislature the power to amend, alter or appeal at pleasure, all acts of incorporation which should be afterwards passed, unless there should have been inserted therein an express limitation as to their duration. Under this it is held in *Roxbury v. Boston etc. R. Co.*, 6 Cush. (Mass.) 424, that an act incorporating a railroad company with a condition inserted therein that it shall be void if not carried into effect within a time limited; and containing also a proviso that after twenty years the commonwealth may, in a certain contingency, purchase the franchise of the road, is not, by virtue

Corporate existence may be terminated by proceeding to forfeit the charter by *quo warranto* or *scire facias*; or by the running out of the period prescribed for its existence; or by any prescribed mode of dissolution.¹ It is not terminated by a lease of all the corporate property,² or by insolvency,³ or by the appointment of a receiver,⁴ or by the sale of its entire property.⁵

5. **Capital Stock of the Corporation—Its Creation—Subscriptions to—Issuance of Shares—Rights of Shareholders, etc.**—See MUNICIPAL SECURITIES, vol. 15, p. 1204; STOCK; STOCKHOLDERS.

6. **Corporate Direction and Control—Officers and Agents of the Corporation.**—See OFFICERS AND AGENTS, vol. 17, p. 39, *et seq.*

7. **Suits By and Against the Corporation.**—(See also CORPORATIONS, vol. 4, p. 274, *et seq.*; FOREIGN CORPORATIONS, vol. 8, p. 375.) The issuance of writs of injunction, *mandamus*, and *quo warranto* is discussed under other titles.⁶

8. **Consolidation.**—See CORPORATIONS, vol. 4, p. 272, *et seq.*

9. **Dissolution of the Corporation.**—See CORPORATIONS, vol. 4, p. 294, *et seq.*; FOREIGN CORPORATIONS, vol. 8, p. 404, *et seq.*

V. **CORPORATE POWERS.**—(See also CORPORATIONS, vol. 4, p. 207; ULTRA VIRES).—The general principles which apply here are well known, viz.: that a corporation being a mere creature of law, possesses only those properties and powers which the charter of its creation confers upon it, either expressly or as incidental to its existence;⁷ and also that all grants to the corporation, whether

of either of these provisions, expressly limited as to its duration.

1. **Termination of Corporate Existence.**—See CORPORATIONS, vol. 4, p. 294, *et seq.*; QUO WARRANTO; SCIRE FACIAS.

2. *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506; *Bruffett v. Great Western R. Co.*, 25 Ill. 310; *U. S. v. Little Miami etc. R. Co.* (U. S. 1880), 9 Rep. 676; 1 Fed. Rep. 700.

3. *Germantown Pass. R. Co. v. Fittler*, 60 Pa. St. 124; *People v. Northern R. Co.*, 53 Barb. (N. Y.) 98; *aff'd* 42 N. Y. 213; *State v. Bailey*, 16 Ind. 46.

4. *Willink v. Morris Canal etc. Co.*, 4 N. J. Eq. 377; *State v. Board of Railroad Com'rs*, 41 N. J. L. 235; *Pierce on Railroads*, p. 10.

5. *Buffett v. Great Western R. Co.*, 25 Ill. 310; *State v. Rives*, 5 Ired. (N. Car.) 297; *Troy etc. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581. The charter and franchises of a corporation are not an incident that is annexed to and passes with a transfer of its property.

6. See INJUNCTION, vol. 10, p. 969, *et seq.*; MANDAMUS, vol. 14, p. 158; QUO WARRANTO.

See also 1 Redfield on Ry's p. 673;

2 Redfield on Ry's (6th ed.), p. 401,

et seq. (Injunction); 1 Redfield on Ry's (6th ed.), p. 699, 723, *et seq.* (*Quo Warranto*).

As to service of process in suits against railway corporations, see FOREIGN CORPORATIONS, vol. 8, p. 382; SERVICE OF PROCESS.

7. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 636 (Marshall, C. J.); *State v. Atchison etc. R. Co.*, 24 Neb. 143; 32 Am. & Eng. R. Cas. 388; *Pierce on Railroads* 491; *Mobile etc. R. Co. v. Franks*, 41 Miss. 494; 1 Minor's Insts. (3rd ed.); *Com. v. Erie etc. R. Co.*, 27 Pa. St. 339.

The charter of a corporation is therefore the measure of its powers. This rule with its modifications, and the rule of construction of charters of corporations generally are set forth in CORPORATIONS, vol. 4, pp. 207, *et seq.*

The general incorporation law of Iowa provides specifically that articles of incorporation confer no power or privilege not possessed by natural persons. *Rodemacher v. Milwaukee etc. R. Co.*, 41 Iowa 301.

In *Railroad Co. v. Furnace Co.*, 37 Ohio St. 321; 41 Am. Rep. 509; 3 Am. & Eng. R. Cas. 471, the court, by Johnson, J., said: But there is a "clear line

of powers, privileges or exemptions, are to be construed strictly in favor of the State.¹ The powers conferred upon every corporation are express or implied, the latter class embracing all those powers necessary to carrying into effect those specifically granted,² and may be either incident to a par-

of distinction between cases involving the mode of exercising granted powers and those where the power to do the act is wanting. If the power to do an act is clearly conferred either by express grant or by necessary implication the corporation may adopt any appropriate means not expressly forbidden."

1. "A technical reason for this rule of construction is that the grant being made by the State at the request of the citizen is supposed to have been made in his language in a bill submitted by him, and, therefore, in case of doubt or ambiguity the construction should be against him; but a more substantial reason for the rule is that it tends to prevent improvident grants." *Pierce on Railroads* 491; *Black v. Delaware etc. Canal Co.*, 22 N. J. Eq. 401.

The principle of the text is well established. See *CORPORATIONS*, vol. 4, pp. 212, 215, and authorities cited; *FRANCHISES*, vol. 8, pp. 593, 620; *Stourbridge Canal v. Wheeley*, 2 B. & Ad. 792; 22 E. C. L. 185 (a railway act regarded as a bargain between a company of adventurers and the State); *McCalmont v. Philadelphia etc. R. Co.*, 7 Fed. Rep. 386; 3 Am. & Eng. R. Cas. 163. But this rule of strict construction is confined to cases where there is ambiguity or where a power is claimed by implication. *Newhall v. Galena etc. R. Co.*, 14 Ill. 273.

The construction given to a charter by the courts of the State which granted it, will be followed in other States. *Black v. Delaware etc. Canal Co.*, 22 N. J. Eq. 139, 422 (this case was reversed in 24 N. J. Eq. 455, on other points decided in it, but not as to the one stated).

In some cases a charter granted by more than one State has been liberally construed in view of the magnitude of the enterprise, etc. *Brocket v. Ohio etc. R. Co.*, 14 Pa. St. 244; *Cleveland etc. R. Co. v. Speer*, 56 Pa. St. 332.

The construction must be uniform. A corporation cannot adopt the acts of its agents in reference to matters not altogether beyond the general objects of its incorporation, but which

would be embraced within a liberal construction of them, so long as they are beneficial; and when otherwise, shield themselves from responsibility by resorting to a more limited and literal construction of their corporate powers. *Noyes v. Rutland etc. R. Co.*, 27 Vt. 110; *Milnor v. New York etc. R. Co.*, 53 N. Y. 363.

This rule of strict construction has been carried so far that in one case where the right was granted "to connect with any passenger railway now constructed or hereafter to be constructed so as to give them a complete route from F. to E.," it was held that the company could not connect with another passenger railway which was not made, nor the right of making granted at the time this right was given. *North Branch etc. R. Co. v. City etc. R. Co.*, 38 Pa. St. 361.

2. *Lower v. Chicago etc. R. Co.*, 59 Iowa 563; 10 Am. & Eng. R. Cas. 17; *Central etc. R. Co. v. Smith*, 76 Ala. 572; 25 Am. & Eng. R. Cas. 25; *Com. v. Erie etc. R. Co.*, 27 Pa. St. 339.

"Necessary."—In this connection the word "necessary" is not to be construed as to import an absolute physical necessity; nor is it to be made to mean "indispensable;" but it should rather be made to embrace all things suitable and proper for carrying into execution the powers granted. Necessarily, however, the construction must in each case depend greatly upon the peculiar circumstances involved. *State v. Hancock*, 35 N. J. L. 537; *State v. Comr's of Mansfield*, 23 N. J. L. 510; *Worcester v. Western R. Co.*, 4 Met. (Mass.) 564. See also *McCulloch v. Maryland*, 4 Wheat. (U. S.) 413.

"But 'necessity' is a word of flexible meaning. There may be an absolute necessity, a great necessity and a small necessity; and between these degrees there may be many others depending on the ever-varying exigencies of human affairs. It is plain that corporations, in executing their express powers are not confined to means of such indispensable necessity that without them there could be no execution at all." *Curtis v. Leavitt*, 15 N. Y. 9.

ticular express power, or to the general objects of the corporation.¹

Railroad companies constitute no exception to these rules except in this respect, that they are not merely private corporations created solely for the pecuniary benefit of the stockholders, but are in their nature public uses.²

1. **Powers of Eminent Domain.**³—(See also EMINENT DOMAIN, vol. 6, pp. 518, 530, *et seq.*)

2. **Power to Issue Bonds and Negotiable Securities; to Contract Debts, etc.**—See RAILROAD SECURITIES; CORPORATIONS, vol. 4, pp. 223–229.

3. **Power to Construct Lateral or Branch Roads.**⁴—(See also LATERAL OR BRANCH RAILROADS, vol. 12, p. 940. *et seq.*)

1. *Hood v. New York etc. R. Co.*, 22 Conn. 16; *Central etc. R. Co. v. Smith*, 76 Ala. 572; 25 Am. & Eng. R. Cas. 25.

2. This idea is well expressed in *Mayor etc. of Baltimore v. Baltimore etc. R. Co.*, 21 Md. 91, where the court by Bartol, J., said: "It must also be borne in mind that we are not dealing with an ordinary private corporation created only for the pecuniary benefit of its stockholders. The powers granted to the appellee (*i.e.*, the railroad company) are of the most extensive and comprehensive kind, involving in their exercise great public interests, to promote which was the chief object of its charter. Looking to the great and important objects which the legislature designed to accomplish by the charter of this road, the court of Appeals (in *Mayor etc. of Baltimore v. Baltimore etc. R. Co.*, 6 Gill (Md.) 297; 48 Am. Dec. 531), have declared the rules by which this charter ought to be construed. . . . The court say: "In expounding, therefore, those provisions of the charter of the company by which its express privileges and exemptions are imparted, liberal rules of interpretation for its benefit ought to be adopted to effectuate the benevolent designs of the legislature, and not such rules of construction as are applied to the charters of companies incorporated for the peculiar benefit of the stockholders."

In *Pierce on Railroads*, p. 499, it is said: "Its capacity to make contracts cannot therefore be measured by the narrow and rigid rules which were applied at an early day to business or commercial corporations, still less by those which govern municipal and eleemosynary corporations. The courts while in theory adhering to the ancient formula which defines the power of a

corporation to make contracts in fact deprive it of its legal force by a liberal application of the doctrine of estoppel."

3. The right of eminent domain does not exist in a corporation except by express legislative grant. It is never to be implied. *Philips v. Dunkirke etc. R. Co.*, 78 Pa. St. 177.

And statutes conferring the power of eminent domain are always to receive a strict construction. *Sandford v. Martin*, 31 Iowa 67; *Pierce on Railroads*, p. 145 and cases cited; EMINENT DOMAIN, vol. 6, p. 522.

See generally *Mills on Em. Domain*; *Lewis on Em. Domain*; *Pierce on Railroads*, ch. 7; *Wood's Ry. Law*, ch. 13, 14, 15; 1 *Rorer on Railroads*, ch. 10; 1 *Redfield on Railways*, ch. 11.

4. The whole subject is discussed in LATERAL RAILROADS, vol. 12, p. 940. Some later decisions may be added.

A lateral road is only an offshoot from the main line and authority to construct lateral railroads conveys the power to construct a branch line running in the same general direction with the main line. The fact that the branch road is intended to connect the main line with the line of another company does not change its character nor deprive the company of the right to construct it. *Blanton v. Richmond, etc. R. Co.*, 86 Va. 618; 43 Am. & Eng. R. Cas. 617; *Atlantic etc. R. Co. v. St. Louis*, 66 Mo. 255; *Volmer's Appeal*, 115 Pa. St. 166. See also *Pierce on Railroads* 495; *Protzman v. Indianapolis etc. R. Co.*, 9 Ind. 467; *Shoenberger v. Mulhollan*, 8 Pa. St. 134.

Compensation for condemnation of land for a right of way is supposed to include future as well as present damages and therefore precludes a claim for additional compensation for a

4. Power as to Real Estate.—(See also CORPORATIONS, vol. 4, pp. 217, 230; EMINENT DOMAIN, vol. 6, p. 518; FOREIGN CORPORATIONS, vol. 8, p. 357.)

The general power of corporations to acquire real property has already been considered.¹ Usually the power of a railroad company to hold real estate is limited to lands necessary for the location, construction, and operation of its road, and for other similar uses, such for example, as grounds for stations, machine shops, etc., and from which to get material for the construction of the road;² it does not extend to the purchase of lands as an investment or on

subsequent construction of side tracks. *White v. Chicago etc. R. Co.*, 122 Ind. 317; 43 Am. & Eng. R. Cas. 156.

As to the right to build a branch road in a street, see *Republic Iron Works v. Burgwin* (Pa. 1891), 46 Am. & Eng. R. Cas. 232, note.

Agreement in conveyance not to build side tracks, see *Donisthorpe v. Fremont etc. R. Co.* (Neb. 1890), 43 Am. & Eng. R. Cas. 583. See also *Wilson v. Furness R. Co.*, L. R., 9 Eq. 29.

Where a railroad company has no authority to condemn right of way for a lateral line, there is no fraud on land-owners in its organizing another company of its own stockholders with such authority. *Lower v. Chicago etc. R. Co.*, 59 Iowa 563. See also *Bangor etc. R. Co. v. Smith*, 47 Me. 34; *New Orleans etc. R. Co. v. Second Municipality*, 1 La. Ann. 128.

It has been held in some cases that power to build branch roads expires with the power to build the main line, which is usually after the line has been located and constructed. *Morris etc. R. Co. v. Central R. Co.*, 31 N. J. L. 205; *Atlantic etc. R. Co. v. St. Louis*, 66 Mo. 228.

1. See CORPORATIONS, vol. 4, pp. 217, 230; EMINENT DOMAIN, vol. 6, p. 518; *infra*, this title, *Right of Way*. See also generally *Pierce, Railroads*, pp. 130, 506-7, 1 Wood's Ry. Law, pp. 561-3; *Rorer, Railroads* 78; *ULTRA VIRES*.

2. *Blunt v. Walker*, 11 Wis. 334; 78 Am. Dec. 709; *State v. Newark*, 25 N. J. L. 315; 26 N. J. L. 519; *Overmeyer v. Williams*, 15 Ohio 26 (may hold land when necessary for procurement of materials or for economical construction of the road); *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, 30 Ohio St. 604; *Taber v. Cincinnati etc. R. Co.*, 15 Ind. 459; *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331; *Land v. Coffman*, 50 Mo. 243; *Boston etc. R.*

Co. v. Greenbush, 5 Lans. (N. Y.) 461; *McClure v. Missouri River R. Co.*, 9 Kan. 373; *New York etc. R. Co. v. Kip*, 46 N. Y. 546; 7 Am. Rep. 385; *Virginia etc. R. Co. v. Elliott*, 5 Nev. 358; *South Carolina R. Co. v. Blake*, 9 Rich. (S. Car.) 228. See also *Georgia Pac. R. Co. v. Wilks*, 86 Ala. 478; 38 Am. & Eng. R. Cas. 665.

Of course when the charter provides otherwise its provisions are to control. See *Walsh v. Barton*, 24 Ohio St. 28 (all the land "necessary and convenient" for railway purposes).

The charter of the Milwaukee, etc., Railroad Company provided that the corporation should not in its corporate capacity hold, purchase or deal in any lands within the State other than the lands on which the road should run, or which might be actually necessary for the construction or maintenance thereof, and of the warehouses, machine-shops and other fixtures connected therewith. It was held that this was intended to prohibit the corporation from purchasing, etc., lands directly and in a manner unconnected with the lawful and proper management and control of its business, but not to prevent acquiring an interest therein incidentally whenever in the proper exercise of its powers it became necessary for it to do so in order to protect its legal rights. *Blunt v. Walker*, 11 Wis. 334; 78 Am. Dec. 709.

Where lands are necessary for railway purposes when acquired, the company does not lose its right to hold them by the fact that they have become no longer necessary. Thus in *Paige v. Heineberg*, 40 Vt. 81; 94 Am. Dec. 378, a railroad company acquired certain lands by deed in fee. They were afterwards abandoned for railway purposes, the location of the road having been changed. It was held that the land did not revert, but that the fee remained in the

company. See also *Hendee v. Pinkerton*, 14 Allen (Mass.) 381. Compare *Kellogg v. Malin*, 50 Mo. 496.

The corporation may acquire and hold a fee in lands, even though it be created for only a limited period of time. *Nicoll v. New York etc. R. Co.*, 12 Barb. (N. Y.) 460; 12 N. Y. 121; *New York R. Co. v. Kip*, 46 N. Y. 546; *Yates v. Van DeBogert*, 56 N. Y. 526.

The Iowa Code, § 1241, provides that any railway corporation "may take and hold so much real estate as may be necessary for the location, construction and convenient use of its railway. . . . the land so taken . . . shall not exceed 100 feet in width, except for wood and water stations." Under this it was held that a company could not take, outside of 100 feet, additional real estate to build passenger stations, freight or engine houses, warehouses, elevators, and such other appliances as might be necessary for its convenient use. *Johnston v. Chicago etc. R. Co.*, 58 Iowa 537. See also *Spofford v. Bucksport etc. R. Co.*, 66 Me. 26.

What Are Railroad Purposes.—Under the implied or express authority to hold lands necessary for railroad purposes a railroad corporation may own a coal mine from which to supply fuel for its engines; and it may sell the superfluous coal. *Lyde v. Eastern Bengal R. Co.*, 36 Beav. 17.

Authority to buy land for the purpose of procuring stone and other material necessary to the construction of the road conveys power to buy lands from which to get cross-ties, fire wood, etc. *Mallett v. Simpson*, 94 N. Car. 37; 55 Am. Rep. 594.

A company may allow one of its buildings to be used for the examination of its passengers' luggage. *Warden etc. of Dover v. Southeastern R. Co.*, 9 Hare 483.

A company may, with a view to an increase of its business, buy lands for the purpose of selling the gravel therefrom to persons who are to pay for its transportation over their road; and it may afterwards sell the land and enforce in equity the contract of sale. *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 255; 66 Am. Dec. 394.

In the case of *Eldridge v. Smith*, 34 Vt. 484, it is said that the manufacture of railroad cars is not so legitimately and necessarily connected with the management of a railroad that the railroad company would be authorized by its charter to condemn land for the pur-

pose of erecting shops for such manufacture. This case, however, does not deny the right of a company to purchase and hold lands for such purposes.

A canal basin is not a legitimate incident to a railroad having no authorized canal connections, and is therefore not exempt from execution and sale. *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337.

The acquisition of lands for the purpose of speculation or sale, or to prevent interference by competing lines or methods of transportation, or in aid of collateral enterprises remotely connected with the running or operation of the road, are not such purposes as authorize the condemnation of private property. *Rensselaer etc. R. Co. v. Davis*, 43 N. Y. 137.

Where A quit-claimed "a right of way" to a company "for all purposes connected with the construction, use and occupation of said railroad," it was said that the company could not take sand from the way to construct a round house, that not coming within the purposes named. It was held also that A might take sand for any purpose so long as he did not interfere with the company's proper use of the land. *Vermilya v. Chicago etc. R. Co.*, 66 Iowa 606; 55 Am. Rep. 279; 23 Am. & Eng. R. Cas. 108.

The erection of buildings by permission of the railway company within the line of its roadway for convenience in receiving and delivering freight, is not inconsistent with the purposes of the company. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

Passenger Depots; convenient and proper places for storing and keeping cars and locomotives; proper, secure and convenient places for the receipt and delivery of freight, and for the safe and secure keeping of property, between the time of its receipt and dispatch, or after its arrival and discharge and before delivery; turn-outs, engine houses, shops and turn-tables, are among the acknowledged necessities for running and operating a railroad; and the right to take land for those purposes is included in the grant of power which authorizes a railroad corporation to acquire real estate for the purposes of its incorporation or for the purpose of operating its road. *New York etc. R. Co. v. Kip*, 46 N. Y. 546; 7 Am. Rep. 385; *Hannibal etc. R. Co. v. Muder*, 49 Mo. 165; *Cumberland*

speculation.¹ In all cases, however, where land is purchased, the presumption is in favor of the power of the company; and that the land was required for its purposes.² All railroad companies necessarily have some power to acquire land; the question as to whether the company was authorized to acquire certain land is therefore one of degree; it is not a question of *ultra vires* but of a violation of the charter, and can be raised only in a direct proceeding by the State; it cannot be litigated between private parties or in a collateral proceeding.³ Another result of

Valley R. Co. v. McLanahan, 59 Pa. St. 23; Spofford v. Bucksport etc. R. Co., 66 Me. 26; Chicago etc. R. Co. v. Wilson, 17 Ill. 123.

As to acquiring by eminent domain a spring of water in order to supply a tank, see Strohecker v. Alabama etc. R. Co., 42 Ga. 509.

What is Real Estate.—In the case of Blunt v. Walker, 11 Wis. 350; 78 Am. Dec. 709, it is said that a mortgage for all the purposes of negotiation and trade is to be regarded as mere personality. It is not considered as a conveyance of land but as a charge which attaches itself to the debt, and follows its ownership; that therefore taking a mortgage to secure the payment of a debt due is not a dealing in lands as regards the powers of a railway corporation.

Consolidated Company.—Where two railroad companies are consolidated under Code of Alabama (1886), § 1583, the new company does not possess the power of the original corporations to acquire land, unless the road when consolidated will admit a continuous passage of cars without break or interruption. Georgia Pac. R. Co. v. Gaines, 88 Ala. 377; 44 Am. & Eng. R. Cas. 1.

1. Pacific R. Co. v. Seely, 45 Mo. 212; 100 Am. Dec. 369; Waldo v. Chicago etc. R. Co., 14 Wis. 575; Rensselaer etc. R. Co. v. Davis, 43 N. Y. 137.

Although in a suit for specific performance of a contract to convey lands to a railroad company, the contract may be incapable of enforcement as being intended for purposes of speculation, yet if the deed be made voluntarily the company will take a good title. Land v. Coffman, 50 Mo. 243.

A agreed with a railroad company to convey it a certain lot of ground for purposes of speculation, in consideration that the company would locate a freight and passenger depot on his land. There was no evidence that the land

was to be used for the general purpose of locating, constructing, managing, and using the road. It was held that such an agreement was contrary to public policy and void; that the railroad company had no power to acquire land under such circumstances. Pacific R. Co. v. Seely, 45 Mo. 212; 100 Am. Dec. 369.

2. Yates v. Van De Bogert, 56 N. Y. 527; Pierce, Railroads 507; McCarthy v. St. Paul etc. R. Co., 31 Minn. 279; Ohio etc. R. Co. v. McCarty, 96 U. S. 267.

3. Land v. Coffman, 50 Mo. 243; Hickory Farm Oil Co. v. Buffalo etc. R. Co., 32 Fed. Rep. 22; Southern Pac. R. Co. v. Orton, 6 Sawy. (U. S.) 157; Russell v. Texas Pac. R. Co., 68 Tex. 646 (conveyance of excess of land is not void but voidable only, and the sovereign only can object); CORPORATIONS, vol. 4, p. 233-4, and cases cited.

When a corporation has power to hold property and is forbidden to hold beyond a certain amount, the matter being one of degree merely, it is not a question of *ultra vires* but of a violation of its charter. Jones v. Habersham, 3 Wood (U. S.) 476; *aff'd* 107 U. S. 174.

In Martindale v. Kansas City etc. R. Co., 60 Mo. 510, the court by Sherwood, J., said: "The only exception to the rule which prohibits collateral inquiry by a private citizen into the supposed illegal acts of a corporation is where express legislative permission is granted therefor."

This principle, however, does not apply in cases where the corporation as plaintiff seeks to acquire real estate which it is not by law authorized to acquire. Case v. Kelly (U. S. 1883), 13 Am. & Eng. R. Cas. 70; *aff'd* 133 U. S. 21. In this case the court by Miller, J., said: "We think the questions are very different ones, and that while a court might hesitate to declare the title to lands, received already and in

this principle is that a deed to a railroad company of any amount of land conveys (so far as corporate powers are concerned) a perfect title, and the company holds it subject only to the right of the State to escheat; so that if it conveys away such lands before proceedings to escheat are instituted the title in the vendee will be indefeasible.¹

But these doctrines do not all apply where the land is acquired under the right of eminent domain; in such a case the company acquires only an easement and the land reverts to the original owner whenever it is no longer necessary for railroad purposes, unless there is a specific statutory provision otherwise.²

Unless restricted by legislation, a railroad corporation may sell, convey, or mortgage its property, real or personal, with the exception of its franchises and property essential to them;³ these,

the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids."

The case of *Runyan v. Coster*, 14 Pet. (U. S.) 122, is to be distinguished from this. There the corporation was allowed to maintain ejectment for certain lands even though such lands were in excess of the amount it was authorized to hold. In this case the title had vested while in that of *Case v. Kelly*, 13 Am. & Eng. R. Cas. 70, the title had never vested in the corporation. Compare also *Showalter v. Pirner*, 55 Mo. 232.

As a consequence of the doctrine of the text it is no defense to an action by a railroad company to recover the price of land sold by them, to allege a want of authority in the company to acquire such lands. *Rutland etc. R. Co. v. Proctor*, 29 Vt. 93.

1. Power to Convey a Perfect Title.—The doctrine of the text is confirmed in *Walsh v. Barton*, 24 Ohio St. 28; *Blunt v. Walker*, 11 Wis. 334; 78 Am. Dec. 707.

Having acquired a fee in lands necessary for its purposes, a railway company may convey it away, the lands having become no longer necessary to its uses. *Yates v. Van DeBogert*, 56 N. Y. 526.

In *Blunt v. Walker*, 11 Wis. 334; 78 Am. Dec. 707, it is held that though a corporation is not empowered to deal in lands, it may yet acquire and transmit a title to lands as an incident to its general power to contract.

Power to Mortgage.—In *Hendee v. Pinkerton*, 14 Allen (Mass.) 381, it is said that a corporation authorized to hold lands for depots and storehouses as well as for railway purposes and to allow other railway corporations to establish depots upon its premises, etc., may lawfully mortgage lands held by it and not required for railroad purposes, to secure bonds issued by it.

See also *CORPORATIONS*, vol. 4, p. 236.

A company having a general power to mortgage its road may mortgage any part of it. *Pullan v. Cincinnati etc. R. Co.*, 4 Biss. (U. S.) 94.

2. *Cooley's Const. Lim.* (4th ed.) [558] 697-8; *EMINENT DOMAIN*, vol. 6, p. 530; *Dean v. Sullivan R. Co.*, 22 N. H. 321; *Blake v. Rich*, 34 N. H. 282; *Barclay v. Howell*, 6 Pet. (U. S.) 498; *Jackson v. Rutland etc. R. Co.* 25 Vt. 151; *Kellogg v. Malin*, 50 Mo. 496.

The fee may be taken only when absolutely necessary for public uses, and when a lesser estate will not suffice. *New Orleans Pac. R. Co. v. Gay*, 32 La. Ann. 471.

The condemnation of the fee in lands for railroad purposes is forbidden by the *Illinois* Constitution, art. 2, § 13.

The conversion of land taken under the right of eminent domain to uses remote from any connection with railroad uses is a misappropriation, and entitles the original owner to a writ of entry to establish his right and to recover damages for the wrongful use. *Pierce, Railroads* 508; *Proprietors etc. v. Nashua etc. R. Co.*, 104 Mass. 1.

3. *Pierce v. Emery*, 32 N. H. 484; *Coe v. Columbus etc. R. Co.*, 10 Ohio St. 372; *Miller v. Rutland etc. R. Co.*, 36 Vt. 452; *Kelly v. Alabama etc. R.*

in most jurisdictions, it is not permitted to sell without special legislative authority.¹

Where a railway company has acquired real estate by purchase it has the same right of property in it which would belong to a natural person. But in its use of land acquired by eminent domain it is limited strictly to what is necessary for the proper construction, maintenance and operation of the road.²

5. Powers as to Stock—(See also STOCK; STOCKHOLDERS).—Railroad companies are no exception to the general rule which forbids one corporation, in the absence of express authority, to

Co., 58 Ala. 489; *Yates v. Van De Bogen*, 56 N. Y. 526; *McAllister v. Plant*, 54 Miss. 106.

Where the enacting section of the charter provided that "they and their successors . . . shall be capable of purchasing, holding and conveying, any lands, tenements, goods and chattels, whatever, necessary and expedient to the objects of this incorporation"—this only authorized property to be sold or conveyed when necessary or expedient for the objects of the incorporation; it did not authorize the source from which the corporation derived its income to be sold and conveyed. *Kean v. Johnson*, 9 N. J. Eq. 401.

As to the power of a railroad company to sell the exclusive right to convey passengers and freight over a portion of its road, see *Tippecanoe Co. v. LaFayette etc. R. Co.*, 50 Ind. 85.

1. See FRANCHISES, vol. 8, pp. 634 *et seq.*; CORPORATIONS, vol. 4, p. 238; *Pierce, Railroads* 503; *Coe v. Columbus etc. R. Co.*, 10 Ohio St. 372; 75 Am. Dec. 518; *Thomas v. West Jersey etc. R. Co.*, 101 U. S. 71; *Clark v. Omaha etc. R. Co.*, 4 Neb. 458; *Stewart's Appeal*, 56 Pa. St. 413.

The estate which a railroad company acquires in land appropriated to its use may be transferred, by legislative assent, to another railroad company, and the use may extend beyond the prescribed term of the existence of the first corporation. *Miner v. New York Cent. etc. R. Co.*, 46 Hun (N. Y.) 612.

2. Thus the company may take materials such as stone, gravel, timber, etc., from the land condemned as far as may be needed for the construction of the road, but it may not sell them. *Chapin v. Sullivan R. Co.*, 39 N. H. 564; *Henry v. Dubuque etc. R. Co.*, 2 Iowa 288; *Aldrich v. Drury*, 8 R. I. 554; 5 Am. Rep. 624; *Taylor v. New York etc. R. Co.*, 38 N. J. L. 28; *Brainard v.*

Clapp, 10 Cush. (Mass.) 6; 57 Am. Dec. 74; *Pierce, Railroads*, 159.

And while it may use the timber on the right of way for constructing the road it may not appropriate it for fuel. *Preston v. Dubuque etc. R. Co.*, 11 Iowa 15.

In one case it is said the company may not use such timber even for construction. *Blake v. Rich*, 34 N. H. 282. But this decision was rendered under a peculiar statute.

In statutes concerning the right of a railroad to appropriate material on the right of way to the extent that may be necessary for the construction of the road, the word "construction" implies not only the making of the road-bed, but also its preparation and readiness for use in a safe and convenient manner. *Preston v. Dubuque etc. R. Co.*, 11 Iowa 15.

Whether or not a certain use is necessary or not is a question for the jury. *Curtis v. Eastern R. Co.*, 14 Allen (Mass.) 55. There is no burden of proof upon the company to show the necessity. *Brainard v. Clapp*, 10 Cush. (Mass.) 6; 57 Am. Dec. 74.

There are many other uses to which a railroad company cannot put its property acquired by eminent domain, while a private owner might. Thus he cannot by erecting boardings shut out the light from an adjoining proprietor, even one who has acquired no presumptive right to it. *Norton v. North London etc. R. Co.*, L. R., 9 Ch. Div. 623; 13 Ch. Div. 268. See also *Fenwick v. East London R. Co.*, L. R., 20 Eq. Cas. 544 (injunction granted to restrain erection of a noisy mill).

A railroad company cannot devote a portion of its roadway, over which it has only a right of passage, to station purposes—such as the making up of trains, distributing cars, the standing thereon of locomotives and cars laden with live stock—to the detriment of

hold stock in another corporation.¹ There seems to be no reason, however, why a railroad company may not purchase and hold shares of stock which it has issued to individuals or to public corporations,² if it is done in good faith, and the exchange is free

private residences. *Angel v. Pennsylvania R. Co.*, 38 N. J. Eq. 58; 41 N. J. Eq. 316; 26 Am. & Eng. R. Cas. 559.

1. Power to Hold Stock of Another Company.—As to corporations generally, *CORPORATIONS*, vol. 4, p. 249; *STOCK*; *STOCKHOLDERS*. As to railway corporations, *Pearson v. Concord etc. R. Co.*, 62 N. H. 537; 13 Am. & Eng. R. Cas. 102, 119, note; *Hazellhurst v. Savannah etc. R. Co.*, 43 Ga. 13; *Central R. Co. v. Collins*, Ga. 582; *Green's Brice's Ultra Vires* 91; *Pierce on Railroads* 505; *Elkins v. Camden etc. R. Co.*, 36 N. J. Eq. 5, 233; 9 Am. & Eng. R. Cas. 590, 639; *Brightley's Digest* (Pa.), vol. 1, p. 343.

See also *Burke v. Concord R. Co.*, 61 N. H. 160; 8 Am. & Eng. R. Cas. 552 (railroad has no power to form partnership with another company). A railway corporation cannot in its own name subscribe for stock or be a corporator, under the general railroad law of *New Jersey*; nor can it do so by a simulated compliance with the provisions of the law through its agents as pretended corporators and subscribers of stock. *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475.

In *Pierce on Railroads* 505, it is said that the purchase by a railroad company of the stock of other corporations when not prohibited by statute may be allowed to a limited extent and for incidental purposes; but when it involves a misappropriation of the corporate funds or is a mere speculation, or is induced by a vicious purpose, it will be enjoined at the instance of the stockholders. See also *Hodges v. New England Screw Co.*, 1 R. I. 312; 3 R. I. 9.

In *Ryan v. Leavenworth etc. R. Co.*, 21 Kan. 365, it was held that, a railroad having authority to hold real and personal estate necessary for its uses, it will be presumed that a purchase by it of the stock of a connecting road was made for corporate purposes, and it will therefore be upheld.

Authority to subscribe may be given by express statutory provisions. See *White v. Syracuse etc. R. Co.*, 14 Barb. (N. Y.) 559 (such provisions are

constitutional); *Mayor etc. of Baltimore v. Baltimore etc. R. Co.*, 21 Md. 50 (Baltimore and Ohio road authorized to acquire any interest in any connecting road, not exceeding two-fifths of its estimated cost); *Atchison etc. R. Co. v. Cochran*, 43 Kan. 225; 19 Am. St. Rep. 129; 41 Am. & Eng. R. Cas. 48.

Purchase of a Rival Road—Consolidation.—A necessary consequence of the principle of the text is that a railroad company has no power to purchase a rival road. The contract for such purpose would be void as being *ultra vires*, and also as being against public policy, since it would tend to create a monopoly. 1 *Wood's Ry. Law*, § 175; *Morgan v. Donovan*, 58 Ala. 241.

But a charter provision allowing a company to consolidate with another may authorize such a purchase. *Branch v. Jesup*, 106 U. S. 468; 9 Am. & Eng. R. Cas. 558. See also *CORPORATIONS*, vol. 4, p. 272.

Generally.—A railroad company having under its charter a right to construct a road between two places by a circuitous route and intending to apply to the legislature for authority to construct a more direct road between these places may, before such authority is obtained or any location thereunder made, make a valid contract for a sale of its stock conditioned upon the building of the latter route. *Portage Co. v. Wisconsin Cent. R. Co.*, 121 Mass. 460. See also *STOCK*.

A railroad corporation cannot, without special legislation, contract and pay interest on stock before the road is completed or any income received; and a contract to do so cannot be enforced against the capital stock of the company. *Painesville etc. R. Co. v. King*, 17 Ohio St. 534.

A railroad corporation having by its charter, power to make contracts conducive to the interest of the company, may assign its stock subscriptions, unless expressly restricted therefrom. *Downie v. Hoover*, 12 Wis. 174; *Racine Co. Bank v. Ayers*, 12 Wis. 512; *Kimball v. Spicer*, 12 Wis. 668.

2. *Chicago etc. R. Co. v. Marseilles*, 84 Ill. 145, 643 (and such sale is a

from all fraud actual or constructive, and the rights of creditors are not affected adversely thereby.¹

Authority to issue shares to the extent of its capital stock belongs to a railroad corporation as an incident to its existence, though it is usually conferred by statute.² So also a company, in the absence of special provision otherwise, has authority to guarantee the bonds of another company.³

6. Power as to Connections with Other Roads—Traffic Arrangements—(See also CARRIERS OF GOODS, vol. 2, p. 859, *et seq.*)—As a common carrier a railroad company has an undoubted right to enter into contracts for the transportation of goods or passengers; and this power is not confined to such contracts as relate only to its own lines, but extends further so as to embrace contracts for carriage to points beyond its lines.⁴ As an incident to this power

sufficient consideration to support an agreement to pay money); *State v. Smith*, 48 Vt. 266; *Pierce, Railroads* 505; *Cook, Stock and Stockholders*, § 311; *St. John v. Erie R. Co.*, 10 Blatchf. (U. S.) 271; *Clapp v. Peterson*, 104 Ill. 31 ("the doctrine that a corporation has power to purchase its own stock seems well enough settled").

Railroad companies are forbidden by statute in *New York* to purchase shares of their own stock. *New York Rev. Stat.* (7th ed.), p. 1547; *New York Sess. Laws*, 1881, ch. 468, § 12; "except so far as the same may be agreed upon in the articles of association." In *Barton v. Port Jackson etc. Plank Road Co.*, 17 Barb. (N. Y.) 397, it is held that an agreement by a plank road company to purchase its own stock is against public policy and void. And this seems to be the doctrine at common law. *Cook, Stock and Stockholders*, § 309; *In re Marseilles Extension R. etc. Co.*, L. R., 7 Ch. 161; 1 Moak's Rep. 490.

1. *Clapp v. Peterson*, 104 Ill. 26.

2. *Angell and Ames on Corp.*, § 556; *Somerset etc. R. Co. v. Cushing*, 45 Me. 524; *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 233; *Philadelphia etc. R. Co. v. Lewis*, 33 Pa. St. 33; 75 Am. Dec. 574.

As to the general power of a corporation to issue stock, the liability for an overissue, etc., see *STOCK; OFFICERS AND AGENTS (PRIVATE CORPORATIONS)*, vol. 17, p. 39; *Pierce on Railroads*, pp. 110-127; 1 Wood's Ry. Law, 37, *et seq.*

3. **Power to Guarantee Bonds of Another Company**.—*Madison etc. R. Co. v. Norwich etc. Soc.*, 24 Ind. 457;

Atchison etc. R. Co. v. Fletcher, 35 Kan. 236; 24 Am. & Eng. R. Cas. 34; *Pierce on Railroads*, p. 504; *Zabriskie v. Cleveland etc. R. Co.*, 23 How. (U. S.) 381; *Cozart v. Georgia R. etc. Co.*, 54 Ga. 379; *Arnot v. Erie R. Co.*, 5 Hun (N. Y.) 608; 67 N. Y. 315; *Connecticut Mut. L. Ins. Co. v. Cleveland etc. R. Co.*, 41 Barb. (N. Y.) 9; *East Boston etc. R. Co. v. Eastern R. Co.*, 13 Allen (Mass.) 422; *Low v. Central Pac. R. Co.*, 52 Cal. 53. It may guarantee municipal bonds issued in payment of subscriptions to its capital stock. *Chicago etc. R. Co. v. Havard*, 7 Wall. (U. S.) 392.

In leasing the road of another company it may as a part of the transaction guarantee its bonds. *Low v. Central Pac. R. Co.*, 52 Cal. 53; *Opdyke v. Pac. R. Co.*, 3 Dill. (U. S.) 55.

See also *RAILROAD SECURITIES*, vol. 19.

4. Where the power is not specifically conferred by the act of incorporation it belongs to the company by implication as necessary to the proper and profitable exercise of its enumerated powers. *Perkins v. Portland etc. R. Co.*, 47 Me. 573; 74 Am. Dec. 507; *Noyes v. Rutland etc. R. Co.*, 27 Vt. 110; *Morse v. Brainard*, 41 Vt. 550; *Packer v. Sunbury etc. R. Co.*, 19 Pa. St. 211; *Baltimore etc. Steamboat Co. v. Brown*, 54 Pa. St. 77; *Nashua Lock Co. v. Worcester etc. R. Co.*, 48 N. H. 339; *Burtis v. Buffalo etc. R. Co.*, 24 N. Y. 269; *Kessler v. New York Cent. R. Co.*, 7 Lans. (N. Y.) 63; *Cincinnati etc. R. Co. v. Pontius*, 19 Ohio St. 235; 2 Am. Rep. 391; *Grover etc. Sewing Mach. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672; 35 Am. Rep. 444; *Stewart v.*

a railroad company may enter into traffic arrangements with connecting lines for the purpose of providing through transportation over its road.¹ And where there is no actual connection it may construct and operate a branch road, stage² or steamship line to

Erie Transp. Co., 17 Minn. 372 (the whole question considered); *Wheeler v. San Francisco etc. R. Co.*, 31 Cal. 46; 89 Am. Dec. 147; *Ohio etc. R. Co. v. McCarthy*, 96 U. S. 258; *Ogdensburg etc. R. Co. v. Pratt*, 22 Wall. (U. S.) 123; *Lindley v. Richmond etc. R. Co.*, 88 N. Car. 547; 9 Am. & Eng. R. Cas. 31; *Rome R. Co. v. Sullivan*, 25 Ga. 228; *Cummins v. Dayton etc. R. Co.* (Ind. 1882), 9 Am. & Eng. R. Cas. 36; *Munhall v. Pennsylvania R. Co.*, 92 Pa. St. 150; 5 Am. & Eng. R. Cas. 337; *Napman v. People*, 19 Mich. 352; *Kerrigan v. Southern Pac. R. Co.*, 81 Cal. 250; 41 Am. & Eng. R. Cas. 28.

The doctrine announced in the text seems to be opposed nowhere except in the *Connecticut* courts. In *Hood v. New York etc. R. Co.*, 22 Conn. 1, 502, the authority of a railroad company to contract for transportation beyond its lines was denied. In *Elmore v. Naugatuck R. Co.*, 23 Conn. 471, a general clause of the charter allowed the company to contract, but it was held that neither the receiving of goods for transportation, nor a receipt given stating the goods had been so received, nor an advertisement of the general facilities of the road, was evidence of any special contract to carry beyond its terminus. In *Naugatucket R. Co. v. Waterbury Button Co.*, 24 Conn. 468, the power was specially conferred by the charter. See also *Converse v. Norwich etc. Transp. Co.*, 33 Conn. 166, where all the decisions on this subject are reviewed.

But power to make connections does not give the company authority to make a contract to extend its road beyond its charter terminus. *Union Bridge Co. v. Troy etc. R. Co.*, 7 Lans. (N. Y.) 241. See also as to authority to make connections North Branch etc. R. Co. *v. City etc. R. Co.*, 38 Pa. St. 361; *Warren etc. R. Co. v. Clarion Land Co.*, 54 Pa. St. 28.

Under a power by charter to contract with connecting roads, for their use, etc., a railroad company is authorized to accept bills drawn by a connecting road as a consideration for a change of gauge of that road. *Smead v. Indianapolis etc. R. Co.*, 11 Ind. 104.

Liability for Injury by Connecting Carrier.—The contract being a valid one renders the company liable for all injuries occasioned by its negligence and that of the connecting lines. See in addition to the cases cited above, *CARRIERS OF GOODS*, vol. 3, pp. 859, *et seq.*; *TICKETS AND FARES*, where the liability of connecting carriers is discussed. See also *Maghee v. Camden etc. R. Co.*, 45 N. Y. 514; 6 Am. Rep. 124; *Bissell v. Michigan Southern R. Co.*, 22 N. Y. 258; *Hill Mfg. Co. v. Boston etc. R. Co.*, 104 Mass. 122; 6 Am. Rep. 202; *FORWARDING MERCHANTS*, vol. 8, p. 577.

Where a statute imposes the duty of receiving goods from other lines the receiving company is not liable as partner or joint contractor. *Fort Worth etc. R. Co. v. Williams*, 77 Tex. 121; 42 Am. & Eng. R. Cas. 464.

1. Traffic Arrangements.—Division of Profits.—*Pierce on Railroads*, p. 510; *Sussex R. Co. v. Morris etc. R. Co.*, 19 N. J. Eq. 13; 20 N. J. Eq. 542; *Stewart v. Erie etc. Transp. Co.*, 17 Minn. 372; *Simpson v. Denison*, 10 Hare 51; *Midland R. Co. v. Great Western R. Co.*, 8 Ch. 841; 7 Moak's Rep. 408.

This is provided for by the English Railway act (1845), 8 Vict. ch. 20, § 88. Two roads may agree upon a division of fares by which one allows to the other part of the fares earned on its own road. Such a contract may be valid as to future extensions of the road, even such as may be authorized by subsequent legislation. *Sussex R. Co. v. Morris etc. R. Co.*, 19 N. J. Eq. 13; 20 N. J. Eq. 542; *Llanelly R. Co. v. London etc. R. Co.*, L. R., 7 H. L. 550; 13 Moak's Rep. 73.

2. It may build side-tracks to large manufacturing establishments. *Wilson v. Furness etc. R. Co.*, L. R., 9 Eq. 28; *Lydick v. Baltimore etc. R. Co.*, 17 W. Va. 427; 11 Am. & Eng. R. Cas. 336.

So also it may build a short elevated road from its terminus along a public landing. *McAlvoy's Appeal*, 107 Pa. St. 548; 20 Am. & Eng. R. Cas. 314.

It may have a stage line to convey passengers to and from its depots. *Buflit v. Troy etc. R. Co.*, 36 Barb. (N. Y.) 420; 40 N. Y. 168.

connect with another road, provided such an enterprise is not so large as to be plainly beyond the powers intended to be conferred by the charter.¹

Authority to make traffic arrangements with other roads embraces not only the power to provide for a division of the freights and fares, but also to contract for the use of one road for the carriages of the other.² But such authority cannot be so construed as to authorize the company to enter into a contract by which it practically gives up all control of its road, and in effect surrenders its franchises.³ The permanence of traffic and connection

Or it may contract with a stage line to convey their passengers, and in such case the stage line will be regarded as its agents, for whose negligence the company will be liable. *Wilson v. Chesapeake etc. R. Co.*, 21 Gratt. (Va.) 654.

1. **To Operate Steamship Lines.**—A railroad company may own and control a steamboat for the purpose of transporting its freight and passengers across navigable waters on the line and constituting a part of its route, or lying at the end of its road. *Wheeler v. San Francisco etc. R. Co.*, 31 Cal. 46; 89 Am. Dec. 147. But such a steamboat is not "railroad property" and exempt from taxation as such. *Illinois Cent. R. Co. v. Irvin*, 72 Ill. 452. See also as to purchase of a steamboat by a railway company, *Rutland etc. R. Co. v. Proctor*, 29 Vt. 93 (where contract to purchase was sustained, the defense of want of authority not being open to the parties); *Shawmut Bank v. Plattsburg etc. R. Co.*, 31 Vt. 491.

In *South Wales R. Co. v. Redmond*, 10 C. B., N. S. 675; 100 E. C. L. 674, a railway company was allowed to own and operate a steamer between Cork and Dublin, and its terminus in England. This was because "the whole object of the incorporation of the company was to connect England and Wales with the Irish Coast."

In *Gregory v. Patelutt*, 33 Beav. 595; *Hare v. London etc. R. Co.*, 2 Johns. & H. 80; *Colman v. Eastern Counties R. Co.*, 10 Beav. 1, a railway company was enjoined from investing its funds in a steamboat company. These cases, however, are clearly distinguishable from those sustaining the principle of the text.

But a company has no power to form a partnership with an individual to buy and operate a steamer on a river forming no part of its route. *Central R. etc.*

Co. v. Smith, 76 Ala. 572; 52 Am. Rep. 353; 25 Am. & Eng. R. Cas. 25.

In the case of *Pearce v. Madison etc. R. Co.*, 21 How. (U. S.) 441, two railroad corporations whose roads connected, united their business and became practically one corporation. Together they purchased a steamboat intending to run it upon a river on which one of their termini was situated. In an action upon a note given for the price, signed by the adopted name, recovery was denied, and it was held that the corporations had no authority to unite; that in the absence of express authority a railroad corporation had no authority to purchase a steamboat to operate beyond its terminus. This case is followed in *Hogland v. Hannibal etc. R. Co.*, 39 Mo. 451; *St. Joseph v. Saville*, 39 Mo. 460. It is criticised, however, in *Pierce on Railroads*, p. 510, note; *Bisseil v. Michigan Southern R. Co.*, 22 N. Y. 258, 278 (called an "extreme authority").

2. *Sussex R. Co. v. Morris etc. R. Co.*, 19 N. J. Eq. 13; 20 N. J. Eq. 542.

3. *Beach, Private Corp.*, § 408; *Ohio etc. R. Co. v. Indianapolis etc. R. Co.* (Ohio, 1866), 5 Am. L. Reg., N. S. 733; *Midland R. Co. v. Great Western R. Co.*, L. R., 8 Ch. 841; 7 Moak's Rep. 408; *Gardner v. London etc. R. Co.*, L. R., 2 Ch. 201.

To fix the charges for the transportation of passengers and freight is an exercise of the franchise by a company, and if two companies agree that both shall regulate this it is no abandonment or transfer of the franchises of either. *Columbus etc. R. Co. v. Indianapolis etc. R. Co.*, 5 McLean (U. S.) 450.

In the case of *Johnson v. Shrewsbury etc. R. Co.*, 3 DeG. M. & G. 914, a railway company agreed with the contractors that the contractors should work the line and keep the engines and rolling stock in repair at a specified

arrangements must depend upon the conditions under which they were made, and the character and terms of the contract.¹

7. Power to Contract.—(See also CORPORATIONS, vol. 4, p. 245; ULTRA VIRES).—The power of a railroad company to contract or be contracted with is a necessary incident to its existence, and so far as it relates to contracts connected with the proper construction, maintenance, and operation of the road, and not expressly prohibited, is coextensive with that of an individual.²

remuneration, and that the contract should be in force for seven years. It was held that the agreement was not of such a kind as to be enforceable by injunction to restrain the company. Whether the agreement was consistent with public policy, *quaere*.

1. Permanence of Traffic Arrangements.—In a leading case, *Boston etc. R. Co. v. Boston etc. R. Co.*, 5 Cush. (Mass.) 375, one company allowed another to use its track and made expensive arrangements to accommodate it in pursuance of its (the first company's) charter. It was held that this was not a perpetual arrangement, and that, notwithstanding the expenditures by the first company, the second might build a new track and so discontinue the use of that of the other company.

In another case it is said that the connection of the roads, being by contract a continuance of the contract, will be enforced in equity. *Androscoggin etc. R. Co. v. Androscoggin R. Co.*, 52 Me. 434.

But where an arrangement amounts to a guaranty by one company of the dividends upon the capital stock of the other, irrespective of the amount of traffic carried, it is void as being beyond corporate powers. *Simpson v. Denison*, 10 Hare 51; 16 Jur. 830. In this case there was an agreement under which one company agreed to carry the whole traffic of the other for such a "toll" as would, when added to the net profits of the second company, make up its dividend to a certain amount. A different decision was rendered in *Green Bay etc. R. Co. v. Union Steamboat Co.*, 107 U. S. 98. But in that case the powers granted to the company were much greater.

Change of Gauge.—Two railroad companies agreed to build a road from certain cities, and to connect with each other at a given place; that the charges, etc., and the meeting of the cars and through freight cars should be regulated by both companies. It was held that

an injunction would be granted to prevent one company from changing its gauge whereby the connection would be broken. *Columbus etc. R. Co. v. Indianapolis etc. R. Co.*, 5 McLean (U. S.) 450; and this case seems to state the better doctrine.

But in *Sussex R. Co. v. Morris etc. R. Co.*, 19 N. J. Eq. 13; 20 N. J. Eq. 542, it is said that a contract between railroad companies using the same gauge, to transport passengers and freight continuously over both lines does not imply a contract on the part of either company that it will not change the gauge of its road.

2. South Wales R. Co. v. Redmond, 10 C. B., N. S. 675; 100 E. C. L. 674; *Mayor etc. of Baltimore v. Baltimore etc. R. Co.*, 6 Gill (Md.) 297; 48 Am. Dec. 531; *Mayor etc. of Baltimore v. Baltimore etc. R. Co.*, 21 Md. 91; *Hamilton v. Newcastle etc. R. Co.*, 9 Ind. 359; *Frye v. Tucker*, 24 Ill. 180; *Joy v. St. Louis*, 138 U. S. 1; *Shrewsbury etc. R. Co. v. Northwestern R. Co.*, 6 H. L. Cas. 113 (where the Lord Chancellor said: "When the legislature constitutes a corporation it gives to that body *prima facie* an absolute right of contracting"); *Mayor etc. of Norwich v. Norfolk R. Co.*, 4 El. & B. 397; 82 E. C. L. 396 (may make any contract not expressly or impliedly prohibited); 1 Wood's Ry. Law, § 179; *Smith v. Nashua etc. R. Co.*, 27 N. H. 94; 59 Am. Dec. 368; *Buffit v. Troy etc. R. Co.*, 36 Barb. (N. Y.) 423; 40 N. Y. 168; *Church v. Sterling*, 16 Conn. 388.

The power of a railroad company to make contracts, in the absence of an express provision, "is implied as necessary and incidental to the express power to locate, construct and work a railroad. The power, whether expressed or implied, must, in view of the purposes and methods of such an enterprise, be allowed a liberal scope." *Pierce on Railroads* 499.

"By the weight of modern authority,

In cases of doubt the presumption is in favor of the power of the corporation, and the burden of proof to show a want of power rests upon the party attacking the validity of the contract,¹ indeed, in some English cases, it is said that in all cases the proper inquiry is whether the contract was prohibited by the charter, not whether it was permitted.² A railroad corporation differs from other corporations in that it is *quasi* public and has assumed unusual obligations, and it cannot enter into any contract whereby it is to be released from any of its obligations to the public.³

a railroad corporation independent of any express authority in its charter so to do, may, as incident to its creation and existence and as a necessity growing out of the purposes of its organization, contract generally in the necessary course of its legitimate business . . . unless prohibited or restricted by some express provision of law." Rorer on Railroads, p. 228

A grant to a railroad company of power to locate and construct a railroad, open books of subscription, etc., confers, by implication, the power to make all contracts and agreements which the execution and management of the work, and the convenience and interests of the company in the construction of the road may require, so far as the same are not forbidden by any restrictive clause. *Western Bank v. Tallman*, 17 Wis. 530.

A corporation is liable upon its contracts not in writing where it has accepted the benefits arising from them, even where the statute expressly confines its liability to written contracts. The statute must be limited to contracts wholly executory. *Foulke v. San Diego etc. R. Co.*, 51 Cal. 365. See, as to a particular case, *Tappan v. Western etc. R. Co.*, 62 Ga. 198 (railroad owned by the State).

1. *Ohio etc. R. Co. v. McCarthy*, 96 U. S. 267; *Yates v. Van De Bogert*, 56 N. Y. 526; *Morris etc. R. Co. v. Sussex etc. R. Co.*, 20 N. J. Eq. 542.

Contracts must be clearly shown to be outside of the objects of the corporation in order to be held invalid between the corporation and innocent third parties. *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331; *Pierce on Railroads* 501.

2. *Mayor etc of Norwich v. Norfolk etc. R. Co.*, 4 El. & Bl. 397; 82 E. C. L. 396, 397; *South Wales R. Co. v. Redmond*, 10 C. B., N. S. 675; 100 E. C.

L. 674; *South Yorkshire R. etc. Co. v. Great Northern R. Co.*, 9 Exch. 84; *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331; *Cary v. Cleveland etc. R. Co.*, 29 Barb. (N. Y.) 52; *Shrewsbury etc. R. Co. v. Northwestern R. Co.*, 17 Q. B. 652; 6 H. L. Cas. 113; *Taylor v. Chichester etc. R. Co.*, L. R. 2 Exch. 356.

"Corporations have at law capacity to make all contracts not expressly or impliedly prohibited, and therefore, contracts frustrating or necessarily inconsistent with the object for which the company is incorporated by an act are impliedly prohibited by it." *Erle, J., South Wales R. Co. v. Redmond*, 10 C. B., N. S. 682, 100 E. C. L. 674. It will be seen from the latter part of the quotation that the *English* rule virtually amounts to the same as that in *America*.

3. See *infra*, this title, *Legal Status of Railroads*; *Thomas v. West Jersey R. Co.*, 101 U. S. 71.

In the case of *Thomas v. West Jersey R. Co.*, 101 U. S. 71, the court by *Miller, J.*, after mentioning that there was a principle which showed clearly that the railroad company had no power to make a certain contract, said: "That principle is that where a corporation like a railroad company has granted to it by charter a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court

The general power of corporations to contract, and the effect of their contracts, has received treatment in other articles.¹ This section will be confined to a consideration of the power of such companies in relation to particular contracts.

a. CONTRACTS TO FORM POOLS.—See RAILROAD POOLS.

b. CONTRACTS CONCERNING THE LOCATION OF STATIONS.—It is a duty which railroad companies owe to the public to provide reasonable depot facilities, and contracts whose effect would be to cause a breach of this duty are void as against public policy.² Therefore contracts or conditions in deeds, the consideration or object of which is to secure the location of a depot or of the line of road at certain places with regard to private interests only are usually held to be void and of no effect.³ This is

delivered by Mr. Justice Campbell, in the case of York etc. R. Co. v. Winans, 17 How. (U. S.) 30."

Contracts Involving Breach of Duty as Carrier—Exclusive Privileges.—The rule of the text will prevent a railroad company from entering into any contract the effect of which must be a breach of its duties as a common carrier of goods and passengers. Thus, a contract giving to one person or company the exclusive privilege of transportation in their passenger trains, is illegal and void. *Sanford v. Erie R. Co.*, 2 Phila. (Pa.) 107.

So also a contract by a railroad company with certain elevators, that it will deliver grain to them exclusively is not a valid excuse to the company for refusing to deliver grain to other elevators upon the line of its way, the owners of which are not parties to the contract and to which grain has been consigned. The court in this case went on to say that a common carrier under the common law came under obligations from which he could not discharge himself by his own volition, and that much less should a railroad company be permitted to do so when it is created for the public benefit and is the recipient of extraordinary privileges. *Chicago etc. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690.

Compare *Richmond v. Dubuque etc. R. Co.*, 26 Iowa 191, in which a contract by a company that a certain elevator should have the handling "of all through grain" was upheld as being neither contrary to public policy nor involving a breach of the carrier's duty; nor was it violative of the power of Congress over interstate commerce. *Richmond v. Dubuque etc. R. Co.*, 33 Iowa 422; 40 Iowa 264; *aff'd* 19 Wall.

(U. S.) 595; *Wiggins Ferry Co. v. Chicago etc. R. Co.*, 73 Mo. 389; 5 Am. & Eng. R. Cas. 1.

1. See *CORPORATIONS*, vol. 4, p. 245; *FOREIGN CORPORATIONS*, vol. 8, p. 331, *et seq.*; *ULTRA VIRES*; *STOCK*; *RAILROAD SECURITIES*; *RAILROAD POOLS*. See also generally *Pierce on Railroads*, pp. 510. *et seq.*; 1 *Wood's Ry. Law*, § 179, *et seq.*; *Beach on Private Corp.*, § 421, *et seq.*; 1 *Rorer on Railroads*, p. 228, *et seq.*; 1 *Redfield on Ry's* (6th. ed.), 407, *et seq.*; *Marshall v. Baltimore etc. R. Co.*, 16 How. (U. S.) 314 (lobbying contract).

2. *St. Joseph etc. R. Co. v. Ryan*, 11 Kan. 602; 15 Am. Rep. 357; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Pacific R. Co. v. Seely*, 45 Mo. 212; 100 Am. Dec. 369; *Mobile etc. R. Co. v. People*, 132 Ill. 559; 42 Am. & Eng. R. Cas. 671 (this duty not affected by contract as to other stations); *Northern Pac. R. Co. v. Territory*, 3 Wash. Ter. 303; 29 Am. & Eng. R. Cas. 82 (equity will enforce the performance of this duty). Railroad companies are *quasi* public corporations, and the public have an interest in the location of their lines and depots. *Holladay v. Paterson*, 5 Oregon 177; *State v. Republican Valley R. Co.*, 17 Neb. 647; 22 Am. & Eng. R. Cas. 506; 18 Neb. 512.

3. *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Marsh v. Fairburg etc. R. Co.*, 64 Ill. 414; *Pacific R. Co. v. Seely*, 45 Mo. 212; 100 Am. Dec. 369; *Holladay v. Patterson*, 5 Oregon 177; *Currier v. Concord R. Co.*, 48 N. H. 321; *St. Joseph etc. R. Co. v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357; *St. Louis etc. R. Co. v. Mathers*, 104 Ill. 257; 9 Am. & Eng. R. Cas. 600; *Houston etc. R. Co. v. McKinney*, 55 Tex. 176; 8 Am. & Eng. R. Cas. 723; *Louisville etc. R. Co. v.*

particularly true where the object is to prevent the location of other depots in the vicinity of the one contracted for.¹

c. CONTRACTS BETWEEN RAILROADS.—Aside from the law of railroad pools and that of connecting carriers, there is little to be said in this connection. A contract between two railroad companies owning different lines, if not invalid as being *ultra vires*, is not objectionable, unless its plain purpose and object is to destroy competition and establish a monopoly of carriage between certain points.² In the interpretation and construction of such contracts

Sumner, 106 Ind. 55; 24 Am. & Eng. R. Cas. 641.

See also Snell v. Pells, 113 Ill. 145; Wooters v. International etc. R. Co., 54 Tex. 294; 4 Am. & Eng. R. Cas. 100.

So of an agreement to establish its terminus and machine shops at a certain place. Texas etc. R. Co. v. Marshall, 136 U. S. 393; 42 Am. & Eng. R. Cas. 637.

A different doctrine is maintained and such contracts are upheld in Cedar Rapids etc. R. Co. v. Spafford, 41 Iowa 292; First National Bank v. Hendrie, 49 Iowa 402; Texas etc. R. Co. v. Robards, 60 Tex. 549; Missouri Pac. R. Co. v. Tygard, 84 Mo. 263; 22 Am. & Eng. R. Cas. 54; Kansas Pac. R. Co. v. Hopkins, 18 Kan. 494; Vicksburg etc. R. Co. v. Ragsdale, 54 Miss. 200; Cumberland Valley R. Co. v. Babb, 9 Watts (Pa.) 58 (contract to locate line of road at certain place). In none of these cases, however, were there any monopoly or bribery features in the contract; and it seems that the doctrine propounded by them should govern in all similar instances. The interests of the public and of the stockholders are both to be consulted and are opposed by the directors' blinding the company not to locate depots at proper places. St. Louis etc. R. Co. v. Mathers, 71 Ill. 592. Even where the interests of neither are prejudiced, yet if the company made its power the instrument of private emolument equity will not enforce the contract. Bestor v. Mathew, 60 Ill. 138.

But a contract to pay a given sum of money to one who should present a petition to the directors of a railroad company for the location of the depot on certain land, the money to be paid on the location of the depot and the completion of the road, is not void as against public policy, unless it appear that sinister, extraneous, or corrupting influences were brought to bear on the company to superinduce the loca-

tion. Workman v. Campbell, 46 Mo. 310.

1. Williamson v. Chicago etc. R. Co., 53 Iowa 126; 26 Am. Rep. 606; St. Louis etc. R. Co. v. Mathers, 71 Ill. 592 (condition that no other depot should be erected within three miles); St. Louis etc. R. Co. v. Mathers, 104 Ill. 257; 9 Am. & Eng. R. Cas. 600; Louisville etc. R. Co. v. Sumner, 106 Ind. 55; 24 Am. & Eng. R. Cas. 641.

2. See RAILROAD POOLS, vol. 19; *infra*, this title, *Powers as to Connections with Other Roads*; RAILROAD SECURITIES; ULTRA VIRES; Currier v. Concord R. Co., 48 N. H. 321.

Two companies whose roads form a continuous line may appoint a common manager and run through trains. State v. Concord etc. R. Co., 59 N. H. 85; 13 Am. & Eng. R. Cas. 94.

Even if a railroad company owning a road forming a continuous line with that of another company, might not make arrangements for a joint ownership of locomotives to run over both their roads, yet a charter providing for the connection of the first road, "by railroad" with the farther end of the second, justifies such an arrangement. Olcott v. Tioga R. Co., 27 N. Y. 546.

In the case of Central R. Co. v. Collins, 40 Ga. 582, it is said that it is a part of the public policy of the State of Georgia, as indicated by the charter of several railroads from the seaboard to the interior, to secure a reasonable competition between those roads for public patronage. And it is contrary to that policy for one of those roads to attempt to secure a controlling interest in another. Any contract made with that view, will be set aside by a court of equity as illegal, beyond the objects of the charter, and contrary to the public policy of the State.

An agreement between two connecting railroad companies, that the one shall discontinue the use of a part of its road by which it has for a long

the usual rules of law apply; there is no practical distinction in this regard between these contracts and those of private individuals or of other corporations.¹

time been connected with a line of steamboats at tide water, which by the terms of its charter was one of its termini, and that in consideration therefor the other road shall use its influence to prevent the extension of a third road which would interfere with the business of the first one, is against public policy and void. *State v. Hartford etc. R. Co.*, 29 Conn. 538.

When the contract between two railroad companies provides that all disputes between the two shall be settled by arbitration, and one road has made an illegal misapplication of funds or profits belonging to both, with the assent of a majority of the other road, if stockholders in the latter road, not thus assenting, bring their bill to recover their share of such profits, the court will enjoin both roads, if necessary, from settling, or attempting to settle the claims made by such stockholders by arbitration. *March v. Eastern R. Co.*, 43 N. H. 515.

In *Pearson v. Concord R. Co.*, 62 N. H. 537; 13 Am. & Eng. R. Cas. 102, two railroad companies, whose lines connected with a third one, desiring to control the line of such third company, bought a controlling interest in its stock at a rate greatly in excess of the market value. They then placed a number of their own directors in the board of the third company so as to obtain the control thereof, and had such board to enter into contracts with them relative to the transportation of goods over the third company's line, and to vote the payment of certain large sums as compromises of claims preferred by the first two companies against the third one. Upon a bill for relief filed by the stockholders of the third company, it was held that although it was not shown that the contracts entered into were not fair and just, nor that the sums voted were more than were justly due, nevertheless the manner in which they had been procured constituted a fraud in law; that the company had no power to purchase the third company's stock for the purpose above indicated, and at that price; and that, therefore, the directors of the third company were incapable of serving as such, and that a trustee would be appointed by the court to manage the road.

Contract of Sale.—In *Branch v. Jesup*, 106 U. S. 468; 9 Am. & Eng. R. Cas. 558, it was held that while as a general rule a corporation cannot dispose of its franchises, nor a railroad company its road, nor purchase the road and franchises of other companies without specific legislative authority, yet in the particular case in hand, where one company had the right to construct a particular line of road with general power to purchase all kinds of property of whatever nature or kind, it might purchase from another company a road constructed upon that line, the other company having the power to sell.

1. Construction of Such Contracts.—*State v. New Orleans etc. R. Co.* (La. 1890), 7 So. Rep. 606; 43 Am. & Eng. R. Cas. 276; *Baltimore etc. R. Co. v. Brydon*, 65 Md. 198; 25 Am. & Eng. R. Cas. 287; *Railroad Companies v. Schutte*, 103 U. S. 118; 3 Am. & Eng. R. Cas. 1.

In *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468, there was a charter provision that the company might "make any lawful contract with any other railroad corporation in relation to the business of said road." It was held that the object of this permission was to enable such road to contract for the common use of so much of another road already constructed as lay within the limits of the road so chartered.

Where several railroad companies enter into an agreement by which through coupon-tickets are sold and baggage checked for the united length of their lines, each company receiving fares for the passengers it has carried, such arrangement does not constitute them partners, and renders neither liable for losses on other than its own road. *Straiton v. New York etc. R. Co.*, 2 E. D. Smith (N. Y.) 184.

See *Bartlett v. Norwich etc. R. Co.*, 33 Conn. 560, as to the construction of a contract whereby several railroad companies agreed that one of them should build a connecting road, and the others contribute a specified proportion of the expense thereof.

See also *Chicago etc. R. Co. v. New York etc. R. Co.*, 24 Fed. Rep. 516; 22 Am. & Eng. R. Cas. 265, as to construction of contract between two

d. VARIOUS OTHER CONTRACTS.—A contract by a railroad company, based upon a proper consideration, to give to a party during his life a free pass over its roads is not objectionable as being illegal or against public policy, and will be enforced in equity or damages may be recovered for a breach of it.¹ So also of an agreement between two companies by which one agrees to transport free the officers and employes of the other.² A company may lease a portion of the premises along its line to be used for refreshment rooms, and contract that all its passenger trains shall stop there for a reasonable time.³ The power of a company to make contracts for its right of way has already been noticed.⁴

A railway company may in certain cases make a contract whereby it agrees to give to a certain ferry company all its ferrying business.⁵

As to contracts for the services of physicians or attorneys see other articles.⁶

8. Power to Make Reasonable Rules and Regulations.—As a carrier of passengers a railroad company has the right and it is its duty to make and enforce all regulations necessary for the convenience

companies in which they agreed to establish a dispatch line.

Joy v. St. Louis, 138 U. S. 1; 45 Am. & Eng. R. Cas. 655, as to construction of tripartite agreement between two companies and the city for a right of way through a park of the latter.

1. Contract to Give Free Pass.—*Erie etc. R. Co. v. Douthet*, 88 Pa. St. 243; 32 Am. Rep. 451 (injuries received); *Bettridge v. Great Western R. Co.*, 3 Grant (Up. Can.) 58; *Grimes v. Minneapolis etc. R. Co.*, 37 Minn. 66; 31 Am. & Eng. R. Cas. 123. See also *Shaffer v. Lee*, 8 Barb. (N. Y.) 412.

The grant of a free pass may be to the party alone or to him and his family. *Erie etc. R. Co. v. Douthet*, 88 Pa. St. 243; 32 Am. Rep. 451; *Grimes v. Minneapolis etc. R. Co.*, 37 Minn. 66.

But receivers, it is said, have no authority to enter into a covenant to grant annual free passes in consideration of a conveyance of the right of way. *Martin v. New York etc. R. Co.*, 36 N. J. Eq. 109; 12 Am. & Eng. R. Cas. 448.

2. Niagara Falls Bridge Co. v. Great Western R. Co., 25 Up. Can., Q. B. 313.

See also *Pennsylvania Co. v. Erie etc. R. Co.*, 108 Pa. St. 621; 29 Am. & Eng. R. Cas. 549; *Knopf v. Richmond etc. R. Co.*, 85 Va. 769; 37 Am. & Eng. R. Cas. 140.

3. Contracts for Refreshment Rooms—Stoppage of Trains.—A company made such a lease and contracted that all passenger trains, except those not under

its control, should stop ten minutes. The company was a mail carrier and the Postmaster General, subsequently, under authority given him by statute, required all mail trains to stop only five minutes at stations. It was held that it was not a breach of the contract for the company to stop none of its trains ten minutes at the said station since it was beyond its power to do so. *Phillips v. Great Western R. Co.*, L. R., 7 Ch. 409; 2 Moak's Rep. 316. See also *Burnett v. Great North etc. R. Co.*, 10 App. Cas. 147; 24 Am. & Eng. R. Cas. 647; *Rigby v. Great Western R. Co.*, 14 M. & W. 811; *Flanagin v. Great Western R. Co.*, L. R., 7 Eq. 116; 1 Wood's Ry. Law, § 185.

4. Contracts Concerning the Right of Way.—*Infra*, this title, *Acquisition by Purchase*. See also *Dayton etc. R. Co. v. Lewton*, 20 Ohio St. 401.

5. Wiggins Ferry Co. v. Chicago etc. R. Co., 73 Mo. 389; 5 Am. & Eng. R. Cas. 1. Compare *Sanford v. Erie Co.*, 2 Phila. (Pa.) 107; *Chicago etc. R. Co. v. People*, 56 Ill. 365; 8 Am. Rep. 690.

6. Employment of Physicians and Attorneys.—See AGENCY, vol. 1, p. 364; OFFICERS OF PRIVATE CORPORATIONS, vol. 17, pp. 150, 151; PHYSICIANS AND SURGEONS, vol. 18, p. 434 *et seq.*; *Davis v. Memphis City R. Co.*, 22 Fed. Rep. 883; 22 Am. & Eng. R. Cas. 1 (president has power to employ attorney); *Canney v. South Pac.*

and safety of its passengers.¹ So also it may make whatever other rules and regulations may be necessary for the proper management of its road and conduct of its business,² subject in each case to the limitation that such regulations shall be not unreasonable or unnecessary, and shall be uniform in their operation.³ It may eject from its premises or accommodations all who refuse obedience, but this must be done with due regard to the safety of the person ejected;⁴ or it may decline to enter into business relations with those who disregard its regulations.⁵

R. Co., 63 Cal. 501; 12 Am. & Eng. R. Cas. 310; St. Louis etc. R. Co. v. Grove (Kan. 1888), 18 Pac. Rep. 958 (authority of general manager to employ attorney).

1. See CARRIERS OF PASSENGERS, vol. 2, p. 759, note; Chicago etc. R. Co. v. Williams, 55 Ill. 185; Gray v. Cincinnati Southern R. Co., 11 Fed. Rep. 683; 6 Am. & Eng. R. Cas. 588. See also *infra*, this title, *Expulsion of Passengers*.

2. Chicago etc. R. Co. v. People, 56 Ill. 365; 9 Am. Rep. 690; Com. v. Power, 7 Met. (Mass.) 596; Cleveland etc. R. Co. v. Bartram, 11 Ohio St. 457; Reagan v. St. Louis etc. R. Co., 93 Mo. 348.

As to regulations concerning freight and passenger charges, see FREIGHT, vol. 8, p. 900; TICKETS AND FARES.

The superintendent of a railroad depot may exercise this power to a certain extent by delegation. Com. v. Power, 7 Met. (Mass.) 596; 41 Am. Dec. 472.

It is the positive duty of a railroad company to make proper regulations for the protection of its servants. Abel v. Delaware etc. Canal Co., 103 N. Y. 581.

3. Chicago etc. R. Co. v. Williams, 55 Ill. 185; Chicago etc. R. Co. v. People, 56 Ill. 365; 9 Am. Rep. 690; West Chester etc. R. Co. v. Miles, 55 Pa. St. 209; Attorney Gen'l v. Fitchburg R. Co., 142 Mass. 40; 26 Am. & Eng. R. Cas. 54 (a rule or regulation cannot exist which impairs the obligation of the contract existing between the railroad and the State). A company cannot discriminate between persons and sell tickets to some and refuse them to others without reason. Indianapolis etc. R. Co. v. Rinard, 46 Ind. 293; Old Colony R. Co. v. Tripp, 147 Mass. 35.

It is sometimes said that the question as to whether any particular regulation is reasonable is for the jury. Brown v. Memphis etc. R.

Co., 4 Fed. Rep. 37; Com. v. Power, 7 Met. (Mass.) 596; 41 Am. Dec. 472, note; CARRIERS OF PASSENGERS, vol. 2, p. 759 and cases cited. But the correctness of this may well be doubted. See Louisville etc. R. Co. v. Fleming, 14 Lea (Tenn.) 128; 18 Am. & Eng. R. Cas. 347; Smith v. Wabash etc. R. Co., 92 Mo. 359; 31 Am. & Eng. R. Cas. 331; South Florida R. Co. v. Rhoads, 25 Fla. 40; 37 Am. & Eng. R. Cas. 100; Vedder v. Fellows, 20 N. Y. 127; Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420, where the direct contrary is held. See also QUESTIONS OF LAW AND FACT.

4. Landrigan v. State, 31 Ark. 50; 25 Am. Rep. 547; Marquette v. Chicago etc. R. Co., 33 Iowa 562; Harris v. Stevens, 31 Vt. 79; 73 Am. Dec. 337; Texas etc. R. Co. v. Pearle (Tex. 1885), 26 Am. & Eng. R. Cas. 195.

See also *infra*, this title, *Expulsion of Passengers*.

One who desires to take passage upon the cars must exercise his right to enter and remain in the station-house in conformity with the due and reasonable regulations of the company as to his conduct while there; and he cannot exercise it until a reasonable time next prior to the departure of the train on which he intends to go. What is such a reasonable time depends upon the circumstances of each particular case. Harris v. Stevens, 31 Vt. 79; 73 Am. Dec. 337.

Effect of Failure to Comply with Regulations.—A failure by a passenger to comply with the reasonable rules and regulations may constitute such contributory negligence as to relieve the company from liability for injuries received. See CONTRIBUTORY NEGLIGENCE, vol. 4, p. 50, *et seq.*; Eaton v. Delaware etc. R. Co., 57 N. Y. 383; 15 Am. Rep. 513; Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21.

5. See CARRIERS OF GOODS, vol. 2, p. 787, *et seq.*

It is no evidence of the waiver of any rule that the employes of the company were accustomed to act in disregard of it unless the officer charged with its enforcement was aware of such custom.¹

Passengers and other persons avail themselves of the accommodations offered by railroads subject to these rules and regulations and must inform themselves of them and conform to them.²

Instances of such regulations might be multiplied.³

1. *O'Neill v. Keokuk etc. R. Co.*, 45 Iowa 546; *Prince v. International etc. R. Co.*, 64 Tex. 144; 21 Am. & Eng. R. Cas. 152; *Hobbs v. Texas etc. R. Co.*, 49 Ark. 357; 34 Am. & Eng. R. Cas. 268.

Compare *Britton v. Atlanta etc. R. Co.*, 88 N. Car. 536; 18 Am. & Eng. R. Cas. 391.

The company is not bound by a conductor's agreement to let a passenger off at a station at which the published regulations of the company do not allow the train to stop. *Ohio etc. R. Co. v. Hatton*, 60 Ind. 12; *Pittsburg etc. R. Co. v. Nuzum*, 60 Ind. 533.

2. *Louisville etc. R. Co. v. Fleming*, 14 Lea (Tenn.) 128; 18 Am. & Eng. R. Cas. 348; *McRae v. Wilmington etc. R. Co.*, 88 N. Car. 526; 18 Am. & Eng. R. Cas. 316; *Little Rock etc. R. Co. v. Miles*, 40 Ark. 298; 13 Am. & Eng. R. Cas. 10; *Abend v. Terre Haute etc. R. Co.*, 111 Ill. 202; 17 Am. & Eng. R. Cas. 614 (person riding in engine cab contrary to rules); *Alabama etc. R. Co. v. Hawk*, 72 Ala. 112; 18 Am. & Eng. R. Cas. 195 (passenger on platform).

The rules must be so published that all persons connected with the road, whether passengers or servants, may easily inform themselves of them. Otherwise no one can be bound for violation of a regulation of which he was ignorant. *St. Joseph etc. R. Co. v. Wheeler*, 35 Kan. 185; 26 Am. & Eng. R. Cas. 173; *Fay v. Minneapolis etc. R. Co.*, 30 Minn. 231; 11 Am. & Eng. R. Cas. 193; *Burlington etc. R. Co. v. Rose*, 11 Neb. 177; 1 Am. & Eng. R. Cas. 153; *Lake Shore etc. R. Co. v. Brown*, 123 Ill. 162; 31 Am. & Eng. R. Cas. 61; *McGee v. Missouri Pac. R. Co.*, 92 Mo. 208; 38 Am. & Eng. R. Cas. 1; *Trotlinger v. East Tennessee etc. R. Co.*, 11 Lea (Tenn.) 533; 13 Am. & Eng. R. Cas. 49; *Pennsylvania R. Co. v. Spicker*, 105 Pa. St. 142; 23 Am. & Eng. R. Cas. 672.

There is no irrebuttable presumption

that a passenger is informed of the rules of the company. *Lake Shore etc. R. Co. v. Rosenzwing*, 113 Pa. St. 519; 26 Am. & Eng. R. Cas. 489.

3. **Instances.**—As to regulations concerning freight or passenger charges, see **FREIGHT**, vol. 8, p. 200; **TICKETS AND FARES**. As to regulations concerning stations, see **STATIONS**.

The following are regulations which have been held reasonable and valid:

That passengers shall not drum for custom for hotels while on the train. *Texas etc. R. Co. v. Pearle* (Tex. 1885), 26 Am. & Eng. Cas. 195, note.

That hackmen, peddlers, expressmen, and loafers shall not enter a passenger room at the station. *Summit v. State*, 8 Lea (Tenn.) 413; 41 Am. Rep. 637; 9 Am. & Eng. R. Cas. 302.

That passengers shall not stand on the platform while the train is in motion. *Alabama etc. R. Co. v. Hawk*, 72 Ala. 112; 18 Am. & Eng. R. Cas. 195; *Wills v. Lynn etc. R. Co.*, 129 Mass. 35; 2 Am. & Eng. R. Cas. 27.

That persons hauling freight shall receive freight from the platform and shall not enter the warehouse, and that persons transacting their business with the company shall do so over a counter. *Donovan v. Texas etc. R. Co.*, 64 Tex. 519; 29 Am. & Eng. R. Cas. 320.

That various passenger trains shall stop only at certain stations. *Atchison etc. R. Co. v. Grants*, 38 Kan. 608; 34 Am. & Eng. R. Cas. 200; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 333; 3 Am. & Eng. R. Cas. 478.

The company may prescribe conditions upon which passengers shall be allowed to ride upon freight trains. *Cleveland etc. R. Co. v. Bartram*, 11 Ohio St. 457; *Burlington etc. R. Co. v. Rose*, 11 Neb. 177; 1 Am. & Eng. R. Cas. 253. But a regulation is not reasonable which, while allowing passengers to travel on freight trains, affords them no opportunity to procure tickets except at such hours as would make it more

9. Miscellaneous Powers.—If its charter does not forbid, a railroad company may become a joint owner of a ferry with the same rights as a natural person;¹ and where its road forms with that of another company a continuous line, the two companies may

expeditious to travel by the passenger trains. *Evans v. Memphis etc. R. Co.*, 56 Ala. 246; 28 Am. Rep. 771; *St. Louis etc. R. Co. v. Myrtle*, 51 Ind. 566.

The company may divide passengers and freight over their road into classes, but their charges must be uniform upon all persons and freight embraced in the several classes. *Chicago etc. R. Co. v. Parks*, 18 Ill. 468; 16 Am. Dec. 562.

A company may set apart a certain car as a "ladies' car" and may authorize its employes to exclude from such car men traveling without female company. *Peck v. New York etc. R. Co.*, 70 N. Y. 587; *Bass v. Chicago etc. R. Co.*, 36 Wis. 450; 17 Am. Rep. 495.

But a regulation that the company will not be responsible for baggage unless fully addressed with the name and destination of the owner is unreasonable, and not enforceable. *Cutler v. North London R. Co.*, 16 Q. B. Div. 64; 31 Am. & Eng. R. Cas. 105.

Nor is a regulation a reasonable one which prohibits passengers from wearing the uniform cap of a rival line. *South Florida R. Co. v. Rhodes*, 25 Fla. 40; 37 Am. & Eng. R. Cas. 100.

A regulation by a company which has five passenger stations within the corporate limits of a city, that tickets shall be sold only to the station which forms the terminus of the road, and that baggage shall be checked only to that station, though the other stations are regular stopping places for passenger trains, is unreasonable and void as a matter of law, even though it was made for the purpose of preventing the transfer of passengers and baggage to a rival road. *Pittsburgh etc. R. Co. v. Lyon*, 123 Pa. St. 140; 37 Am. & Eng. R. Cas. 231.

Discrimination on Account of Color.—In the case of *West Chester etc. R. Co. v. Miles*, 55 Pa. St. 209; 93 Am. Dec. 744, it is said that there is such a natural, legal, and customary difference between the white and black races, that their separation in a public conveyance may be the subject of a sound regulation to secure order, promote comfort, preserve the peace, and maintain the rights of both carriers

and passengers. And this seems to be the doctrine generally, but only in cases where accommodations equally good are afforded to each class of passengers. *Houck v. Southern Pac. R. Co.*, 38 Fed. Rep. 226; *Heard v. Georgia etc. R. Co.*, 1 Interst. Com. Rep. 428; *Logwood v. Memphis etc. R. Co.*, 23 Fed. Rep. 318; 21 Am. & Eng. R. Cas. 256; *Chesapeake etc. R. Co. v. Wells*, 85 Tenn. 613; 31 Am. & Eng. R. Cas. 111; *Britton v. Atlanta etc. R. Co.*, 88 N. Car. 536; 18 Am. & Eng. R. Cas. 391; *Civil Rights Bill*, 1 Hughes (U. S.) 541; *Murphy v. Western etc. R. Co.*, 23 Fed. Rep. 637; 21 Am. & Eng. R. Cas. 258; *Green v. Bridgeton (U. S. 1879)*, 9 Cent. L. J. 206. See also *Day v. Owen*, 5 Mich. 520, and *Gaines v. McCandless*, 4 Phila. (Pa.) 255 (decided prior to adoption of 14th Amendment).

Compare Chicago etc. R. Co. v. Williams, 55 Ill. 185; *Gray v. Cincinnati Southern R. Co.*, 11 Fed. Rep. 683; *Coger v. Northwest etc. Packet Co.*, 37 Iowa 145.

In *Washington etc. R. Co. v. Brown*, 17 Wall. (U. S.) 450, such a regulation was held invalid because the road was operated under a statute which forbade such discrimination.

In *Hall v. DeCuir*, 95 U. S. 485, a statute providing for a similar regulation was held invalid as infringing upon the congressional power over interstate commerce.

In some cases, statutes have been passed forbidding the enforcement of such regulations. *Central R. Co. v. Green*, 86 Pa. St. 421; *Washington etc. R. Co. v. Brown*, 17 Wall. (U. S.) 450.

In other cases, it has been provided that such regulations shall be enforced, and that separate coaches shall be provided. *Louisville etc. R. Co. v. State*, 66 Miss. 662; aff'd 133 U. S. 587; 41 Am. & Eng. R. Cas. 46; *Alabama Acts 1890-91*, No. 185, p. 412; *Arkansas Acts 1891*, ch. 17, p. 15; *Louisiana Acts 1890*, No. 111, p. 152; *Tennessee Acts 1891*, ch. 52, p. 135; *Gen. Laws Texas (1891)*, ch. 41, p. 44.

1. *Hackett v. Multnomah R. Co.*, 12 Oregon 124; 53 Am. Rep. 327 (and it

be joint owners of all the rolling stock used on both roads.¹ It may in certain cases carry on an express business, to the exclusion of all other parties.² If the charter does not forbid, it may dedicate for a public highway land which it has taken by eminent domain.³

The power to own and operate a canal does not belong to railroad companies unless conferred by express grant; it cannot exist by implication.⁴

A railroad company has no implied power to lend its funds or credit to aid in the construction of another railroad or similar enterprise; such power is not incidental to its authority to construct and operate its own road, but is entirely foreign to the objects and purposes of its incorporation.⁵ The power to do so may, however, belong to it by statute.⁶ A railroad company

may compel an account for its share of its earnings).

A railway company owning boats which it is bound to supply to a ferry may, when the boats are not otherwise needed, use them for excursions to places not mentioned in the acts. *Forrest v. Manchester etc. R. Co.*, 30 Beav. 40.

1. *Olcott v. Tioga R. Co.*, 40 Barb. (N. Y.) 179; 27 N. Y. 546; 84 Am. Dec. 298. The power exists irrespective of a statute authorizing the connection of the lines.

2. *Sargent v. Boston etc. R. Co.*, 115 Mass. 416. And this notwithstanding a statute requiring every railroad to give all persons or companies reasonable and equal terms and facilities for transportation, etc.

Upon this immediate question there has been considerable conflict of authority. The case of *St. Louis etc. R. Co. v. Southern Express Co.*, 108 U. S. 24; 23 Am. & Eng. R. Cas. 545, supports the doctrine of the text in holding that a railroad company is not bound to afford facilities to express companies. But see this subject treated in *EXPRESS COMPANIES*, vol. 7, p. 542.

3. But only in connection with the owners of the fee. *Green v. Canaan*, 29 Conn. 157.

4. *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337; 80 Am. Dec. 526.

And a railroad company has no power to improve the navigation of a stream merely because it has extensive wharves upon it whose business is decreasing owing to lack of such improvement in the stream. *Munt v. Shrewsbury etc. R. Co.*, 13 Beav. 1.

5. **Authority to Aid Other Enterprises—Loan of Corporate Funds.**—*East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775; 73 E. C. L. 775 (no authority to assist in securing an act of Parliament to extend the line of road of another company); *McGregor v. Dover etc. R. Co.*, 18 Q. B. Div. 618; 83 E. C. L. 618 (same as preceding); *Davis v. Old Colony R. Co.*, 131 Mass. 258; 41 Am. Rep. 221 (no authority to assist a musical company); 1 *Wood's Ry. Law*, § 176; *Mannsell v. Midland etc. R. Co.*, 1 H. & N. 130 (assisting bill through Parliament); *Zabriskie v. Cleveland etc. R. Co.*, 23 How. (U. S.) 381.

See also *ULTRA VIRES*; *Caledonian etc. R. Co. v. Helensburgh Trustees*, 39 Eng. L. & Eq. 28.

Therefore a corporation created to construct a railroad between certain points will be enjoined from using its funds or pledging its credit for the purpose of extending its road beyond such limits. *Stevens v. Rutland etc. R. Co.* 29 Vt. 545.

A general corporate franchise to a railroad company has been construed to authorize it to lend its surplus funds and to recover the same by action. *North Carolina R. Co. v. Moore*, 70 N. Car. 6.

6. **To Guaranty Bonds of Other Railroads.**—Cases in which such authority has been expressly given are *Connecticut Mut. L. Ins. Co. v. Cleveland etc. R. Co.*, 41 Barb. (N. Y.) 9; 26 How. Pr. (N. Y.) 225; *Mayor etc. of Baltimore v. Baltimore etc. R. Co.*, 21 Md. 50; *Smead v. Indianapolis etc. R. Co.*, 11 Ind. 104; *Madison etc. R. Co. v. Norwich etc. Soc.*, 24 Ind. 457.

may have authority to do various other things connected with its business; such, for example, as maintaining restaurants for passengers,¹ machines for public weighing at its stations;² it may erect telegraph lines along its route,³ and grant exclusive privileges to a telegraph company under certain circumstances;⁴ and make other arrangements for the proper carrying on of its business.⁵

See also *East Boston etc. R. Co. v. Eastern R. Co.*, 13 Allen (Mass.) 422; *Arnot v. Erie R. Co.*, 5 Hun (N. Y.) 608; *aff'd* 67 N. Y. 315 (question not decided); *Cozart v. Georgia R. etc. Co.*, 54 Ga. 379; *Chicago etc. R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Pierce, Railroads* 504. In taking the lease of the road of another company it may as a part of the transaction guaranty such company's bonds. *Low v. Central Pac. R. Co.*, 52 Cal. 53; *Opdyke v. Pacific R. Co.*, 3 Dill. (U. S.) 55.

1. **Restaurants.**—*Flantsgan v. Great Western R. Co.*, L. R., 7 Eq. 116.

2. *London etc. R. Co. v. Price*, 11 Q. B. Div. 485; 13 Am. & Eng. R. Cas. 128.

3. In *Prather v. Western Union Tel. Co.*, 89 Ind. 501; 14 Am. & Eng. R. Cas. 1, the railroad company was expressly authorized to appropriate the fee of its right of way sixty feet in width. It was held that it might construct, within the limits of the way (sixty feet), a telegraph line.

In *Western Union Tel. Co. v. Rich*, 19 Kan. 516; 27 Am. Rep. 159, it was held that a railroad company might for its own use in operating its line construct a telegraph line along and upon its right of way; and in so doing might remove trees upon the right of way if necessary without becoming liable for extra damages. See also *St. Joseph etc. R. Co. v. Dryden*, 11 Kan. 186.

If such a line be built by the railroad company and another party at their joint expense and for their joint use the latter only is liable for the damages caused by the additional burden upon the easement held by the company. *Western Union Tel. Co. v. Rich*, 19 Kan. 516; 27 Am. Rep. 159.

4. A contract by a railroad company with a telegraph company for such exclusive rights is not against public policy as creating a monopoly and discouraging competition so far as it excludes competitors from the line of poles occupied by the telegraph com-

pany. And if the railroad company authorizes any other company to erect another line equity will enjoin the placing of wires upon such poles. *Western Union Tel. Co. v. Chicago etc. R. Co.*, 86 Ill. 246; 29 Am. Rep. 28. The same view is upheld in *Western Union R. Co. v. Atlantic etc. R. Co.*, 7 Biss. (U. S.) 367; *Beach on Private Corp.*, § 405.

But in *Western Union Tel. Co. v. Burlington etc. R. Co.*, 3 McCrary (U. S.) 130, it is said that it is not competent for a railroad company to grant a single telegraph company the exclusive right to a line of telegraph along its right of way; that a contract with such object is against public policy and void.

See also *New Orleans etc. R. Co. v. Southern etc. Tel. Co.*, 53 Ala. 211.

5. A railroad company may subscribe to secure the permanent location of a State fair upon its line. *State Board v. Citizens' St. R. Co.*, 47 Ind. 407; 17 Am. Rep. 702.

It may out of its funds give gratuities to the employés or directors. *Beach on Private Corp.*, § 405; *Hutton v. West Cork R. Co.*, 23 Ch. Div. 654.

It may offer a reward "for the arrest with proof to convict, of any person for the malicious obstruction of" its tracks, and such offer is binding upon it. *Central R. etc. Co. v. Cheatham*, 85 Ala. 292; 37 Am. & Eng. R. Cas. 282.

It may have a line of wagons to cart freight to and from its depots. *Attorney Gen'l v. Grand Trunk R. Co.*, 16 Dec. Des. Trib. (L. C.) 9; *Beach on Private Corp.*, § 405. So of a stage line for passengers to and from its depots. *Buffitt v. Troy etc. R. Co.*, 36 Barb. (N. Y.) 420; 40 N. Y. 168; and it may arrange with an omnibus line as to the carriage of its patrons to and from stations; such arrangements are exempt from municipal interference. *Napman v. People*, 19 Mich. 352.

As incident to the power to conduct its business the company may compromise disputes and release a part of a doubtful claim in order to secure the

In addition to those enumerated, a railroad company possesses usually all those minor powers which belong to corporations generally. These have already been detailed.¹

VI. LOCATION—1. Power of the Company to Choose.—In some instances the exact location of the railroad is prescribed by the charter of the company;² in others only the termini and general route are so prescribed, the determination of details being left to the discretion of the company;³ while in still other instances the determination of the general and particular location is left entirely to the company, subject only to the approval of certain public authorities.⁴ When such discretion is allowed to the

residue. *Philadelphia etc. R. Co. v. Hickman*, 28 Pa. St. 318.

1. See CORPORATIONS, vol. 4, p. 248; FOREIGN CORPORATIONS, vol. 8, p. 331, *et seq.*; OFFICERS AND AGENTS, (PRIVATE CORPORATIONS), vol. 17, pp. 87, 135; ULTRA VIRES; BRIDGES, vol. 2, p. 550.

2. An instance is seen in *In re Coney Island R. Co.*, 12 Hun (N. Y.) 451, where it was held that the particular location by the legislature dispensed with the notice of the location of the route required under the general railroad law.

The charter constitutes a contract between the corporation and a subscriber to its capital stock; and any material departure from the points designated in the charter for the location of the road, is a violation of the charter, for which the franchise of the corporation may be seized upon *quo warranto*, unless the legislature has waived the right of the State to seize the franchise, by acts legalizing the violation of the charter. *Mississippi etc. R. Co. v. Cross*, 20 Ark. 443.

In *Louisiana* the laws regulating the appropriation of land for railroads do not make it the province of the jury to determine the route of the road. *New Orleans etc. R. Co. v. Robertson*, 34 La. Ann. 865.

3. Thus in *Boston Water Power Co. v. Boston etc. R. Co.*, 23 Pick. (Mass.) 360, the charter authorized the company to construct a railroad "in or near the city of Boston and thence to any part of the town of W, in such manner and form as they should deem convenient."

In *Wisconsin* a general railroad act conferred authority to change the routes of railroads, but it was held to be confined to a change of route, not of termini. *Attorney Gen'l v. West Wisconsin R. Co.*, 36 Wis. 466. And this

is by far the most usual. See *Boston etc. R. Co. v. Midland R. Co.*, 1 Gray (Mass.) 341; *Com. v. Franklin Canal Co.*, 21 Pa. St. 117; *Parke's Appeal*, 64 Pa. St. 137; *Norton v. Wallkill Valley etc. R. Co.*, 61 Barb. (N. Y.) 476; 63 Barb. (N. Y.) 77.

All railroad charters which do not express the contrary must be taken to allow the exercise of such discretion in the location of the route as is incident to an ordinary practical survey of the same, made with reference to the nature of the country, etc. *Southern Minn. R. Co. v. Stoddard*, 6 Minn. 150.

When the legislature authorizes the construction of a railroad between two designated points, no intermediate point being named, and there are routes between said points equally feasible, that which is most direct may be deemed to have been contemplated; but where there is a difference in the feasibility of the routes, a reasonable discretion must be allowed in the selection of that which is to be followed. *Newcastle etc. R. Co. v. Peru etc. R. Co.*, 3 Ind. 464.

4. *Massachusetts* St. of 1874, ch. 372, §§ 23-31 authorized persons incorporating themselves for the purpose, to construct a railroad upon submitting a map and profile of the proposed route to the selectmen of any town and to the mayor and aldermen of any city through which the road passed, and agreeing with them as to the route in that town or city. *Boston etc. R. Co. v. Lowell etc. R. Co.*, 124 Mass. 368. See also *Williams v. Hartford etc. R. Co.*, 13 Conn. 397.

In *Cleveland etc. R. Co. v. Speer*, 66 Pa. St. 326; 94 Am. Dec. 84, the company were authorized to build their road by the most direct and least expensive route; it was held that after the location and construction of the road were

company, it is not to be abused, and it cannot be exercised to build a road entirely different from that intended by the charter;¹ but neither is the exercise of it to be disturbed, unless there is a plain case of error or abuse.² Having once exercised this discretion it is

complete the exercise of the discretion could not be impeached by a private individual.

In *Frankfort etc. Turnp. Co. v. Philadelphia etc. R. Co.*, 54 Pa. St. 345; 93 Am. Dec. 708, it is said that in the absence of any charter provisions the company may locate its road and stations on such route and at such points as, in its judgment, will be beneficial to its own and the public's interest.

In *Com. v. Crosscut R. Co.*, 53 Pa. St. 62, authority to construct a road "to connect with any railroad constructed or to be constructed, at any point in the northern boundary" of two counties, was held to authorize the termination of the road at any point of the boundary named and not to limit the terminus to another road.

In **New York**.—Under the General Railroad Act, any person aggrieved by the proposed location of the road over or through his land, may apply to a justice of the supreme court for an appointment of commissioners. These commissioners act in each county, and it is their duty to examine the route proposed and to affirm or alter it as may best subserve the interests of the parties concerned and the public. Their power is not restricted to that portion of the route which lies within the bounds of the land of the party procuring their appointments, but any portion of the route within the limits of their county may be altered by them to obviate such objections of the party aggrieved as they may deem well founded; but their alteration must not disturb the continuity of the line, or so change the proposed route as to leave it disconnected at either end with the other portion, thereby abridging or interrupting the road. There is but one board of commissioners for each county, and when their work is done, the route through the county is settled. *People v. Tubbs*, 59 Barb. (N. Y.) 401; *aff'd*, 49 N. Y. 356; *In re Hartman*, 9 Abb. Pr., N. S. (N. Y.) 124; *Norton v. Wallkill Valley R. Co.*, 61 Barb. (N. Y.) 470.

No person is authorized to apply for the appointment of commissioners, except one whose lands have not been acquired by the company. He must

feel himself aggrieved by the proposed location over his land, and should set forth his objections to the route designated in his petition. *People v. Tubbs*, 59 Barb. (N. Y.) 401; *aff'd*, 49 N. Y. 356.

1. Thus where the authority to the company was to build a road between certain points "by such route as the said company shall deem most expedient and advantageous, it was held that it was not intended that the company should regard their own advantage but the advantage of the route as a route between the points prescribed. *Com. v. Franklin Canal Co.*, 21 Pa. St. 117. See also *Brigham v. Agricultural Branch R. Co.*, 1 Allen (Mass.) 316; *Boston etc. R. Co. v. Midland R. Co.*, 1 Gray (Mass.) 340.

An injunction will lie to prevent a contemplated abuse of this discretion. *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; 32 N. J. Eq. 755.

Such a discretion cannot authorize the construction of the road in a different manner from that intended. *Boston etc. R. Co. v. Lowell etc. R. Co.*, 124 Mass. 368.

Nor can a company use a granted right of way for a road running in a different direction from the one contemplated in the grant. *Crosbie v. Chicago etc. R. Co.*, 62 Iowa 189; 14 Am. & Eng. R. Cas. 463.

2. *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646; *New York Cent. etc. R. Co. v. People*, 12 Hun (N. Y.) 195; 74 N. Y. 302 (election as to mode of crossing a highway when exercised by company in good faith, not reviewable); *Cleveland etc. R. Co. v. Speer*, 56 Pa. St. 326; 94 Am. Dec. 84 (location not reviewable after road is built); *Parke's Appeal*, 64 Pa. St. 137; *Struthers v. Dunkirk etc. R. Co.*, 87 Pa. St. 282.

Under a charter which fixes one terminus of a railroad at or near a certain point, a large discretion is conferred upon the railroad company in locating their road, the exercise of which will not be revised by the court unless they have clearly exceeded its just limits, or acted in bad faith; and where a charter authorizes a railroad company to extend, locate, construct

said that the power of the company is exhausted, and it cannot change the location without specific legislative authority,¹ and

and maintain a railroad "from a point at or near the present terminus of its track in Fall River in a southerly direction to the line of the State of Rhode Island," a location starting at a point, 2,475 feet, by the line of the railroad, northerly from the termination of the old track, is authorized. *Fall River Iron Works Co. v. Old Colony etc. R. Co.*, 5 Allen (Mass.) 221.

Authority to "Extend" the Road.—A legislative grant of authority to "extend" the road contemplates that one terminus shall remain the same, and does not authorize the construction of an independent road. *Savannah etc. R. Co. v. Shiels*, 33 Ga. 601.

Authority to extend and unite with any other railroad in the State confers a general authority to extend to any other road within the prescribed limits. *Belleville R. Co. v. Gregory*, 15 Ill. 20.

Temporary Location or Right of Way.—Where a railroad company is authorized by law, only "to enter upon any land to survey, lay down, and construct its road;" to appropriate land for "necessary side tracks," and "a right of way over adjacent lands sufficient to enable it to construct and repair its road," and such company has located, and is engaged in the construction of its permanent main road along the north side of a town, it is not authorized to appropriate a temporary right of way, for three years, along the south side of the town, to be used as a substitute for the main track while the same is in course of construction along the north side of the town. *Currier v. Marietta etc. R. Co.*, 11 Ohio St. 228.

1. Power to Change Location.—It is an ancient rule that "if a man once determines his election, it shall be determined forever." Comyn's Dig., Election, c. 2. See *Little Miami R. Co. v. Naylor*, 2 Ohio St. 236; 59 Am. Dec. 667; *Mason v. Brooklyn etc. R. Co.*, 35 Barb. (N. Y.) 373; *People v. New York etc. R. Co.*, 45 Barb. (N. Y.) 73; aff'd 3 Abb. App. Dec. (N. Y.) 220; *Hudson etc. Canal Co. v. New York etc. R. Co.*, 9 Paige (N. Y.) 323; *Turnpike Road Co. v. Hosmer*, 12 Conn. 361; *Morris etc. R. Co. v. Central R. Co.*, 31 N. J. L. 205; *Brigham v. Agricultural Branch R. Co.*, 1 Allen (Mass.) 316; *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722; *Neal v. Pittsburgh etc. R.*

Co., 2 Grant's Cas. (Pa.) 137 (though they may make experimental surveys at pleasure).

Even where the act of incorporation gave express authority "to vary the route and change the location after the first selection had been made:" 1. Whenever a better and cheaper route could be had; and, 2. Whenever any obstacle to continue said location was found, either by difficulty of construction or of procuring right of way at a reasonable cost, authority was not thereby conferred upon the corporation to relocate their road, after completing it upon the first location, and to take private property for the uses of the road. *Moorhead v. Little Miami R. Co.*, 17 Ohio 340.

Where a petition for a private railroad has been granted, and a survey accompanies the petition, and where the courses, distances, grades, and the like are laid down on draughts that are put on file, if, upon the proposed plan, a view has been granted and damages assessed, the location cannot be changed except upon a new petition. *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722.

The power to lay double tracks is not exhausted by the laying of one set, and may be subsequently exercised. *Philadelphia etc. R. Co. v. Williams*, 54 Pa. St. 103; *People's Pass. R. Co. v. Baldwin*, 37 Leg. Int. (Pa.) 424.

What Constitutes an Exercise of the Right to Choose Location.—In the case of *Appeal of Western Pa. R. Co.*, 99 Pa. St. 155; 4 Am. & Eng. R. Cas. 191, a company, authorized by its charter to construct a railroad from an incorporated city to a certain point, accepted an ordinance of such city granting it a right of way to a certain point therein. It then built its track from that point, and established there its freight and passenger depots. There was no other act on its part indicating an intention to fix its terminus at that point. The court held that the power imposed in the company to build its road from that city, authorized it to commence its road at any point within it, and that its power to locate its terminus had not been exhausted, and it might subsequently extend its line to a point beyond where these depots were located.

this authority, when granted, is to be construed strictly.¹ This rule, however, has been variously modified and restricted, and in some cases even denied.² The power of the company to select

A executed a writing with the C. & O. road professing to convey for valuable consideration certain lots through which the company's road was expected to be built, and containing a clause that such grant was on the condition that the property should revert to the grantor, his heirs or assigns, in case it should ever cease to be used for railroad purposes; containing also a covenant that A should have leave to connect a single branch with the road at a point near his hotel, and that the company should erect lawful fences, etc. Such a writing does not constitute a contract on the part of the company to build its road, along and through such lots, which can be enforced by a bill for specific performance. Such a contract as well as the law, contemplates the right of a company to change its route before being built and to abandon it afterwards, and if the complainant is injured thereby his only remedy is by an action at law. *Hoard v. Chesapeake etc. R. Co.*, 123 U. S. 222. See also *Morrill v. Wabash etc. R. Co.*, 96 Mo. 174; 36 Am. & Eng. R. Cas. 425.

Effect of a Change of Location.—If a railroad company has received from individuals or municipalities donations of land or of money, or other assistance, and in consideration thereof has engaged to locate its road through certain points, and grant certain privileges in connection with the road, it cannot change its location without making due compensation to such parties. *Chapman v. Mad River etc. R. Co.*, 6 Ohio St. 119; **MUNICIPAL SECURITIES**, vol. 15, p. 1295, *et seq.* Therefore a municipal subscription is invalidated if the location, on the strength of which it was given, is changed. *Curry v. Decatur Co.*, 61 Iowa 71; 13 Am. & Eng. R. Cas. 80; *Saginaw etc. R. Co. v. Chappell*, 56 Mich. 190; 22 Am. & Eng. R. Cas. 16. See also *Braddock v. Philadelphia etc. R. Co.*, 45 N. J. L. 353; 16 Am. & Eng. R. Cas. 436; *Montgomery etc. R. Co. v. Matthews*, 77 Ala. 375; 24 Am. & Eng. R. Cas. 9.

And a note given to aid in the construction of a road cannot be recovered upon, when the road is constructed along a different route from that con-

templated when the note was given, unless the assent of the maker to the change of location can be shown. *Toledo etc. R. Co. v. Lamphear*, 54 Mich. 575; 20 Am. & Eng. R. Cas. 43; *Miller v. Gulf etc. R. Co.*, 65 Tex. 659; 24 Am. & Eng. R. Cas. 158. See also **MUNICIPAL SECURITIES**, vol. 15, p. 1295; **STOCKHOLDERS**.

A company having begun proceedings for the condemnation of land, if it changes its route and discontinues them, must pay all the costs growing out of the suit. *North Missouri R. Co. v. Reynal*, 25 Mo. 534; *Drath v. Burlington etc. R. Co.*, 15 Neb. 367; 20 Am. & Eng. R. Cas. 385; *Leisse v. St. Louis etc. R. Co.*, 72 Mo. 561; 6 Am. & Eng. R. Cas. 611; *Hudson River R. Co. v. Outwater*, 3 Sandf. (N. Y.) 689; **EMINENT DOMAIN**, vol. 6, p. 634.

A change in its location constitutes an abandonment of the old location. *Stacey v. Vermont Cent. R. Co.*, 27 Vt. 39.

1. Thus a power to change the route does not include a power to change the terminal points. *Attorney Gen'l v. West Wisconsin R. Co.*, 36 Wis. 466; *Brigham v. Agricultural Branch R. Co.*, 1 Allen (Mass.) 316.

And authority to vary the route and change the location after selection does not include authority, after the road is constructed, to relocate the road and condemn land to the new uses of the road. *Moorehead v. Little Miami R. Co.*, 17 Ohio 340; *Little Miami R. Co. v. Naylor*, 2 Ohio St. 236; 59 Am. Dec. 667; *Atkinson v. Marietta etc. R. Co.*, 15 Ohio St. 21.

See also *Doughty v. Somerville etc. R. Co.*, 21 N. J. L. 443.

A company authorized to change the location of its track on account of "difficulty of construction" and other causes, may do so at any time before the track is completed. *Atkinson v. Marietta etc. R. Co.*, 15 Ohio St. 21. And this authority to change is exhausted when once the change has been made. *Mason v. Brooklyn etc. R. Co.*, 35 Barb. (N. Y.) 373.

2. Thus it does not apply except in cases where the land is to be acquired by eminent domain. If the company purchase the right of way it may change its location at pleasure within certain

limits. *Mine Hill etc. R. Co. v. Lipincott*, 86 Pa. St. 480.

In *Mississippi etc. R. Co. v. Devaney*, 42 Miss. 583; 2 Am. Rep. 608, the company was allowed to relocate part of its road in view of the necessities of the case, and of the fact that no detriment would thereby accrue to the public. See also *Atkinson v. Marietta etc. R. Co.*, 15 Ohio St. 21.

The right of a company to change its location, at least before the actual construction of the road, in accordance with its discretion, was also conceded in *Mahaska Co. R. Co. v. Des Moines Valley R. Co.*, 28 Iowa 437. So also where there was a charter right to change the location after an appraisal made of condemned lands but before confirmation. *Hudson River R. Co. v. Outwater*, 3 Sandf. (N. Y.) 689.

In *Baltimore etc. R. Co. v. Compton*, 2 Gill (Md.) 20, there was express legislative authority to relocate.

In *Virginia etc. R. Co. v. Lovejoy*, 8 Ney. 100, it is said that the fact that the road has been constructed according to the surveys and maps already filed, does not prevent the company from condemning other land which may be necessary and proper for its purposes.

In *Chicago etc. R. Co. v. Wilson*, 17 Ill. 123, it is said that the power to condemn lands for a location is not exhausted by the apparent completion of the road. And in *Philadelphia etc. R. Co. v. Williams*, 54 Pa. St. 103, 107, the doctrine is intimated that the power continues so as to meet all requirements for new and increased facilities. See also *Black v. Philadelphia etc. R. Co.*, 58 Pa. St. 249. But the doctrine of these last three cases is considered to be opposed by principle and the weight of authority and they have been criticized as being wrongly decided. *Lodge v. Philadelphia etc. R. Co.*, 8 Phila. (Pa.) 345; *Prather v. Jeffersonville etc. R. Co.*, 52 Ind. 16. See also *People v. Lockport etc. R. Co.*, 13 Hun (N. Y.) 211.

The True Rule.—An examination of the cases cited will demonstrate that the right of a company to change its location where sufficient reason exists cannot be denied. In all the cases denying the right, the decision was based on the ground that there was no necessity for the change, and that a railroad company should not be allowed to condemn land for relocation merely from caprice or for the benefit of individuals.

Thus in the case of *Moorhead v.*

Little Miami R. Co., 17 Ohio 340, the court enjoined the company from condemning land for relocation, assigning as a reason that "there was no necessity for the change, and it was not a case for the exercise of any implied power." Citing *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235; 59 Am. Dec. 667.

And in *Griffen v. House*, 18 Johns. (N. Y.) 397, the court in denying the right of the turnpike company to change its gates said: "When the discretion has once been exercised, the power is exhausted, and cannot be revived so as to authorize the company to move the gates to suit their convenience, without some strong and manifest necessity to warrant it."

These and other cases are reviewed in the leading case of *Mississippi etc. R. Co. v. Devaney*, 42 Miss. 555; 2 Am. Rep. 608, and the conclusion is reached that a railroad company may condemn land for its relocation, if there be a manifest necessity for the change of location, and no detriment accrues therefrom to the public.

The correct rule, therefore, seems to be that while a railroad company may not change its location from motives of caprice, or for the sake of private individual convenience, it may do so whenever the interest or convenience of the public is to be subserved thereby and where it is essential to the accomplishment of the ends for which the road is being built. See *Mississippi etc. R. Co. v. Devaney*, 42 Miss. 555; 2 Am. Rep. 608; *Ex parte South Carolina R. Co.*, 2 Rich. (S. Car.) 434; *South Carolina R. Co. v. Blake*, 9 Rich. (S. Car.) 228; *New Orleans etc. R. Co. v. New Orleans*, 1 La. Ann. 128; *Atlantic R. Co. v. St. Louis*, 66 Mo. 228; *Works v. Junction R. Co.*, 5 McLean (U. S.) 425; *Eel River etc. R. Co. v. Field*, 67 Cal. 429; 22 Am. & Eng. R. Cas. 91; *McCartney v. Chicago etc. R. Co.*, 112 Ill. 611; *Minneapolis etc. R. Co. v. St. Paul etc. R. Co.*, 35 Minn. 265; 26 Am. & Eng. R. Cas. 638; *Hewitt v. St. Paul etc. R. Co.*, 35 Minn. 226; 27 Am. & Eng. R. Cas. 342 (statutory authority to relocate); *In re New York etc. R. Co.*, 88 N. Y. 279; 10 Am. & Eng. R. Cas. 113 (statutory authority); 1 Rorer, *Railroads*, p. 275, 277; *Mahaska Co. R. Co. v. Des Moines Valley R. Co.*, 28 Iowa 437; *Hoard v. Chesapeake etc. R. Co.*, 123 U. S. 222; *North Missouri R. Co. v. Lackland*, 25 Mo. 515.

lands for its location is also exhausted by the expiration of the time limited in its charter for the completion of the road.¹

It is within the discretion of the company to locate the track on any part of the right of way; it is not bound to place it in the center.²

2. Conflicting Grants of Location.—It is a rule to govern in all cases of public grants that lands already appropriated to another purpose are excepted from such grants, even though the exception be not mentioned specifically.³ Therefore where grants of a definite location are inconsistent the earlier one will prevail;⁴ if the grants are indefinite, leaving the exact routes to be selected by the companies, the right to specific lands will belong to the company making the prior location.⁵ Where in a peculiar case

1. *Peavey v. Calais R. Co.*, 30 Me. 498; *Morris etc. R. Co. v. Central R. Co.*, 31 N. J. L. 205; *Atlantic etc. R. Co. v. St. Louis*, 66 Mo. 228.

But a failure to select the location within the time limited does not exhaust the power where the assent of the city to the location was not given until after the time had expired. *Illinois Cent. R. Co. v. Rucker*, 14 Ill. 353.

2. Track Need Not be in Center of the Way.—*Stark v. Sioux City etc. R. Co.*, 43 Iowa 501; *Dougherty v. Wabash etc. R. Co.*, 19 Mo. App. 419.

Nor is the company bound to so construct its road and lay its track as to produce the least possible inconvenience to the owner of the land over which the right of way has been acquired. *International etc. R. Co. v. Pope*, 62 Tex. 313.

3. *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Boston etc. R. Co. v. Lowell etc. R. Co.*, 124 Mass. 368; *Pierce*, on Railroads pp. 157, 257.

4. *Chesapeake etc. Canal Co. v. Baltimore etc. R. Co.*, 4 Gill & J. (Md.) 1; *Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 27 Fed. Rep. 770; 25 Am. & Eng. R. Cas. 150.

5. Prior Location Prevails.—*Morris etc. R. Co. v. Blair*, 9 N. J. Eq. 635; *New Jersey So. R. Co. v. Long Branch Comrs.*, 39 N. J. L. 33; *Waterbury v. Dry Dock etc. R. Co.*, 54 Barb. (N. Y.) 388; *Boston etc. R. Co. v. Lowell etc. R. Co.*, 124 Mass. 368; *Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 27 Fed. Rep. 770; 25 Am. & Eng. R. Cas. 150; *Titusville etc. R. Co. v. Warren etc. R. Co.*, 12 Phila. (Pa.) 642.

And a land owner cannot defeat the prior location of one company by conveying his land to other parties. *Sioux City etc. R. Co. v. Chicago etc. R. Co.*,

27 Fed. Rep. 770; 25 Am. & Eng. R. Cas. 150.

A survey followed by occupancy for the purpose of constructing a railroad, will determine the location so as to give priority against other companies attempting to appropriate the land within it. *Pierce on Railroads*, p. 257; *Denver etc. R. Co. v. Canon City etc. R. Co.*, 99 U. S. 463; *Atchison etc. R. Co. v. Mecklim*, 23 Kan. 167.

But a location had before the incorporation of a company is ineffective to preserve the location as against another corporation afterward making and adopting the same location. A ratification after incorporation will not avail. *New Brighton etc. R. Co. v. Pittsburgh etc. R. Co.*, 105 Pa. St. 13.

The case of *New York etc. R. Co. v. New York etc. R. Co.*, 11 Abb. N. Cas. (N. Y.) 386, does not conflict with the doctrine stated in the text. In that case, one railroad company was the owner of the land, and it was held that a second company could not merely by filing a map of its route prevent such owner from constructing a road there. In order for such company to acquire any right against the owner it must either purchase the land or appropriate it by condemnation proceedings.

Since the prior location prevails, one railroad company cannot by purchasing land and proceeding to lay its track thereon, debar from the same land another company which had previously staked on and surveyed there a line of its own. *Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 27 Fed. Rep. 770.

A railroad company permitted its charter to be used for purposes of condemnation of lands for another company's road, and the latter company,

there is but one location practicable on a part of the route followed by two companies, though priority of location will determine the ownership as between two companies, yet equity will compel the owner to allow the use of such location to the other company.¹

Grants of locations for railroads are to receive a reasonable interpretation, due regard being had to the magnitude, character and general public utility of the enterprise.²

3. Description of the Location, Plans, etc.—A written description, usually known as a location or survey, verified and recorded as required in most jurisdictions, determines the exact property taken for the location, and constitutes the record evidence of the amount;³ in most cases the location is not complete until the filing or recording of this description.⁴ The description, either

on the location of its road, paid and took title in its own name for the lands, and built the road. *Held*, that the road was the property of the latter company. If, in such case, any of the land condemned was paid for by the former company with its own funds which have not been repaid to it, the latter company is bound to refund the amount. *Coe v. N. J. Midland R. Co.*, 31 N. J. Eq. 105.

1. *Denver etc. R. Co. v. Canon City etc. R. Co.*, 99 U. S. 463; *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 72; *Western etc. R. Co. v. Georgia etc. R. Co.*, 88 N. Car. 79; 17 Am. & Eng. R. Cas. 28.

The first of these cases was as to the right of contesting railroad companies to use the grand canon of the Arkansas for railway purposes. The second was a somewhat similar case, and in the course of its opinion, the court by Shaw, C. J., said: "Take the familiar case of the Notch of the White Mountains, a very narrow gorge which affords the only practicable passage for many miles through that mountain region. A turnpike road through it has already been granted. Suppose the notch not wide enough to accommodate another road, but the legislature, in order to accommodate a great line of public travel should grant power to lay a railroad in that line, they would by necessary implication grant the power to take some portion of the road-bed of the turnpike."

And in *Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 27 Fed. Rep. 770; 25 Am. & Eng. R. Cas. 150, it is said that the right of priority of location must give way to the exigencies of the case, and if the surrender of a portion

of the first line is essential to insure the building of the second the priority of location will not enable the first line to exclude the second.

2. Construction of Grants.—Pierce, on Railroads, p. 258, and authorities; *Bradley v. New York etc. R. Co.*, 21 Conn. 294; *infra*, this title, *Corporate Powers*. See also *Peavey v. Calais R. Co.*, 30 Me. 498.

A legislative grant to construct a railroad "along" a river does not authorize the construction of the road in or upon such river. *Stevens v. Erie R. Co.*, 21 N. J. Eq. 259.

The mere enumeration of certain places in designating the route of the road does not require the road to be located through them in the order named. *Com. v. Fitchburg R. Co.*, 8 Cush. (Mass.) 240.

3. Pierce on Railroads, p. 256; *Drury v. Midland R. Co.*, 127 Mass. 571; *Morris etc. R. Co. v. Blair*, 9 N. J. Eq. 635; *Toledo etc. R. Co. v. East Saginaw etc. R. Co.*, 72 Mich. 206; 36 Am. & Eng. R. Cas. 553 (plat on which terminal branches are designated and mapped out and approved by directors, is sufficient to give State crossing board jurisdiction). This description being the record evidence is conclusive as against the corporation, and extrinsic evidence cannot be admitted. *Hazen v. Boston etc. R. Co.*, 2 Gray (Mass.) 574.

4. This was a requirement provided in statutes granting public land to railroad companies. *Baker v. Gee*, 1 Wall. (U. S.) 333; *Western Pac. R. Co. v. Tevis*, 41 Cal. 489; *Pacific R. Co. v. McComb*, 39 Mo. 329; *Hannibal etc. R. Co. v. Moore*, 37 Mo. 335; *Hannibal etc. R. Co. v. Smith*, 41 Mo. 310.

alone or aided by maps and plans accompanying it, and properly referred to, must be exact and complete, and must clearly identify the property taken and define its precise limits.¹

Ambiguity in the description may be cured by possession by the railroad company, acquiesced in by the land owner.²

4. Termini.—A description of the termini of the intended road is usually required to be given in the articles of association or in the map and plan filed with them. A slightly defective statement in this regard is not fatal to the validity of the articles;³ in one case it has been considered sufficient where one terminus was given and the other designated as "at or near B,"⁴ or as "some

In *Kansas*, the description need not be filed prior to commencing proceedings to condemn. *Missouri River etc. R. Co. v. Shepard*, 9 Kan. 647.

Survey.—A charter of a company provided that it should have authority to take possession of lands for its right of way, when a survey of the route located should have been filed in the office of the Secretary of State. A statement of the commencement of the road, the different stations made at the time of the survey, the courses and distances between the stations, and the number of stations to the termination, constitutes a "survey" within the meaning of this provision. *Attorney-General v. Stevens*, 1 N. J. Eq. 369; 22 Am. Dec. 526.

1. *Housatonic R. Co. v. Lee etc. R. Co.*, 118 Mass. 361; *Kohlhepp v. West Roxbury*, 120 Mass. 596; *In re New York etc. R. Co.*, 62 Barb. (N. Y.) 89; *Callender v. Painesville etc. R. Co.*, 11 Ohio St. 516; *Cleveland etc. R. Co. v. Prentice*, 13 Ohio St. 373; *Pennsylvania R. Co. v. Porter*, 29 Pa. St. 165 ("land must be so described that its identity cannot be questioned"); *Vail v. Morris etc. R. Co.*, 21 N. J. L. 189; *Strang v. Beloit etc. R. Co.*, 16 Wis. 635; *EMINENT DOMAIN*, vol. 6, p. 610 and cases cited; *Convers v. Grand Rapids etc. R. Co.*, 18 Mich. 459; *Brock v. Old Colony R. Co.*, 146 Mass. 194; 33 Am. & Eng. R. Cas. 96 (name of owner need not be stated); *Mason v. Brooklyn etc. R. Co.*, 35 Barb. (N. Y.) 373.

The plan or map relied on to assist the description must be intelligible without the aid of parol evidence and must be referred to in the description. *Portland etc. R. Co. v. York Co.*, 65 Me. 292; *Wilson v. Lynn*, 119 Mass. 174; *Grand Junction R. etc. Co. v. Middlesex*, 14 Gray (Mass.) 553; *Hunt*

v. Smith, 9 Kan. 137; *Quincy etc. R. Co. v. Kellogg*, 54 Mo. 334.

Such a map filed together with the location of the road and expressly made "a part of the description of said location," may be referred to in order to explain, but not to modify or control the written location. *Hazen v. Boston etc. R. Co.*, 2 Gray (Mass.) 574.

A location filed with the county commissioners, by which alone the true location upon the ground cannot be fixed and ascertained, is nevertheless sufficient, if, by a plan which is made part thereof and filed therewith, the location can be determined. *Grand Junction R. etc. Co. v. Middlesex*, 14 Gray (Mass.) 553.

See also as to quantity and description in such cases, *Pennsylvania R. Co. v. Bruner*, 55 Pa. St. 318; *In re Washington Park Com'rs*, 65 N. Y. 131.

2. *Drury v. Midland R. Co.*, 127 Mass. 571; *Pierce on Railroads*, p. 257, note 6.

See also *Brock v. Old Colony R. Co.*, 146 Mass. 194; 33 Am. & Eng. R. Cas. 96.

3. *Cayuga Lake R. Co. v. Kyle*, 5 Thomp. & C. (N. Y.) 659; 64 N. Y. 185; *Warner v. Callender*, 20 Ohio St. 190 ("in or near" sufficient).

See also *Attorney-Gen'l. v. West Wisconsin R. Co.*, 36 Wis. 466.

4. *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; 32 N. J. Eq. 755; *Warner v. Callender*, 20 Ohio St. 190.

See also *State v. Hudson Tunnel R. Co.*, 38 N. J. L. 548; *Fall River Iron Works Co. v. Old Colony etc. R. Co.*, 5 Allen (Mass.) 221.

But in *De Long v. Schimmel*, 58 Ind. 64, a petition for a highway and the report of viewers thereon were

eligible and convenient point in the county of S, there to connect with" another railroad.¹ The terms "beginning at" or "from," or "running to" certain places are inclusive, and, in the absence of special provision otherwise, authorize a location within such place.² So also where the authority is to build the road "between" two designated places.³

5. Property in Location.—The term "location" is used in railroad law to designate the line over which it is proposed to run the road, after such line has been surveyed and fixed upon as the route of the road, but before the actual acquisition by the company, by condemnation or purchase, of the land which it covers.⁴

considered too uncertain and indefinite in describing the beginning point of the highway "as at or near the residence of B." See also *Indianapolis etc. R. Co. v. Newson*, 54 Ind. 121; *Griscom v. Gilmore*, 16 N. J. L. 105.

"At the termini" was made to read "near the termini" in *State v. Camden*, 38 N. J. L. 299.

1. *Chicago etc. R. Co. v. Chamberlain*, 84 Ill. 333.

2. *Mohawk Bridge Co. v. Utica etc. R. Co.*, 6 Paige (N.Y.) 554 note ("commencing at or near S"); *Smith v. Helmer*, 7 Barb. (N. Y.) 416 ("from" opposed to "to"); *Moses v. Pittsburgh etc. R. Co.*, 21 Ill. 516 ("to" equivalent to "into"); *Mason v. Brooklyn etc. R. Co.*, 35 Barb. (N. Y.) 373; *Tennessee etc. R. Co. v. Adams*, 3 Head (Tenn.) 596 ("from"); *Hazelhurst v. Freeman*, 52 Ga. 244; *Farmers' Transp. Co. v. Coventry*, 10 Johns. (N. Y.) 389 ("to"); *Com. v. Erie etc. R. Co.*, 27 Pa. St. 339; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88 ("at" and "from" correlative with "to"); *Pierce on Railroads*, p. 258.

Thus, authority to construct a road "from the city of Chicago to any point in the town of E," means from any point within the city of Chicago. *Chicago etc. R. Co. v. Chicago etc. R. Co.*, 112 Ill. 589; 25 Am. & Eng. R. Cas. 158; *McCartney v. Chicago etc. R. Co.*, 112 Ill. 611; 29 Am. & Eng. R. Cas. 326; *S. P. in Appeal of Western Pa. R. Co.*, 99 Pa. St. 155; 4 Am. & Eng. R. Cas. 171.

A railroad company whose charter gives it the right to build its road "from" a certain city is not barred from making the Union depot in such city its terminus by the fact that it began to construct its road from a point in the outskirts of the city, and for some time ran trains from such point, when it appears the company never made any

permanent improvements at such point, and that from the first it made efforts to extend its line to the Union depot. *Colorado E. R. Co. v. Union Pac. R. Co.*, 41 Fed. Rep. 293; 44 Am. & Eng. R. Cas. 10.

The charter of a railroad fixed the terminus "at or near P." A location a mile and a half from P would not transgress the discretion allowed, and a court has no right to interfere, nothing appearing to show any error. *Park's Appeal*, 64 Pa. St. 137.

Authority to construct a road "to the place of shipping lumber" on a tide water river does not limit the right of location to the uplands or to the shore, but the road may be extended across tide water to a point where lumber may conveniently be shipped. *Peavey v. Calais R. Co.*, 30 Me. 493.

Contra.—In *Northeastern R. Co. v. Payne*, 8 Rich. (S. Car.) 177, a different view is taken from that of the foregoing cases and it is held that authority to construct a road "from Charleston" conferred no right to enter the city.

3. *Morris etc. R. Co. v. Central R. Co.*, 31 N. J. L. 205.

The extension of the boundaries of a town which is the terminus of a road does not increase the powers of the railroad company; its power of location is confined to the town limits at the time when the grade was made. *Com. v. Erie etc. R. Co.*, 27 Pa. St. 339; *Chope v. Detroit etc. Plank Road Co.*, 37 Mich. 195.

4. Definition of Location.—*Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 27 Fed. Rep. 770; 25 Am. & Eng. R. Cas. 150; *Van Wyck v. Knevals*, 106 U. S. 360; *West v. West etc. R. Co.*, 61 Miss. 536; 20 Am. & Eng. R. Cas. 402; *Hickey v. Chicago etc. R. Co.*, 6 Ill. App. 172.

The right of the company to its location is an inchoate one enforceable against all except the owners of the land; it is not until after condemnation proceedings are had or the land is purchased that it becomes a right of way, and the company's title is perfected.¹ Its right as against the land owner is such that he cannot deprive it of its location by the conveyance of the land to a third party or to another company.²

"Locate" means "to fix or establish the situation of anything, as to locate a railroad." 2 Abbot's L. Dict., p. 58. Or "to select the line upon which a road or way is to be constructed." Anderson's L. Dict., p. 636. See also 2 Bouv. L. Dict., p. 80.

The definition must be governed, however, to some extent by the connection in which the word is used. Hence a condition in a subscription that the railroad shall be located within a certain distance of a town, means that it shall be actually constructed and operated within that distance. *Jewett v. Lawrenceburgh etc. R. Co.*, 10 Ind. 539.

It is not necessary in order to constitute a location of the route of a railroad, for the purpose of fixing the liability of subscribers to the stock, that the route should have been staked and marked on the ground, in such a manner that its precise line could be found and identified. Location may be completed by resolutions or acts of the directors manifesting a corporate determination to construct the road over a particular route. *Parker v. Thomas*, 28 Ind. 277. See also in this immediate connection 1 Wood's Ry. Law, p. 68. In this last case the word "location" was used to mean, as it frequently does, the act of locating. Thus in another case, *Foster v. Park Com'rs*, 133 Mass. 332, it is said to be synonymous with "laying out." Its meaning when so used is evident. See definitions, just quoted, of "locate."

1. *Lafferty v. Schuylkill etc. R. Co.*, 124 Pa. St. 297; 36 Am. & Eng. R. Cas. 575; *infra*, this title, *Right of Way*; *Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 27 Fed. Rep. 770; 25 Am. & Eng. R. Cas. 150; *Davis v. Titusville etc. R. Co.*, 114 Pa. St. 308; 30 Am. & Eng. R. Cas. 341; *Rochester etc. R. Co. v. New York etc. R. Co.*, 110 N. Y. 128; 35 Am. & Eng. R. Cas. 267.

In *Rochester etc. R. Co. v. New York etc. R. Co.*, 110 N. Y. 128; 35 Am. & Eng. R. Cas. 267, the court by Gray, J., said: "When, therefore, a cor-

poration has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made, as the result of any proceeding instituted by any land-owner or occupant, in our judgment it has acquired the right to construct and operate a railroad on such line, exclusive in that respect as to all other railroad corporations and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings. We could not hold otherwise without introducing confusion in the execution of such corporate projects, and without violating the obvious intention of the legislature."

In some cases, notably where grants of land are made to the company together with a right of way, the company's title vests as soon as the location is complete, *i. e.*, when the maps and profiles have been filed. Of course in such cases no condemnation or purchase is needed to complete their title. See PUBLIC LANDS; GRANTS, vol. 9, p. 51: *Van Wyck v. Knevals*, 106 U. S. 360; *New Orleans Pac. R. Co. v. U. S.*, 124 U. S. 124; 33 Am. & Eng. R. Cas. 74, note.

The right to enter upon land on which the road has been located depends upon the method of procedure adopted in each particular jurisdiction. Thus in some cases the company may enter as soon as the road is located and take immediate possession, but when the commissioners on application to them have required security for damages this right of entry and possession is suspended until the security is given. See *Davis v. Russell*, 47 Me. 443; EMINENT DOMAIN, vol. 6, p. 586; PUBLIC LANDS.

2. *Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 27 Fed. Rep. 770; 25 Am. & Eng. R. Cas. 150.

"All that the owner can demand is

The title of the company to its location is not impaired by mere non-user, unless it be permanent and entire;¹ in case of mis-user, the original owner of the land may maintain a writ of entry or some equivalent proceeding.²

6. Abandonment of Location or Right of Way.—What constitutes a technical abandonment must depend upon the circumstances of the case.³ The effect of an abandonment of a location or right

that his damages shall be paid, and subject to this right of compensation to the owner, the State has the control over the right of way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest, and also what shall constitute an abandonment of such right." *Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 27 Fed. Rep. 770; 25 Am. & Eng. R. Cas. 150.

1. Non-User of Location.—*Hestonville etc. R. Co. v. Philadelphia*, 89 Pa. St. 210 (non-user of portion of double track for ten years); *Barlow v. Chicago etc. R. Co.*, 29 Iowa 276 (non-user for thirteen years owing to delay in construction of the road); *Noll v. Dubuque etc. R. Co.*, 32 Iowa 66; *Ball v. Keokuk etc. R. Co.*, 62 Iowa 751; 20 Am. & Eng. R. Cas. 375; *People v. Albany etc. R. Co.*, 37 Barb. (N. Y.) 216; 24 N. Y. 261; *Chesapeake etc. Canal Co. v. Baltimore etc. R. Co.*, 4 Gill & J. (Md.) 1.

An easement of the right of way when acquired by express grant is not extinguished by non-user. See *EMINENT DOMAIN*, vol. 6, p. 604, and cases cited in note 7.

But the grant in the charter of a passenger railway company of an optional circuit over another road not having been exercised for eleven years, is such proof of abandonment of the franchise as will defeat the right as against other companies. *Girard College etc. R. Co. v. Thirteenth etc. R. Co.*, 7 Phila. (Pa.) 620.

2. Mis-User.—*Proprietors etc. v. Nashua etc. R. Co.*, 104 Mass. 1; 6 Am. Rep. 181.

A mis-user does not necessarily operate as a forfeiture. *Proprietors etc. v. Nashua etc. R. Co.*, 104 Mass. 1.

3. What Constitutes an Abandonment.—"No general rule of law, applicable to all cases, can be laid down, as to what change of a station will constitute an abandonment or relocation." *Attorney-Gen'l v. Eastern R. Co.*, 137 Mass. 48. "Whether abandonment exists must depend upon the circum-

stances of the case." *Central Iowa R. Co. v. Moulton etc. R. Co.*, 57 Iowa 249. See also 40 Am. Dec. 464, note; *ABANDONMENT*, vol. 1, p. 4; *EMINENT DOMAIN*, vol. 6, p. 603.

Abandonment of the right of way may be presumed from non-user for ten years. *Henderson v. Central Pass R. Co.*, 21 Fed. Rep. 358; 20 Am. & Eng. R. Cas. 542.

Where a railroad, without authority, leases its road it thereby abandons the operation of it. *State v. Atchison etc. R. Co.*, 24 Neb. 143; 32 Am. & Eng. R. Cas. 388.

The mere erection of structures for amusement on the land of a railroad, while such structures might be superfluous, does not constitute an abandonment. *Prospect Park etc. R. Co. v. Williamson*, 91 N. Y. 552; 14 Am. & Eng. R. Cas. 34.

A railroad is to be regarded as a unity, and so long as there is an intention to complete an uncompleted part there is no abandonment. *Central Iowa R. Co. v. Moulton etc. R. Co.*, 57 Iowa 249; 10 Am. & Eng. R. Cas. 138.

A mere sale or transfer of the right of way to another company before the road is built does not constitute an abandonment. *Crolley v. Minneapolis etc. R. Co.*, 30 Minn. 541; 14 Am. & Eng. R. Cas. 47; *State v. Rives*, 5 Ired. (N. Car.) 297; *Henry v. Dubuque etc. R. Co.*, 2 Iowa 288; *Junction R. Co. v. Ruggles*, 7 Ohio St. 1; *Hatch v. Cincinnati etc. R. Co.*, 18 Ohio St. 93.

Nor does a mere failure to run passenger cars operate as an abandonment where the road is regularly used for hauling freight, and the company is ready at all times to transport passengers for reasonable compensation. *Com. v. Fitchburg R. Co.*, 12 Gray (Mass.) 180.

A company may lose its location by allowing another company to occupy and use the land included in it. *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105.

of way is that the company loses all its right thereto and the original owners may resume possession.¹ The abandonment of the whole road or a material part is ground for the forfeiture of the corporate rights and franchises.² Abandonment of condemnation proceedings has been already noticed.³

7. Contracts to Influence Location.—A railroad partaking of the nature of a public institution, its location is not to be governed by considerations of private advantage only, and any contract whose object is to secure such advantage at the expense of the public utility of the road will not be upheld.⁴ But when no injury to the public is occasioned there seems to be no objection

1. Effect of Abandonment.—*Hastings v. Burlington etc. R. Co.*, 38 Iowa 316; *Troy etc. R. Co. v. Boston etc. R. Co.*, 86 N. Y. 107; 7 Am. & Eng. R. Cas. 49; *Harrison v. Lexington etc. R. Co.*, 9 B. Mon. (Ky.) 470; *Great Cent. R. Co. v. Gulf etc. R. Co.*, 63 Tex. 529; 26 Am. & Eng. R. Cas. 114; *New York etc. R. Co. v. Boston etc. R. Co.*, 36 Conn. 196; *Fernow v. Chicago etc. R. Co.*, 75 Iowa 526; 36 Am. & Eng. R. Cas. 420; *Girard College etc. R. Co. v. Thirteenth etc. R. Co.*, 7 Phila. (Pa.) 620.

In *St. Thomas v. Credit Valley R. Co.*, 12 Ont. App. Rep. 273; 36 Am. & Eng. R. Cas. 473, damages were allowed to a municipality where the railroad company by the abandonment of a station caused a decline in the value of property and a decrease of the tax receipts.

But an injunction will not lie to restrain the removal of a depot by a company, thereby abandoning a part of its road. *Moore v. Brooklyn City R. Co.*, 108 N. Y. 98; 36 Am. & Eng. R. Cas. 76.

Where a company has, by its charter, a right to use one of three routes, it cannot complain that one of those routes not adopted, or abandoned by it, was used by another company. *Louisville etc. R. Co. v. Louisville etc. R. Co.*, 2 Duv. (Ky.) 175.

2. Abandonment of the Road.—*State v. Atchison etc. R. Co.*, 24 Neb. 143; 32 Am. & Eng. R. Cas. 388; *Noll v. Dubuque etc. R. Co.*, 32 Iowa 66 (statute authorizing forfeiture for such cause held constitutional); *Lake Erie etc. R. Co. v. Griffin*, 107 Ind. 464; 27 Am. & Eng. R. Cas. 394; *People v. Albany etc. R. Co.*, 24 N. Y. 26 (State cannot maintain an equitable action to compel a company to operate its road; remedy is by mandamus, *quo warranto*, or indictment); *Attorney-Gen'l v. West Wisconsin R. Co.*, 36 Wis. 466.

In *People v. Northern R. Co.*, 53 Barb. (N. Y.) 98, it is said that the law providing for the forfeiture of the charter of a railroad company which has suspended its ordinary and lawful business for more than a year, admits of no excuse for or explanation of such suspension.

A railroad corporation chartered to operate a road between A and B cannot legally operate only between A and C (a way station between A and B), and abandon the part of the route lying between C and B; and if it does so, its charter may be vacated, or its corporate existence annulled by proper proceedings. *People v. Albany etc. R. Co.*, 24 N. Y. 261.

A statute provided that in case any railroad company should not within twelve months after the acceptance of the route by the commissioners, pay for a right of way over all the land covered by its location, such acceptance should be void. It was held that such failure to pay for the right of way was not in the nature of a forfeiture, to be taken advantage of only by the State in a direct proceeding against the company, but that the whole proceeding became of no effect upon the expiration of twelve months. *New York etc. R. Co. v. Boston etc. R. Co.*, 36 Conn. 196.

3. See EMINENT DOMAIN, vol. 6, p. 634; *Cooper v. Anniston etc. R. Co.*, 85 Ala. 106; 36 Am. & Eng. R. Cas. 581, 583, note.

4. *Berryman v. Cincinnati etc. R. Co.*, 14 Bush (Ky.) 755 (contract to influence officer of the corporation); *Cook v. Sherman*, 20 Fed. Rep. 167; 16 Am. & Eng. R. Cas. 561. See also *Marshall v. Baltimore etc. R. Co.*, 16 How. (U. S.) 314. As to the location of stations see *infra*, this title, *Contracts Concerning the Location of Stations*.

to the validity of contracts stipulating for the location of the road along a particular line.¹

8. **Generally.**—An illegal location may be made perfect by legislative confirmation;² so also a defective location may in some cases be reformed in equity.³

Courts do not take judicial notice that a company in locating its road between two given points will not run it to or near certain other places from which it has received subscriptions of stock.⁴

In an action of trespass brought by the owner of the land against the company the burden rests upon the company to prove a justification by showing that they acted within the location.⁵ But the presumption of law is in favor of the necessity of any track laid by the company, and any person claiming damages by reason of its being laid must show to the contrary.⁶

A company may enter upon land for the purposes of examination, preliminary survey, location, etc., without previously acquiring the land; and a statute authorizing such entrance is not invalid as taking private property without due process of law or without just compensation.⁷

1. *Missouri Pac. R. Co. v. Tygard*, 84 Mo. 263; 22 Am. & Eng. R. Cas. 54; *McClure v. Missouri River etc. R. Co.*, 9 Kan. 373; *Stowell v. Stowell*, 45 Mich. 364; 9 Am. & Eng. R. Cas. 598; *Railroad Co. v. Babb*, 9 Watts (Pa.) 458.

Subscriptions to the stock of a railroad company conditioned to be valid only upon the location of the road at particular points are common, and such conditions are not considered objectionable. See *MUNICIPAL SECURITIES*, vol. 15, p. 1286; *STOCK*. See also *Saginaw etc. R. Co. v. Chapell*, 56 Mich. 190; 22 Am. & Eng. R. Cas. 16; *Braddock v. Philadelphia etc. R. Co.*, 45 N. J. L. 363; 16 Am. & Eng. R. Cas. 436; *infra*, this title, *Right of Way*.

Contract or Penalty Influencing Location.—A proviso in an act granting certain privileges recited that if the company "shall not locate the said road in the manner provided for in this statute, then they shall forfeit \$1,000,000 to the State for the use of W county. This proviso, though assented to by the company, did not constitute a contract but was a penalty subject, as to its enforcement, to the pleasure of the legislature. *State v. Baltimore etc. R. Co.*, 12 Gill & J. (Md.) 399; 38 Am. Dec. 319.

2. Such confirmation will not, however, relieve the company from liabil-

ities for injuries to parties, which existed at the time of confirmation. *Com. v. Old Colony etc. R. Co.*, 14 Gray (Mass.) 93; *Salem v. Eastern R. Co.*, 98 Mass. 431.

3. See *Central Mills Co. v. New York etc. R. Co.*, 127 Mass. 537.

4. *Phillips v. Albany*, 28 Wis. 340.

5. **Burden of Proof.**—*Hazen v. Boston etc. R. Co.*, 2 Gray (Mass.) 574; *Crawfordsville etc. R. Co. v. Wright*, 5 Ind. 252; *In re New York etc. R. Co.*, 62 Barb. (N. Y.) 85.

Pending the determination of a controversy between a land-owner and a railroad company, as to the true location of the road under a written grant of way, the court will not arrest the construction of the road by injunction, but will order security to be given sufficient to cover all damages. *Rainey v. Baltimore etc. R. Co.*, 15 Fed. Rep. 767. *Compare Com. v. Hicks*, 7 Allen (Mass.) 573.

6. *Carson v. Central R. Co.*, 35 Cal. 325.

7. **Authority to Enter on Land to Select Location, Make Surveys, etc.**—*Polly v. Saratoga etc. R. Co.*, 9 Barb. (N. Y.) 449 (the statute in this case provided for compensation in case the land should afterward be appropriated); *Bloodgood v. Mohawk etc. R. Co.*, 14 Wend. (N. Y.) 51; *Lyon v. Green Bay etc. R. Co.*, 42 Wis. 538; 15 Am. Ry. Rep. 91; *Fox v. Western*

VII. RIGHT OF WAY—(See also **WAY**).—A “right of way,” as applied to railroads, is the right held by a railroad company in the land over which its road runs, for railroad purposes. It is sometimes used also to denote the land itself.¹ The exact property possessed by a railroad in the land over which its right of way passes, depends upon the manner in which the right was acquired; whether by purchase, by grant, or by the exercise of the right of eminent domain. In the first two cases, it will be determined by the terms of the conveyance or patent;² in the

Pac. R. Co., 31 Cal. 538; *Cushman v. Smith*, 34 Me. 247; *Stewart v. Mayor etc. of Baltimore*, 7 Md. 516; *Walther v. Warner*, 25 Mo. 289; **EMINENT DOMAIN**, vol. 6, p. 562.

1. **Definition of the Right of Way**.—The definition of the text is taken from *Calcasieu L. Co. v. Harris*, 77 Tex. 18; 43 Am. & Eng. R. Cas. 570.

Other definitions may be given of the technical term. Thus, “the term ‘right of way’ can only be understood as embracing the land used as a way for the road, and not such additional grounds as may be used for the convenience of the railroad but not part of its way.” *Chicago etc. R. Co. v. Paddock*, 75 Ill. 616 (railroad tax case).

It is a way over which the company has to pass in the operation of its trains. The term includes land acquired for necessary side tracks and turnouts, and the improvements thereon. *Pfaff v. Terre Haute etc. R. Co.*, 106 Ind. 144; 29 Am. & Eng. R. Cas. 181 (tax case).

It sometimes refers to the mere intangible right of crossing; oftener to the strip which the company appropriates for its use, and upon which it builds its road-bed. *Keener v. Union Pac. R. Co.*, 31 Fed. Rep. 128.

The words “right of way” in a grant, held to describe the tenure, not the land granted. *Atlantic etc. R. Co. v. Lesueur* (Arizona, 1888), 19 Pac. Rep. 157; 37 Am. & Eng. R. Cas. 368.

A “right of way” for all purposes “connected with the construction, use, and occupation of said railway” does not, it is said, give the company a right to take sand from the way in order to build a round house. *Vermilya v. Chicago etc. R. Co.*, 66 Iowa 606; 55 Am. Rep. 279. *Sed quære*.

In the case of *Williams v. Western Union R. Co.*, 50 Wis. 71; 5 Am. & Eng. R. Cas. 290, it is defined as a mere easement in the land of others obtained

by purchase, or by lawful condemnation for a public use.

Is an “Incumbrance.”—A land owner conveyed to a railroad company a right of way over certain lands, upon which the company built and operated its road; subsequently he conveyed the same land to another by a deed purporting to pass the fee to the entire tract without any reservation in respect to the right of way. It was held that the easement of the railroad constituted an incumbrance upon the land, and its existence constituted a breach of the covenant against incumbrances contained in the deed, for which the covenantee might maintain an action. Nor was it a release of the covenant that both parties knew well of the easement of the railroad company. *Beach v. Miller*, 51 Ill. 206; 2 Am. Rep. 290; *Wadhams v. Imres*, 4 Ill. App. 646; aff’d 109 Ill. 47; *Patterson v. Sweet*, 3 Ill. App. 550; *Barlow v. McKinley*, 24 Iowa 69; *Van Wagner v. Van Nostrand*, 19 Iowa 422; *McGowen v. Myers*, 60 Iowa 256; *Butler v. Gale*, 27 Vt. 742 (opinion by Redfield, C. J.); *Kellogg v. Malin*, 50 Mo. 496.

Ownership.—The railroad company and not the owner of all its stocks and bonds, owns its right of way, and the latter cannot maintain an action in relation to it. *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 812.

2. See generally 1 Wood’s Ry. Law, 601 *et seq.*; 1 Rorer on Railroads, § 312; *Hill v. Western Vt. R. Co.*, 32 Vt. 68; U. S. Rev. Stat. § 24, 77; *Flint etc. R. Co. v. Gordon*, 41 Mich. 420; **GRANTS**, vol. 9, p. 48, *et seq.*; *Washington Cemetery v. Prospect Park etc. R. Co.*, 7 Hun (N. Y.) 655; aff’d 68 N. Y. 591 (right of way granted by special act).

Grant by Deed in Fee-Simple.—In the case of *Ottumwa etc. R. Co. v. McWilliams*, 71 Iowa 164; 29 Am. & Eng. R. Cas. 544, there was a contract releasing to a railroad company a right of way of indefinite size and location

last case, the railroad would possess only an easement, the fee remaining in the original owner, except where it is specifically provided for otherwise by statute.¹

A legal right of way can never be acquired except by deed or patent, or by payment of damages after proper condemnation proceedings, or by prescription;² and if a railroad company enters upon land over which it has acquired no right of way whatever, it must be regarded as a mere trespasser and the land owner may maintain an action for ejectment or for damages, at his election.³

through certain land and agreeing to convey a certain strip of ground by metes and bounds by deed in fee-simple when desired. It was held that this was a contract for the conveyance of an easement only, and not of the fee in the strip. See also *Barlow v. Chicago etc. R. Co.*, 29 Iowa 276.

1. **Property in Right of Way.**—*Williams v. Western Union R. Co.*, 50 Wis. 71; 5 Am. & Eng. R. Cas. 290; *Mills on Eminent Domain*, §§ 110, 208; *Pierce v. Boston etc. R. Co.*, 141 Mass. 481; *Oregon R. etc. Co. v. Oregon Real Estate Co.*, 10 Oregon 444; *Quimby v. Vermont Cent. R. Co.*, 23 Vt. 387; *EMINENT DOMAIN*, vol. 6, p. 531, note, 599; *Dean v. Sullivan R. Co.*, 22 N. H. 321; *Giesy v. Cincinnati etc. R. Co.*, 4 Ohio St. 327; *Robbins v. St. Paul etc. R. Co.*, 22 Minn. 286 (easement acquired is practically equivalent to the fee).

"In any case, however, an easement only would be taken unless the statute plainly contemplated and provided for the appropriation of a larger interest." *Cooley's Const. Lim.* (4th ed.) 559; *Lyon v. McDonald*, 78 Tex. 71; *Washington Cemetery v. Prospect Park etc. R. Co.*, 68 N. Y. 591.

Even where the charter provided that a company "shall be seised and possessed of the land, etc." this does not, it is said, make it the owner of the fee, but gives it a right of way only. *Quimby v. Vermont Cent. R. Co.*, 23 Vt. 387 (opinion by Redfield, C. J.); *Kellogg v. Malin*, 50 Mo. 496.

It is however competent for the State to appropriate the fee for the use of a railroad, upon payment of proper compensation. The legislature is the sole judge as to the extent to which the public use requires the extinguishment of the owner's title. *Brooklyn Park Comr's v. Armstrong*, 45 N. Y. 234; *Beal v. New York Cent. etc. R. Co.*, 41 Hun (N. Y.) 172; *Cooley's Const. Lim.* (4th ed.) 558. See also *Towle v. Remsen*,

70 N. Y. 503; *New York etc. R. Co. v. Kip*, 46 N. Y. 546; 7 Am. Rep. 385.

The constitution of *Illinois* forbids the condemnation of lands for a railroad's right of way except to the extent of granting the road an easement. *Illinois Const.* (1870), art. 2, § 13. See also *Heyward v. Mayor etc. of N. Y.*, 7 N. Y. 314.

The *Brooklyn and Jamaica Railroad Company*, under a charter power to acquire lands only for its own corporate purposes, took a strip of land, and some time afterwards assumed to sell it to the city of Brooklyn for a public street forever. It was held that only such an estate in the land was acquired as was necessary for the uses of the railroad, and therefore when the land became no longer necessary it reverted to the original owners, and they might in this case maintain ejectment against the city. *Strong v. Brooklyn*, 68 N. Y. 1; *Heard v. Brooklyn*, 60 N. Y. 242.

The railroad company has no authority to use its right of way acquired by condemnation proceedings for any other purposes than those connected with the proper construction, maintenance, and operation of its road. Therefore it has no right to take ice from the ponds on the way. *Julien v. Woodsmall*, 82 Ind. 568. Nor to take sand for building a round house. *Vermilya v. Chicago etc. R. Co.*, 66 Iowa 606; 55 Am. Rep. 279. Nor to sell material removed in grading the road, though it may use it. *Aldrich v. Drury*, 8 R. I. 554. Nor to erect buildings, machinery, etc., upon it not necessary to the exercise of the franchise. *Lance's Appeal*, 55 Pa. St. 16.

2. *Perkins v. Maine Cent. R. Co.*, 72 Me. 95; 6 Am. & Eng. R. Cas. 608.

3. *Donald v. St. Louis etc. R. Co.*, 52 Iowa 411; *Daniels v. Chicago etc. R. Co.*, 35 Iowa 129; 14 Am. Rep. 490; 41 Iowa 52; *Ruppert v. Chicago etc. R. Co.*, 43 Iowa 490; *Galveston etc. R. Co. v. Pfeuffer*, 56 Tex. 66; *McClinton v. Pittsburg etc. R. Co.*, 66 Pa. St. 404

The fact that the owner of land permitted a railroad company to enter upon it and construct its road there, does not give the company a title to a right of way or estop the owner to maintain an action for damages, though it may preclude him from maintaining ejectment.¹

Where the company has acquired the fee in the lands over which its road is constructed it has all the property rights possessed by a natural person, and therefore an exclusive right of possession *ab solo usque ad coelum*.²

1. **Acquisition by Right of Eminent Domain.**—See EMINENT DOMAIN, vol. 6, pp. 509, *et seq.*

2. **Acquisition by Public Grant.**³—(See also GRANTS, vol. 9, pp. 48-60; PUBLIC LANDS.)

(owner may waive his right to eject and proceed for damages under the statute); Milwaukee etc. R. Co. v. Strange, 63 Wis. 178; 20 Am. & Eng. R. Cas. 413.

The owner of land may maintain ejectment where, from defects in condemnation proceedings, a railroad company has failed to acquire rights in the land. Hull v. Chicago etc. R. Co., 21 Neb. 371.

A purchaser of land which has been wrongfully taken by a railroad may recover the value of the land taken and the damages occasioned by the trespass since his purchase. Donald v. St. Louis etc. R. Co., 52 Iowa 411. Or an injunction will be granted to restrain the company from a use of the right of way until compensation has been made. Hibbs v. Chicago etc. R. Co., 39 Iowa 340.

Where a railroad appropriates land without compensating the owner, he may maintain ejectment; but if the damages have been assessed, execution for possession will not issue until the company has been granted a reasonable time, fixed by the court, in which to pay the damages assessed and interest thereon. Conger v. Burlington etc. R. Co., 41 Iowa 419.

See also Austin v. Rutland R. Co., 45 Vt. 215, where a railroad company located its road on land in which it had only an estate for the life of another.

1. Conger v. Burlington etc. R. Co., 41 Iowa 419; Hibbs v. Chicago etc. R. Co., 39 Iowa 340; Louisville etc. R. Co. v. Beck, 119 Ind. 124; Galveston etc. R. Co. v. Pfeuffer, 56 Tex. 66; Western Pa. R. Co. v. Johnson, 59 Pa. St. 290; McAuley v. Western Vt. R. Co., 33 Vt. 311; Rio Grande etc. R. Co. v. Ostig, 75 Tex. 602; 44 Am. & Eng. R. Cas. 67; Thornton v. Sheffield

etc. R. Co., 84 Ala. 109; 33 Am. & Eng. R. Cas. 226. See also *infra*, this title, *Acquisition by License*.

The mere failure of a land-owner to order a railroad company off his land, or to bring his action against it as a trespasser until near the end of the statutory period of limitation, will not operate as a consent to its occupation and use of the land. Rusch v. Milwaukee etc. R. Co., 54 Wis. 136. But it will estop him to maintain an action of ejectment. Pryzlylowicz v. Missouri River R. Co., 3 McCrary (U. S.) 586; 17 Fed. Rep. 492. See also as to waiver of damages Perkins v. Maine Cent. R. Co., 72 Me. 95; 6 Am. & Eng. R. Cas. 608.

Too long a delay in such cases, to insist upon damages will be considered a waiver of damages by the owner. Thus when the owner delayed seventeen years it was held that his right to recover damages was gone. Texas etc. R. Co. v. Suter, 59 Tex. 29.

A land owner cannot stand by without demanding compensation until a railroad is in operation and public interests involved and then have an injunction or maintain ejectment; his only remedy is a proceeding to have damages assessed. Louisville etc. R. Co. v. Beck, 119 Ind. 124; 39 Am. & Eng. R. Cas. 94.

2. Thus where the road ran through a tunnel, neither the original owner nor the public authorities had any right to build above the roadway Junction R. Co. v. Boyd, 8 Phila. (Pa.) 224; 1 Leg. Gaz. Rep. (Pa.) 107. Compare Kellogg v. Malin, 50 Mo. 496.

It may trim a hedge which is built so close to its way that the branches extend over. Toledo etc. R. Co. v. Green, 67 Ill. 199.

3. **Construction of Grants.**—The rule

3. Acquisition by Dedication.—Cases in which a right of way has been acquired by dedication are rare. A railroad being a *quasi* public highway it seems that the principles which govern the dedication of ordinary highways apply in case of a way occupied by a railroad.¹

4. Acquisition by Purchase or Private Grant.—Railroad companies are not confined to governmental assistance as the only means by which they may acquire a right of way; the right with all the incidents attaching when acquired by eminent domain, may be obtained by purchase from the land owner;² indeed, in many

is well known that grants of land from a State constitute an exception to the general rule of construction and are always construed in favor of the State. *Dubuque etc. R. Co. v. Litchfield*, 23 How. (U. S.) 66; *Leavenworth etc. R. Co. v. U. S.*, 92 U. S. 733; *GRANTS*, vol. 9, p. 56, note 2.

But a distinction must be observed where the grant is to a public or *quasi* public body and intended for the public benefit, since, in these cases, it is to receive a liberal construction in favor of the purposes for which it was granted. *Bradley v. New York etc. R. Co.*, 21 Conn. 294; *Pierce on Railroads* 491; *Galloway v. Lardon*, L. R., 1 H. L. Cas. 34.

See also generally as to effect of the congressional grant of a right of way over public lands. *Alabama etc. R. Co. v. Burkett*, 46 Ala. 569.

1. These principles are laid down in *DEDICATION*, vol. 5, p. 400, *et seq.*; *HIGHWAYS*, vol. 8, p. 363, 408. That they apply to railroads, see *Texas etc. R. Co. v. Sutor*, 56 Tex. 496; 11 Am. & Eng. R. Cas. 506. See also *Giesy v. Cincinnati etc. R. Co.*, 4 Ohio St. 308; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403.

In *Daniels v. Chicago etc. R. Co.*, 35 Iowa 129; 14 Am. Rep. 490, it was held that a dedication of land for a public use, as for a railroad, cannot be established by mere occupancy alone. It must be shown that the occupancy or use was with the knowledge and acquiescence of the land owner for the full period of time fixed by the statute for the limitation of real actions.

Where a husband and wife executed and put upon record a plat of a town laid out on lands of the wife, exhibiting thereon a railroad track and the words "Depot of Ohio and Penn. Railroad," this did not constitute a dedication of the lot to the railroad

company nor to a public use. *Todd v. Pittsburgh etc. R. Co.*, 19 Ohio St. 514.

In the case of *Texas etc. R. Co. v. Sutor*, 59 Tex. 29, a land owner permitted a railroad company to build its road on his land without charge, upon condition that it should construct ditches to carry off water. It was held that this constituted a dedication of the way and that the owner could not declare it forfeited for the failure to construct proper ditches.

2. See *Hill v. Western Vt. R. Co.*, 32 Vt. 68; 1 Wood's Ry. Law 601; *Yates v. Van De Bogert*, 56 N. Y. 526; *Junction etc. R. Co. v. Ruggles*, 7 Ohio St. 1; *Barlow v. Chicago etc. R. Co.*, 29 Iowa 276; *Page v. Heineberg*, 40 Vt. 81; *Harrison v. Lexington etc. R. Co.*, 9 B. Mon. (Ky.) 470. Where a railroad company has authority to acquire lands for railroad purposes it is presumed that land deeded to it was acquired for that purpose. *Yates v. Van DeBogert*, 56 N. Y. 527.

But the policy pursued in some States refuses to allow foreign railroad corporations to acquire a right of way either by condemnation or purchase. *Holbert v. St. Louis etc. R. Co.*, 45 Iowa 23; *Abbott v. New York etc. R. Co.*, 145 Mass. 450; *Const. of Mississippi* (1890), § 197. Compare *Dodge v. Council Bluffs*, 57 Iowa 560. See generally *Pierce on Railroads*, 130 *et seq.*; 1 Wood's Ry. Law, § 208 *et seq.*

Rights and Obligations in Such Cases.

—The right thus secured by purchase carries with it the same rights, privileges and exemptions which attach when the same right is secured by eminent domain. 1 *Rorer on Railroads* 313; *Conwell v. Springfield etc. R. Co.*, 81 Ill. 232; *Junction R. Co. v. Ruggles*, 7 Ohio St. 1.

The power to purchase lands necessary to the carrying out of their objects is a power incident to all corpo-

rations unless they are specially restrained by their charters or by statute. 2 Kent's Com. 281; *Nicholl v. New York etc. R. Co.*, 13 N. Y. 127; *Co. Lit.* 44 a; 1 Kyd on Corp. 76, 78, 108; *First Parish v. Cole*, 3 Pick. (Mass.) 232; *CORPORATIONS*, vol. 4, p. 217, *et seq.*; *Page v. Heineberg*, 40 Vt. 81; 94 Am. Dec. 378.

A company acquiring a right of way by private grant is not released from its statutory obligations as to fencing, etc., even though nothing is said of it in the deed. *Poler v. New York Cent. R. Co.*, 16 N. Y. 476; *Clarke v. Rochester etc. R. Co.*, 18 Barb. (N. Y.) 350.

The right to cast smoke, cinders, etc., upon other parts of the way passes to the grantee of a right of way by necessary implication, being an incident to the operation of the railroad. *Chicago etc. R. Co. v. Smith*, 111 Ill. 363; 29 Am. & Eng. R. Cas. 558.

Where land is conveyed to a railroad company for railroad purposes, it is presumed that all the contingent damages, which would have been included in an assessment of damages by commissioners, were considered in determining the price. *Norris v. Vermont Cent. R. Co.*, 28 Vt. 99.

And the same duty as to the construction of its road and the building of necessary culverts, embankments, fences, etc., rests upon the company as would have existed if the land had been taken under the right of eminent domain. *Hortsman v. Covington etc. R. Co.*, 18 B. Mon. (Ky.) 218; *Smith v. New York etc. R. Co.*, 63 N. Y. 58.

A grant of the right of way carries with it the right to construct suitable culverts; and the right to construct such culverts includes the power to cut the necessary ditches to carry the water into them, although such ditches may extend beyond the limits of the right of way. *Babcock v. Western R. Co.*, 9 Met. (Mass.) 553; 43 Am. Dec. 411; *Boothby v. Androscoggin etc. R. Co.*, 51 Me. 318; *Rood v. New York etc. R. Co.*, 18 Barb. (N. Y.) 80; *Hortsman v. Lexington etc. R. Co.*, 18 B. Mon. (Ky.) 218; *Conwell v. Springfield etc. R. Co.*, 81 Ill. 232.

Compare, however, *Kansas Pac. R. Co. v. Muhlman*, 17 Kan. 224; 9 Am. Ry. Rep. 428.

One who, by deed, grants a right of way over his premises impliedly waives all rights to damages, not reserved in the deed, occasioned by the

removal of timber or other obstructions in the line of the right of way. *Houston etc. R. Co. v. McKinney*, 55 Tex. 176; 8 Am. & Eng. R. Cas. 723.

But in *Vermilya v. Chicago etc. R. Co.*, 66 Iowa 606; 23 Am. & Eng. R. Cas. 108, it is said that a grant of a right of way does not authorize the company to take sand from the land without making compensation to the owner.

The grant does not release the company from liability for damages caused from its negligent construction of the road. *Houston etc. R. Co. v. Adams*, 58 Tex. 476.

When the grant is expressed to be for a particular use neither the grantor nor any claiming under him can object to the use and recover damages resulting therefrom. *Chicago etc. R. Co. v. Smith*, 111 Ill. 363; 29 Am. & Eng. R. Cas. 558.

As to the laying of side tracks, see *Indianapolis etc. R. Co. v. Rayl*, 69 Ind. 424; 3 Am. & Eng. R. Cas. 182.

That a grant conveys by implication what is necessary to its enjoyment, see *Chicago etc. R. Co. v. Smith*, 111 Ill. 363; 29 Am. & Eng. R. Cas. 558; *Riedinger v. Marquette etc. R. Co.*, 62 Mich. 29; 29 Am. & Eng. R. Cas. 611.

Grant of a right of way gives no license to overflow grantor's land by the unskillful construction of a levee. *St. Louis etc. R. Co. v. Morris*, 35 Ark. 622; 5 Am. & Eng. R. Cas. 48.

The execution of a contract for the right of way by the land owner gives the company an immediate right of entry; and if indefinite as to location, the company has the right of selection. *Burrow v. Terre Haute etc. R. Co.*, 107 Ind. 432; 29 Am. & Eng. R. Cas. 574.

What Amounts to a Sale of Right of Way.—Pending an appeal from an assessment of damages in an *ad quod damnum* proceeding, an agreement was entered into between the land owner and the railway company by which judgment was entered in the circuit court for a specified amount with stay of execution "or other proceeding to collect judgment" for two years. It was held that this agreement did not amount to a sale of the right of way, nor did it confer authority to enter into possession; that at the expiration of two years upon default of payment by the company an injunction would lie restraining it from the use of the right of way. *Irish v. Burlington etc. R. Co.*, 44 Iowa 380.

States the refusal of the land owner to sell for a reasonable price is made a condition precedent to valid condemnation proceedings.¹ The estate acquired may be a fee simple, a mere easement, or any intermediate estate, according to the terms of the conveyance.² And where a right of way has been obtained by purchase or otherwise and the road is in operation, the fact that

An agreement in writing executed by a land owner to give a right of way upon compliance by the company with certain conditions, being placed in the hands of a third party who returned it after the company had failed of compliance, is not a sale of the right of way, and the company could claim nothing under it. *Hibbs v. Chicago etc. R. Co.*, 39 Iowa 340.

•In the case of *Boston etc. R. Co. v. Babcock*, 3 Cush. (Mass.) 228, a party agreed to sell a railroad company "the land they take on the northern side of the M turnpike, adjoining T's land, at twenty cents per square foot, for each and every foot so taken." The company brought a bill in equity "or specific performance. It was held that the agreement was not for a sale of the land generally, or of such part of it as the company might elect, or of such as they should accept the offer of; but that the sale was of such a part of the land described as the company might take in the exercise of the authority conferred on them by law to take land for a road.

Where a party executes a release of right of way over any of his lands, for a railroad, he cannot avoid the same as to a particular tract, on the ground that he had, at the time, given a bond for a deed to such tract, where there is no proof made of the payment of any of the purchase-money. And if any payment had been made, that fact would not show he had no interest to release. *Conwell v. Springfield etc. R. Co.*, 81 Ill. 232.

1. Inability to Purchase a Condition Precedent to Acquisition by Eminent Domain.—The fact that no agreement with the land owner could be arrived at, and the reasons therefor are usually required to affirmatively appear in the proceedings of condemnation. *Ellis v. Pacific R. Co.*, 51 Mo. 200; *Lind v. Clemens*, 44 Mo. 540; *Powers v. Hazelton etc. R. Co.*, 33 Ohio St. 429; *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100; *Brown v. Rome etc. R. Co.*, 86 Ala. 206; 36 Am. & Eng. R. Cas. 571; *Vail v. Morris etc. R. Co.*, 21 N.

J. L. 189; *Doughty v. Somerville etc. R. Co.*, 21 N. J. L. 442; *Coster v. New Jersey R. etc. Co.*, 23 N. J. L. 227; *In re Marsh*, 71 N. Y. 318 (*reversing* 10 Hun (N. Y.) 49); *In re Prospect Park etc. R. Co.*, 67 N. Y. 371; *In re Boston etc. R. Co.*, 79 N. Y. 71; *Oregon etc. R. Co. v. Oregon Real Estate Co.*, 10 Oregon 444; *Toledo etc. R. Co. v. Detroit etc. R. Co.*, 62 Mich. 564; 28 Am. & Eng. R. Cas. 272; *Toledo etc. R. Co. v. Dunlap*, 47 Mich. 456; *Contra Costa R. Co. v. Moss*, 23 Cal. 324; *Pierce on Railroads*, p. 181, and cases cited; *Lewis' Em. Domain*, §§ 268, 348. Compare *Bigelow v. Mississippi etc. R. Co.*, 2 Head (Tenn.) 624.

As to the proper affidavit as evidence of such facts, see *Doughty v. Somerville etc. R. Co.*, 21 N. J. L. 442; *Booker v. Venice etc. R. Co.*, 101 Ill. 333; 5 Am. & Eng. R. Cas. 357.

See also generally, *In re New York etc. R. Co.*, 98 N. Y. 447; 33 Hun (N. Y.) 639.

In *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, 116 Ind. 578, there was an attempt made to secure a right of way across another railroad track. It was held that the effort to agree must be made on three points: compensation, points of crossing and character of crossings and connections; that such effort is a condition precedent to a right to condemn. Under such a statute, the fact that the company had once acquired a right of way across another road by agreement does not preclude it from acquiring a more extended way by exercise of the right of eminent domain in a case where public necessity required it. *Chicago etc. R. Co. v. Illinois Cent. R. Co.*, 113 Ill. 156.

2. Property in Right of Way Acquired by Purchase.—Whenever a corporation is empowered by its charter to acquire real estate by deed or charter gift, without limitation in point of estate it has a right to acquire title in fee simple. *Yates v. Van De Bogert*, 56 N. Y. 527; *Frank v. Evansville etc. R. Co.*, 111 Ind. 132; 30 Am. & Eng. R. Cas. 224. See also *Ottumwa etc. R. Co. v. McWilliams*, 71 Iowa 164; 29

the title obtained is defective does not, it seems, prevent the company from acquiring a perfect title by the exercise of eminent domain.¹

Am. & Eng. R. Cas. 544; CORPORATIONS, vol. 4, p. 230, *et seq.*

The fee may be acquired even though the corporation is created for a limited time. *Nicoll v. New York etc. R. Co.*, 12 Barb. (N. Y.) 460; *aff'd* 12 N. Y. 121.

Having acquired the fee, the power to alien the title is a necessary accompaniment. *New Jersey etc. R. Co. v. Van Syckle*, 37 N. J. L. 496; *Yates v. Van De Bogert*, 56 N. Y. 527; *Harrison v. Lexington etc. R. Co.*, 9 B. Mon. (Ky.) 470; *Pollard v. Maddox*, 28 Ala. 321.

All the other rights possessed by an owner of a fee simple belong to a railroad company which has acquired that title to a way. Therefore statutes prohibiting buildings on the right of way have no application where the company has acquired a fee by purchase. *Calcasieu L. Co. v. Harris*, 77 Tex. 18; 43 Am. & Eng. R. Cas. 570.

As to whether a grant of the right of way conveyed a fee or an easement in a particular case, see *Ballard v. Louisville etc. R. Co.*, 85 Ky. 307; 28 Am. & Eng. R. Cas. 135; *Illinois Cent. R. Co. v. Houghton*, 126 Ill. 233; 36 Am. & Eng. R. Cas. 422.

Where land is granted to a company and by the *habendum* clause of the deed it is limited to fifty years or so long as the charter shall continue, a base or qualified fee vests in the company and only a possibility of reverter remains in the grantor, which is incapable of alienation. *Davis v. Memphis etc. R. Co.*, 87 Ala. 633; 30 Am. & Eng. R. Cas. 65. It is inalienable because re-entry is necessary to re-vest the estate, and this right of re-entry belongs only to the grantor or his heirs.

Under a deed granting a qualified fee the grantee enjoys the same right to exclusive possession as an owner of a fee. *New Jersey Zinc etc. Co. v. Morris Canal etc. Co.*, 44 N. J. Eq. 398; 36 Am. & Eng. R. Cas. 515.

Where a grant of land is made to a railway company all the means necessary to attain it, and all the effects of it (within the power of the grantor) are granted also, and will pass without words *cum pertinentiis*. *Chicago etc. R. Co. v. Smith*, 111 Ill. 363; 29 Am. & Eng. R. Cas. 558; *Riedinger v. Mar-*

quette etc. R. Co., 62 Mich. 29; 29 Am. & Eng. R. Cas. 611.

In the case of *Williams v. Western Union R. Co.*, 50 Wis. 71; 5 Am. & Eng. R. Cas. 290, it is said it would be using the term "right of way" in an unusual sense to apply it to an absolute purchase of the fee simple of the lands to be used for a railway or any other way. But this distinction it seems is not recognized by other authorities.

Easement Perpetual.—Where a land owner grants a right of way to a railroad company organized under a charter in perpetuity, and the grant contains no limit as to time, the easement of the railway company will be perpetual, unless terminated by release or abandonment. *Junction R. Co. v. Ruggles*, 7 Ohio St. 1.

1. Right to Perfect an Imperfect Title.—*In re Prospect Park etc. R. Co.*, 8 Hun (N. Y.) 30; *aff'd* 67 N. Y. 371. In this case the right to perfect title was specially provided for by statute. *New York Rev. Stat.* 1553. But there seems to be no reason why the principle should not apply in other cases. See also *Daniels v. Chicago etc. R. Co.*, 41 Iowa 52.

And in view of the hardship which must follow the ejectment of a railroad from its right of way after the road has been constructed and is in operation, equity will always restrain proceedings to eject or to enjoin and allow it to acquire a perfect title by condemnation. *Harrington v. St. Paul etc. R. Co.*, 17 Minn. 215; *North Br. R. Co. v. London etc. R. Co.*, 1 Ry. Cas. 653; *Jones v. Great Western R. Co.*, 1 Ry. Cas. 684; *Lohman v. St. Paul etc. R. Co.*, 18 Minn. 174; *Conger v. Burlington etc. R. Co.*, 41 Iowa 419.

The right of a railroad company to condemn land for its right of way is in no way prejudiced by its having obtained a less advantageous way by purchase. *Eel River etc. R. Co. v. Field*, 17 Cal. 429; *Chicago etc. R. Co. v. Illinois Cent. R. Co.*, 113 Ill. 156. Or by its having entered on land illegally. *State v. Baker*, 20 Fla. 616.

Even where judgment has been obtained in ejectment against the company, equity will restrain execution upon it and allow the railroad to condemn the land so as to secure a perfect right of

No one other than the owner of the fee can convey a right of way to a railroad; a mere equitable owner of an undivided interest in a possible reversion, or the holder of contingent interests, has no power to authorize the appropriation of lands for a railroad's right of way.¹

way. *Pittsburgh etc. R. Co. v. Bruce*, 102 Pa. St. 23; 10 Am. & Eng. R. Cas. 1; *Harrington v. St. Paul etc. R. Co.*, 17 Minn. 215; *New York etc. R. Co. v. Stanley*, 35 N. J. Eq. 283; 10 Am. & Eng. R. Cas. 345.

In the case of *Detroit etc. R. Co. v. Brown*, 37 Mich. 533, a railroad company contracted for certain lands, and under the conditions of the contract proceeded to lay its track across them, receiving a deed from the only owner of whose rights it had any notice. The land had, in the meantime, been set off by deed of partition to a party who held an unrecorded claim to an undivided interest in the premises, and this party quit-claimed the land by deed, referring to the company's occupancy. It was held that an injunction would lie to restrain proceedings in ejectment brought against the company by the holders of the quit-claim.

After a railroad has been completed and put in full operation it would not be equitable nor would it be doing justice to the public to allow a land-owner who had received no compensation for his land taken, to stop the cars until he might coerce the company to pay him an exorbitant amount, or to go through with the dilatory process of having the damages assessed. An injunction therefore should not be granted until all the ordinary means for obtaining indemnity have failed. *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646.

1. Who May Convey a Right of Way.—*Tapert v. Detroit etc. R. Co.*, 50 Mich. 267; 11 Am. & Eng. R. Cas. 413; *Toledo etc. R. Co. v. Dunlap*, 47 Mich. 456 (railroad can obtain no rights of control over lands by license or grant from the holder of a contingent dower interest or from a tenant at will); 1 Wood's Ry. Law 602.

As to power of testamentary trustees in *England* to convey lands to railway company, see *Peters v. Lewes etc. R. Co.*, L. R., 16 Ch. Div. 713; L. R., 18 Ch. Div. 429; 1 Am. & Eng. R. Cas. 583.

But in *Tutt v. Port Royal etc. R. Co.*, 16 S. Car. 365, it was held that under a trust deed which vested the

legal title to lands in a trustee for the benefit of a married woman and her children but which gave to the husband the absolute control and management of the land, the husband might give to a railroad company license to construct their roadbed over such land, binding so long as he should live, or, at least until revoked; unless such right of way injuriously affected the duties and limitation imposed upon the husband by the deed.

In the case of *Pitcher v. Atchison etc. R. Co.*, 38 Kan. 516, it was held that a husband cannot without the consent of his wife grant a right of way for a railroad across land owned by him and occupied as a homestead by his family. See also *Conboy v. Kansas City etc. R. Co.*, 42 Kan. 658; *Chicago etc. R. Co. v. Anderson*, 42 Kan. 297; 39 Am. & Eng. R. Cas. 41.

In *Chicago etc. R. Co. v. Luniney*, 38 Iowa 182, it is held, however, that in such case the husband may convey a right of way when such conveyance will not defeat the substantial enjoyment of the homestead as such. And this case seems to state the more correct doctrine. *Chicago etc. R. Co. v. Luniney*, 38 Iowa 182; *Ottumwa etc. R. Co. v. McWilliams*, 71 Iowa 164; 29 Am. & Eng. R. Cas. 544; *Randall v. Texas etc. R. Co.*, 63 Tex. 586; 22 Am. & Eng. R. Cas. 102.

In *Colorado* it is held that a married woman may convey property for a right of way, although the statute requires that the husband be joined in eminent domain proceedings. *Colorado Cent. R. Co. v. Allen*, 13 Colo. 229; 44 Am. & Eng. R. Cas. 193.

One who has pre-empted a portion of the public lands but whose right is still inchoate may convey a right of way, and the patent when obtained would inure to the benefit of the company. *Indianapolis etc. R. Co. v. Rayl*, 69 Ind. 424; 3 Am. & Eng. R. Cas. 182; PUBLIC LANDS.

Where a company, with the wife's cognizance, had entered into a written agreement for their right of way with her husband, who was the record owner of the land, an injunction

The conveyance to the road may of course be upon condition, either precedent or subsequent, a failure to perform which shall defeat the vesting of the estate.¹ Whether any condition is one precedent or subsequent to the vesting of the title must depend

prayed for by her after the company's entry and road making, with her knowledge, under a license therein was refused; the company being guilty of no negligence in not sooner ascertaining that at the time of the agreement she was the alleged owner by an unrecorded deed. *Pickert v. Ridgefield Park R. Co.*, 23 N. J. Eq. 316.

A mother having one-third interest as joint tenant of minor children cannot release a right of way in behalf of all. But in such case where one tenant grants the right of way through a tract the company may compel partition and enjoin proceedings for damages, by co-tenants. *Charleston etc. R. Co. v. Leish* (S. Car. 1890), 43 Am. & Eng. R. Cas. 588. See also as to joint tenants, *Rush v. Burlington etc. R. Co.*, 57 Iowa 201; 11 Am. & Eng. R. Cas. 298.

A railroad company enters on land with the permission of the "owner," where it enters with the permission of him who has the control of the land, as, for instance, an executor in control. *Tompkins v. Augusta etc. R. Co.*, 21 S. Car. 420.

A life tenant may grant a right of way during his life, but such a grant confers no right as against the reversioner or remainderman, and after the tenant's death the railroad company is liable to an action for unlawful detainer. *Hope v. Norfolk etc. R. Co.*, 79 Va. 283; 22 Am. & Eng. R. Cas. 171.

A tenant is the owner of the leased premises during the term of his tenancy and the landlord can confer no rights to others in respect to them which he could not himself exercise. Therefore a railway company entering upon leased premises and constructing its road there under authority from the landlord only, is a trespasser and liable as such to the tenant for damages caused to his crops, etc. *Crowell v. New Orleans etc. R. Co.*, 61 Miss. 631; 20 Am. & Eng. R. Cas. 306; *Chattanooga etc. R. Co. v. Brown*, 84 Ga. 256; 43 Am. & Eng. R. Cas. 611.

1. 1 Wood's Ry. Law, 603; *Tutt v. Port Royal etc. R. Co.*, 16 S. Car. 365;

Douglas v. New York etc. R. Co., 1 Clarke Ch. (N. Y.) 174 (condition to construct the road over a certain route).

But if the act of the party imposing the condition makes its performance impossible or unnecessary, the estate is absolute, and discharged of the condition. *Jones v. Chesapeake etc. R. Co.*, 14 W. Va. 514.

The condition must, of course, be one not unreasonable nor against public policy. *Hammond v. Port Royal etc. R. Co.*, 15 S. Car. 10; 14 Am. & Eng. R. Cas. 353.

Instances of Grants of Right of Way on Condition.—Instances of conditions precedent are seen where by deed a right of way is granted across certain lands, the route not being described. Until the location of the route the company acquires no title. *Detroit etc. R. Co. v. Forbes*, 30 Mich. 165; *Burrow v. Terre Haute etc. R. Co.*, 107 Ind. 422; 29 Am. & Eng. R. Cas. 574.

The conveyance of land for a right of way upon condition that the railroad company shall erect and maintain a certain dam or embankment conveys the title to the land subject to be defeated by the failure to comply with the conditions. *Underhill v. Washington etc. R. Co.*, 20 Barb. (N. Y.) 455.

A person conveyed a right of way for a railroad upon condition that crossings and cattle-guards should be constructed. It was held that the grantor had an equitable lien upon the land conveyed not only for the purchase money but also for the damages caused by the road not being constructed as the contract provided; that the retention by the grantor, of the legal title, was sufficient to put subsequent grantees and mortgagees upon their guard as to his legal rights. In such case the grantor might either enforce specific performance of the contract or his specific lien. *Dayton etc. R. Co. v. Lewton*, 20 Ohio St. 401.

The condition in a deed that certain portions of the land conveyed should be kept open as public streets is not void as imposing a duty or trust upon the company inconsistent with its business and foreign to the objects for which it was formed. *Tinkham v. Erie R. Co.*, 53 Barb. (N. Y.) 393.

A conveyance of the right of way was made on condition that the depot of the railroad should be located within a certain distance of a given place. It was held that a breach of this condition defeated the title conveyed by the deed, and that the grantor was entitled to have his damages assessed as if no deed had ever been made; that the estate conveyed being less than a freehold no formal act of entry on his part was necessary in order to avail himself of his right to proceed in this manner. *Taylor v. Cedar Rapids etc. R. Co.*, 25 Iowa 371.

Other instances may be seen in *Pennsylvania R. Co. v. Jones*, 50 Pa. St. 417 (where the owner of land incumbered by a mortgage sold a portion of it to a railroad for a right of way); 1 *Wood's Ry. Law* 604; *Rice v. Boston etc. R. Co.*, 12 Allen (Mass.) 141; *Paul v. Connorsville etc. R. Co.*, 51 Ind. 527; *Aikin v. Albany etc. R. Co.*, 26 Barb. (N. Y.) 289 (to erect farm crossings).

A condition in a deed to a railroad company providing that the same shall be void unless the railroad and one of its stations be built in a certain locality is not void as being in contravention of public policy. *McClure v. Missouri River etc. R. Co.*, 9 Kan. 373.

In the case of *Rathbone v. Tioga Nav. Co.*, 7 W. & S. (Pa.) 74, a clause in a conveyance of a right of way "provided the same did not interfere with buildings on the grantor's land was held to prevent the construction so close to the buildings as to endanger them or destroy their usefulness.

A mere stipulation in a deed to the company that it is to maintain the fences is not a condition. *Hornback v. Cincinnati etc. R. Co.*, 20 Ohio St. 81.

A deed recited "provided always and this deed is upon express condition" that a certain system of drainage be kept up. Here was a condition subsequent. *Hammond v. Port Royal etc. R. Co.*, 15 S. Car. 10; 11 Am. & Eng. R. Cas. 353.

A right of way was relinquished to a company, the deed reciting "the railroad to be located on the section line dividing those two sections (aforesaid)." It was held that a failure by the company to lay its track immediately on the section line would not forfeit its right to the land. It had the right to lay its track on any part of the one hundred feet granted. *Munkers v. Kansas City etc. R. Co.*, 60 Mo. 334.

Illegal Condition.—A condition in a deed that the company should not establish a depot within three miles of a certain point is contrary to public policy and illegal, and a reconveyance of the property could not be decreed on account of the violation of it by the company. *St. Louis etc. R. Co. v. Mathers*, 71 Ill. 592; *infra*, this title, *Contracts for the Location of Depots*.

What Is Sufficient Compliance With Conditions.—Whether any condition has been properly complied with must of course depend upon the peculiar circumstances of each case. The general rule is to be remembered that conditions precedent tending, as they do, to create estates, are liberally construed, and that conditions subsequent, since they tend to destroy estates already vested, are to receive a strict construction. 2 *Minor's Inst.* (3rd ed.), p. [240] 273; *Tiedeman on Real Prop.*, § 273; *ESTATES*, vol. 6, pp. 901-2; *Washburne, Real Prop.*, p. 5, *et seq.*

But the rule as to the construction of conditions subsequent is not to be misunderstood. It is construed most strictly against the party claiming a forfeiture under it, and no act or failure to act will be held a breach of the condition unless it is clearly and plainly such. The result is that a substantial compliance is usually sufficient. See *Hoyt v. Kimball*, 49 N. H. 327; *Voris v. Renshaw*, 49 Ill. 422; *Merrifield v. Cobleigh*, 4 Cush. (Mass.) 178; *Martin v. Ballou*, 13 Barb. (N. Y.) 119.

A conveyance of a right of way through his land to a railroad company on condition that it should make the village of C a station; the company made C a station, but located its depot about a quarter of a mile from the town plat. It was held that this was a sufficient performance of the condition under the circumstances. *Jenkins v. Burlington etc. R. Co.*, 29 Iowa 255; *Meador v. Lowry*, 45 Iowa 686.

So also where the company agreed to locate its depot upon a certain forty-acre tract or upon any five-acres adjoining, and the depot was placed on a five-acre tract which touched a corner of the forty-acre tract, but did not lay alongside of it. The company was held to have properly performed the condition. *Fitzgerald v. Britt*, 43 Iowa 498.

The condition in another case was to build a depot and open its road to a

upon the intention of the parties and is to be gathered from the terms of the conveyance and the nature of the whole transaction;¹ if the performance of the whole condition does not necessarily precede the vesting of the estate, but may accompany or follow it, the condition must be considered as one subsequent.² The law, however, favoring the vesting of estates, is inclined to treat conditions as subsequent rather than precedent in all cases in which there is room for doubt.³ And for the same reason where a provision may be either a condition subsequent or a covenant, it will usually be construed as a covenant;⁴ whether or

point within one mile of the postoffice. It was held that the building of a side track, which was operated as such, and a depot at a point within the distance named was a substantial and sufficient compliance with the condition, although neither the main track of the road nor all of the depot building was within the mile. *Cedar Falls etc. R. Co. v. Rich*, 33 Iowa 113; *Courtwright v. Stickler*, 37 Iowa 382.

A deed conveyed a right of way, and recited that the license was to operate in perpetuity if the company should continue to maintain and operate their railroad; but to cease with the non-use of it for the purposes stated. It was held that there was no breach of the condition where the company completed a part of its road within the statutory limitation of time (ten years) but did not complete the whole. *Morrill v. Wabash etc. R. Co.*, 96 Mo. 174; 36 Am. & Eng. R. Cas. 425.

1. *Nicoll v. New York etc. R. Co.*, 12 N. Y. 121; *Hotham v. East India Co.*, 1 T. R. 638; 4 Kent's Com. 124.

No precise or technical words are required to make a condition precedent or subsequent. The construction must always be founded upon the intention of the parties. *Underhill v. Saratoga etc. R. Co.*, 20 Barb. (N. Y.) 455; *Parmalee v. Oswego etc. R. Co.*, 7 Barb. (N. Y.) 559; *aff'd* 6 N. Y. 74.

A railway company was informed by letter of the conditions under which it could lay its track through the lands of a person living on the line of the road. The company accepted the proposition, and constructed their roadbed accordingly, but failed to comply with the condition to open a certain street. Held, that the opening of the street was not a condition precedent to the right to locate the road, and that the proposition was not a license revocable at will. *Wilmington etc. R. Co. v. Battle*, 66 N. Car. 540.

2. The rule is thus stated in a leading case: "If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent." *Underhill v. Saratoga etc. R. Co.*, 20 Barb. (N. Y.) 455. See also 2 Washb. on Real Prop. (4th ed.) 17; *Parmalee v. Oswego etc. R. Co.*, 7 Barb. (N. Y.) 599; *aff'd* 6 N. Y. 74.

And the rule in the text is sustained by many cases. *Finlay v. King*, 3 Pet. (U. S.) 346; *Ludlow v. New York etc. R. Co.*, 12 Barb. (N. Y.) 440; *Nicoll v. New York etc. R. Co.*, 12 N. Y. 130.

3. *Tiedeman on Real Prop.*, § 273; *Finlay v. King*, 3 Pet. (U. S.) 346; 1 Wood's Ry. Law 605; *ESTATES*, vol. 6, p. 901.

This is not to be confused with the recognized rule of construction that conditions subsequent tending as they do to defeat estates are to be strictly construed. See 2 Minor's Insts. (3rd ed.), p. [253] 289; 2 Washburne on Real Prop. (5th ed.) 5.

The rule of the text is illustrated in the case of *Indianapolis etc. R. Co. v. Hood*, 66 Ind. 580, where the owner of the land conveyed a portion of it "for and in consideration of the permanent location and construction of the depot of said railroad company" thereon. This was construed as a condition subsequent. See also *Blanchard v. Detroit etc. R. Co.*, 31 Mich. 43; 18 Am. Rep. 142. Compare *East Line etc. R. Co. v. Garrett*, 52 Tex. 133.

4. *Conditions Subsequent and Covenants*.—The principle announced is well settled. See 2 Washburne on Real Prop.

not a covenant is one running with the land, must depend upon its character and may be determined by well known rules.¹ The

5 *et seq.*; Chapin *v.* School District, 35 N. H. 445; Ayer *v.* Emery, 14 Allen (Mass.) 67; Packard *v.* Ames, 16 Gray (Mass.) 327; REAL PROPERTY; Rawson *v.* School District, No. 5, 7 Allen (Mass.) 127; Curtis *v.* Board of Education, 43 Kan. 144; Hornback *v.* Cincinnati etc. R. Co., 20 Ohio St. 81.

The case of Blanchard *v.* Detroit etc. R. Co., 31 Mich. 43; 18 Am. Rep. 142, sustains the same view. But it is there held that the reason of the rule is confounded and the rule itself is inapplicable to a case where the grantor seeks to have the writing enforced as a covenant, and the grantee contends that it is but a condition. Therefore the following clause, coming after the description, and preceding the *habendum* in a deed to a railroad company: "But this conveyance is made upon the express condition that said railroad company shall build, erect and maintain a depot or station house on the land herein described, suitable for the convenience of the public, and that at least one train each way shall stop at such depot or station each day when trains run on said road, and that freight and passengers shall be regularly taken at such depot," is held to be an express condition subsequent, and not a covenant, nor specifically enforceable as one against the grantee.

In Aikin *v.* Albany etc. R. Co., 26 Barb. (N. Y.) 289, it is laid down as the true principle that words in a conveyance which are not in form either a condition or a covenant will be construed as either the one or the other where without such construction the party injured would have no remedy. The condition in this case was to maintain "two good farm crossings."

The condition must always be express and plain, and a parol condition will not be inserted into a deed unless the evidence be very clear and explicit. East Line R. Co. *v.* Garrett, 52 Tex. 133.

The deed granting a right of way recited "the water on the southeast side of the road to be made to run on the same side of the road instead of through the cattle guards." This provision was held to be a covenant running with the land, not a condition. Peden *v.* Chicago etc. R. Co., 73 Iowa 330. (See this case also as to measure of damages.)

But where the condition is clearly expressed to be such it will not be construed as a covenant. Thus an agreement to fence is usually construed as a covenant, but where it is expressed as a condition with a clause of forfeiture attached it must be held a condition. Hartung *v.* Witte, 59 Wis. 285; Emerson *v.* Simpson, 43 N. H. 475.

1. Covenants Running with the Land.—The general doctrine of covenants in conveyances of real property is treated in the article REAL COVENANTS. Instances of such covenants as connected with the subject under consideration may be given here.

Thus a covenant to fence the right of way and to maintain such fence is one running with the land, and may be enforced by a subsequent grantee against a successor of the original railroad company. Midland R. Co. *v.* Fisher, 125 Ind. 19; 43 Am. & Eng. R. Cas. 578; Kentucky Cent. R. Co. *v.* Kenney, 82 Ky. 154; 20 Am. & Eng. R. Cas. 458; Gill *v.* Atlantic etc. R. Co., 27 Ohio St. 240. But in Pittsburgh etc. R. Co. *v.* Bosworth, 46 Ohio St. 81; 38 Am. & Eng. R. Cas. 200, where it was the duty of the company, by statute, to fence and the grantor had covenanted to fence, it was held that the grantor's covenant did not bind a subsequent purchaser.

So also of stipulations in a deed that the company shall erect stations or farm crossings, etc., or the agreement may be a separate instrument. Georgia Southern R. Co. *v.* Reeves, 64 Ga. 492; 11 Am. & Eng. R. Cas. 333; Akin *v.* Albany etc. R. Co., 26 Barb. (N. Y.) 289; Congregation etc. *v.* Texas Pac. R. Co., 41 Fed. Rep. 568.

A deed conveying right of way recited: "It is hereby agreed and understood a depot and station is to be located and given to said O. R. on the land and strip above conveyed, to be permanently located for the benefit of said O. R. and his assigns, etc." Held, to be a covenant running with the land. Georgia Southern R. Co. *v.* Reeves, 64 Ga. 492; 11 Am. & Eng. R. Cas. 333.

Where the company in consideration of a grant of the right of way covenants with the grantor, his heirs and assigns, to build and forever maintain a switch from said railroad to a mill on his land for the use of such mill, it is a

most frequent stipulations in deeds conveying a right of way are those concerning the location of depots, the building of fences, cattle guards, etc.; such stipulations, in the absence of a clear and express condition, are always construed as mere covenants, for a breach of which the grantor may have a remedy in damages or in some cases a bill in equity for specific performance.¹

covenant running with the land; and though verbal, equity will enforce it. *Lydick v. Baltimore etc. R. Co.*, 17 W. Va. 427; 11 Am. & Eng. R. Cas. 336.

There may be a covenant running with the land by which the railway company is released from all liability for injury which may be caused in future by land slides, etc. *Van Rensselaer v. Albany etc. R. Co.*, 1 Hun (N. Y.) 507.

A parol contract, whatever its nature, cannot run with the land, but if it is of such a nature that if it were a covenant it would run with the land and be a covenant real, it will be regarded in equity as running with the land, and will be enforced at the instance of one who has acquired the land from the covenantee, whether he hold the legal or equitable title. *Lydick v. Baltimore etc. R. Co.*, 17 W. Va. 427; 11 Am. & Eng. R. Cas. 336.

Covenants which from their nature do not inhere in the land cannot be attached at the caprice of the owner. Thus a covenant of a railway company to have its terminus at a certain place and not to extend the road beyond it, will not bind another corporation which succeeds to the ownership of the road. *Pierce on Railroads* 135; *Lynn v. Mount Savage etc. Co.*, 34 Md. 603; *Keppell v. Bailey*, 2 Mgl. & K. 517.

1. Stipulations as to Location of Depots, Building of Fences, etc. — In *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492; 11 Am. & Eng. R. Cas. 333, the grantor conveyed to the railroad company in fee simple a right of way through his land. The deed contained a clause: "It is hereby agreed and understood a depot and station is to be located on the land and strip above conveyed to be permanently located, and to be used for the general purposes of the railroad company." It was held that this constituted a covenant running with the land, and became obligatory on any second company which became the purchaser of rights, franchises, etc., of the former. As to contracts for the location of depots at certain places see *infra*, this title, *Contracts for the Location of Depots, etc.*

In *Hornback v. Cincinnati etc. R. Co.*, 20 Ohio St. 81, the land owner by written contract agreed to give the company a right of way; the contract providing that on the completion of the road the company should fence the land. It was held that this provision was not a condition but a mere contract, so that the land owner could not maintain an ejectment for breach of it. See also *Dayton etc. R. Co. v. Lewton*, 20 Ohio St. 401.

In *Hubbard v. Kansas City etc. R. Co.*, 63 Mo. 68, a relinquishment of the right of way was made, the depot, under the relinquishment, to be located at a certain point. It was held that the remedy for not so locating the road was not ejectment, but that an action for damages for the appropriation of land under false pretenses might be sustained, and the measure of such damages would be payment for the land and all subsequent injuries occasioned by the construction of the road as if no grant had been made.

A deed recited that it was given in consideration of one dollar "and the permanent location of a depot on the grounds conveyed." It was held that if there was any condition it was one subsequent; that the words did not constitute a promissory undertaking on the part of the railroad company or its grantee to maintain a depot on the grounds; and that in case of a failure to so erect and maintain a depot the grantor was entitled only to a forfeiture of the estate, and not to a specific performance nor to a judgment for damages. *Close v. Burlington etc. R. Co.*, 64 Iowa 149; 17 Am. & Eng. R. Cas. 33.

In one case it is said that specific performance will not be decreed at the suit of the land owner to compel a railway company to maintain cattle guards. *Columbus etc. R. Co. v. Watson*, 26 Ind. 50, citing *Story's Eq. Juris.* §§ 725-6. But it may well be doubted whether this case states the correct view. See *Aikin v. Albany etc. R. Co.*, 26 Barb. (N. Y.) 290; *Gray v. Burlington etc. R. Co.*, 37 Iowa 119

Where there is a failure to perform a condition precedent the estate never vests;¹ in cases of a breach of condition subsequent the grantor or his heirs have a right of re-entry and may maintain ejectment against the railroad; nor is this the only remedy; an action to recover damages or a suit to obtain specific performance will lie in many cases.² But where there is a failure

(specific performance granted as to crossings); *Windham Cotton Mfg. Co. v. Hartford etc. R. Co.*, 23 Conn. 373 (specific performance as to construction of turnout and sidetrack).

See contracts for location of depot held void, *infra*, this title, *Contracts for Location of Stations*.

As to a covenant for the building of culverts and drains in a particular case, see *Madden v. Cincinnati etc. R. Co.*, 36 Ohio St. 46; 3 Am. & Eng. R. Cas. 332.

Other Stipulations as Covenants.—A deed for a right of way to a receiver contained a covenant as to fencing, and the receiver agreed verbally to give the grantor an annual free pass over the road. Before the delivery of the deed, but after its execution, an objection was made to the fencing covenant, and the receiver promised verbally that if it were stricken out the fences should be maintained as under the covenant. When the receivers were relieved, the re-organized company refused to comply with the promises. It was held that the deed might be reformed in equity so as to insert the fencing covenant; but there was no remedy on the promise of the free pass, since the receiver had no power to so bind his successors. *Martin v. New York etc. R. Co.*, 36 N. J. Eq. 109; 12 Am. & Eng. R. Cas. 448.

In the case of *New Jersey etc. R. Co. v. Van Syckle*, 37 N. J. L. 496, a railroad company obtained under its charter the consent of the land owner, by deed, to enter on lands and construct its road over a certain route. There was a covenant for further assurance by formal conveyance. It was held that after the construction of the road the land owner could not revoke his consent or refuse to perform the covenant.

In *Purinton v. Northern Ill. R. Co.*, 46 Ill. 297, the covenant was to build a side track on a certain portion of the land. It was held that the construction of a double main track would, in the absence of other evidence, be considered a performance of the agreement.

A railroad crossed a farm and an agreement was made that the fences should be left open for the crossing of cattle. It was held that the company had the right to run its trains as if no such privilege existed, subject only to its duty to look out for the cattle and avoid injuring them if possible. *Whittier v. Chicago etc. R. Co.*, 26 Minn. 484. See also *Artman v. Kansas Cent. R. Co.*, 22 Kan. 296 (agreement to construct a wagon road crossing).

1. See *ESTATES*, vol 6, p. 900-901; 2 *Minors' Insts.* (3rd ed.), p. 292.

Thus, a deed of "one hundred feet in width being fifty feet on each side of the line which may be hereafter established by said company for the route of their railroad over and across the following described land" (describing specifically a forty-acre tract) conveys only a mere floating right which can only be rendered effectual and made to operate as a conveyance of title by the actual location of the road across such tract of land; and until such location is made the title to the whole tract remains in the grantor. *Detroit etc. R. Co. v. Forbes*, 30 Mich. 165.

Escrow.—A deed conveying the right of way to a railroad company was executed as an escrow, to be delivered to the company when it should erect a depot at a point designated. The company platted the land and paid taxes thereon, but the depot was not erected until long afterward, and then by another company. It was held that the first company acquired no title to the land either by deed or by adverse possession. *Sioux City Co. v. Wilson*, 50 Iowa 422.

2. Right of Re-Entry for Condition Broken—Belongs Only to Grantor or His Heirs.—Such conditions inure only to the benefit of the grantor or his heirs—not to his assignees—in accordance with a well settled principle of estates on condition. *Underhill v. Saratoga etc. R. Co.*, 20 Barb. (N. Y.) 455; *Nicoll v. New York etc. R. Co.*, 12 Barb. (N. Y.) 260; *aff'd* 12 N. Y. 121; 2 *Minor's Inst.* (3rd ed.) (240) 270; *Schulenberg v. Harriman*, 21 Wall. (U.

to perform any condition and the grantor neglects to avail himself of it in seasonable time and allows the company to continue making improvements and expenditures without protest or objection, he will be estopped to take advantage of such failure.¹ An

S.) 63; *Paul v. Connersville etc. R. Co.*, 51 Ind. 527; 1 *Rorer on Railroads* 320; *Ruch v. Rock Island*, 97 U. S. 693.

The right of re-entry is not in its nature severable, and is lost when even a portion only of the land is conveyed away. *Trinkham v. Erie R. Co.*, 53 Barb. (N. Y.) 393.

Action for Damages for Breach of Conditions.—A railroad corporation, in consideration of the amicable settlement of his damages by the owner of the land taken for their road, agreed with him to fence the land taken; and having failed to do so within a reasonable time was sued by him for breach of the agreement. It was held that a subsequent erection of the fences by them without the plaintiff's consent or approbation did not affect his right to recover, and that the damages were the sum which it would cost to erect the fences according to the agreement. *Lawton v. Fitchburg R. Co.*, 8 Cush. (Mass.) 230.

By accepting and acting under a deed conveying a right of way and containing certain conditions, a railroad company impliedly contracts to perform such conditions, and a failure to do so renders it liable to assumpsit or to an equivalent action. *Conger v. Chicago etc. R. Co.*, 15 Ill. 366; *Joliet etc. R. Co. v. Jones*, 20 Ill. 225; *Kankakee etc. R. Co. v. Fitzgerald*, 17 Ill. App. 530; *Burnett v. Lynch*, 5 B. & C. (11 E. C. L.) 589; *Gray v. Burlington etc. R. Co.*, 37 Iowa 119; *Baker v. Chicago etc. R. Co.*, 57 Mo. 265; 9 Am. Ry. Rep. 168.

In the case of *Ruch v. Burlington etc. R. Co.*, 57 Iowa 201; 11 Am. & Eng. R. Cas. 298, one of two tenants in common conveyed a right of way through their premises upon certain conditions. The company entered but failed to perform the conditions. The tenant granting the right was allowed to recover damages for the breach of the conditions; while the other tenant might maintain trespass since the entry as to him was without right.

Relief in Equity.—Ordinarily there is no relief in equity for breach of conditions subsequent, the remedy at law be-

ing sufficient. In some cases a bill in equity to cancel the deed as a cloud on the title has been sustained. See *Vicksburg etc. R. Co. v. Ragsdale*, 54 Miss. 200; *Memphis etc. R. Co. v. Neighbors*, 51 Miss. 412.

A railroad company accepting and acting under a deed impliedly agrees to perform all the conditions therein; and where it fails to erect fences or crossings, or similar structures as agreed upon, equity will decree specific performance against it at the suit of the land owner. *Gray v. Burlington etc. R. Co.*, 37 Iowa 119; *Aikin v. Albany etc. R. Co.*, 26 Barb. (N. Y.) 290; *Baker v. Chicago etc. R. Co.*, 57 Mo. 265; 9 Am. Ry. Rep. 168; *Hubbard v. Kansas City etc. R. Co.*, 63 Mo. 68.

As to whether in a particular case, equity will enforce specific performance, it depends upon the character of the contract, the effect of the relief, etc. As to all of which see SPECIFIC PERFORMANCE.

1. *Ludlow v. New York etc. R. Co.*, 12 Barb. (N. Y.) 440; *Taylor v. Cedar Rapids etc. R. Co.*, 25 Iowa 371; 2 Washb. on Real Prop. (4th ed.) 21 (456); *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169.

In *Baker v. Chicago etc. R. Co.*, 57 Mo. 265, a party executed a conveyance to a railroad company granting a right of way over his land, conditioned that the company should within a given time after the completion of the road, construct fences and cattle guards. The deed was delivered to an agent with the understanding that it was not to be delivered until the company had complied with its terms. The company without objection from the grantor went on and built the road, making expensive and permanent improvements on the land, but constructed no fences or cattle guards. The deed was therefore never delivered to the company, and the land owner brought ejectment. It was held that he was estopped to maintain the action by having permitted the improvements to be made, though he might have insisted upon a payment of damages as a condition precedent to the building of the road.

In *McAulay v. Western Vt. R. Co.*,

absolute grant by deed of a right of way is never defeated by a failure by the company to comply with certain covenants constituting the consideration on which the grant was obtained where no fraud is charged.¹

Where the conveyance is unrestricted as to use there is no reversion in the grantor, and the railroad company takes a perpetuity.² Grants from private persons, however, frequently contain

33 Vt. 311; 78 Am. Dec. 627, an owner allowed a railroad company to enter his lands and construct its road upon an understanding or contract for future payment. It was held that after the road was put in operation he could not upon non-payment of the price, maintain either ejectment or trespass for the land.

1. Absolute Grant—Failure of Consideration.—In the case of Galveston etc. R. Co. v. Pfeuffer, 56 Tex. 66; 11 Am. & Eng. R. Cas. 373, a land owner executed an absolute grant of the right of way in consideration of one dollar, etc., and the enhanced value to his property. The enhanced value was supposed to arise from the location of a terminal depot at a certain place according to a collateral agreement. The depot was not located as agreed, and in a suit against the company it was held that the grant would not be affected, that the measure of damages would have no relation to the land, but would be determined by the injury to the land owner otherwise caused by the non-location of the depot at the agreed place. The same principle is found in Houston etc. R. Co. v. McKinney, 55 Tex. 176; 8 Am. & Eng. R. Cas. 723; Hubbard v. Kansas City etc. R. Co., 63 Mo. 68.

In East Line R. Co. v. Garrett, 52 Tex. 133, a grant was made, in consideration of one dollar, "and in further consideration that the company will locate its road" on the grantor's land. It was held that this was not a condition, but only a mere contract.

In Hull v. Chicago etc. R. Co., 65 Iowa 713; 20 Am. & Eng. R. Cas. 341, the land owner conveyed a right of way in consideration of \$500. The deed also contained a clause that "the company agrees . . . to fence said right of way . . . and to put in two crossings," etc. It was held that this agreement constituted part of the consideration.

2. Restriction as to Use.—State v. Brown, 27 N. J. L. 13; Page v. Henie-

berg, 40 Vt. 81; 94 Am. Dec. 378; Hickox v. Chicago etc. R. Co., 78 Mich. 615; 43 Am. & Eng. R. Cas. 613.

When the company is consolidated with and merged into another company, which succeeds to all its rights and franchises, and continuously operates the road, the right of way does not determine and revert to the land owner at the end of the time for which the original company was chartered. Aff'g 46 Hun (N. Y.) 612; Miner v. New York Cent. etc. R. Co., 123 N. Y. 242.

Where, however, the conveyance is restricted to the time the land is used for railway purposes, the title reverts to the grantor when it is no longer used for such purposes. State v. Brown, 27 N. J. L. 13. But no forfeiture can be claimed on this ground because the land is used for other purposes so long as it is also used for the purposes stipulated. McKelway v. Seymour, 29 N. J. L. 321.

A deed of land to be used for certain purposes, but which provides that if used for other purposes a certain sum shall be paid in addition to the original consideration upon which the title shall be absolute does not create a qualified or determinable fee but only a condition subsequent. Board of Education etc. v. Trustees etc., 63 Ill. 204.

The use of the words in a grant "for the use of a plank road" constitutes a limitation, and the deed conveys but an easement. Robinson v. Missisquoi R. Co., 59 Vt. 426; 30 Am. & Eng. R. Cas. 299.

Where a railway company ceases to use a particular part of its right of way for the operation of its road and uses it merely for the storing of cars, the defeasance clause in the grant of the right of way which provided that if "it should cease to be used and operated as a railroad, . . . this release shall cease to be operative, and the right of way granted thereunder shall terminate," becomes operative, and the conveyance is of no further effect. Hickox v. Chicago etc. R. Co., 78 Mich. 615; 43 Am. & Eng. R. Cas. 613.

a clause providing that in case of abandonment or non-user, the right and title shall revert to the grantor. In all such cases no actual reversion takes place until a forfeiture is declared by judicial decision,¹ and it cannot be considered as an abandonment where the company loses the road under a mortgage and sale.²

A railroad company may also enter into a contract or agreement for a conveyance of the right of way,³ and such contract

In consideration of the erection of a depot and junction on his place, the owner of a large body of land granted to a railroad company the right of way across the same and two acres near the middle of the tract "to be used for railroad purposes only and none other." The land-owner, among other things, bought and shipped cotton seed in bulk, and was desirous, as the company knew, of preventing competition. To this end he retained ownership of all the surrounding land. As was its custom elsewhere, the company licensed other parties (rival merchants) to erect on the depot grounds, a house in which to store seed for shipment in bulk. It was held that this was not a "railroad purpose and none other" within the meaning of the contract, and that the owner was entitled to an injunction against the erection of any such house on the depot grounds or on the right of way, within the limits of his land. *Wilczinski v. Louisville etc. R. Co.*, 66 Miss. 595. The court also held that in such a case, where the question arises as to whether a certain use attempted to be made of the property is within the terms of the contract, the situation and surroundings of the subject-matter, the consideration and other circumstances attending the execution of the instrument, may be shown in evidence.

1. *Harrison v. Lexington etc. R. Co.*, 9 B. Mon. (Ky.) 470.

In the case of *Barlow v. Chicago etc. R. Co.*, 29 Iowa 376, it was held that a right of way thus secured was not forfeited or lost by a failure to occupy it for a period of thirteen years, growing out of a delay in the construction of the road. A mere non-user of an easement of this character, acquired by deed, will not operate to defeat or impair the right. See also *Washburn on Easements* 640; *Noll v. Dubuque etc. R. Co.*, 32 Iowa 66; *Slocumb v. Chicago etc. R. Co.*, 57 Iowa 681.

2. *Harrison v. Lexington etc. R. Co.*, 9 B. Mon. (Ky.) 470; *Fries v. Southern Pa. R. etc. Co.*, 85 Pa. St. 73.

Therefore upon a sale of such right of way all of the interests of the grantee company pass to the purchaser. *Barlow v. Chicago etc. R. Co.*, 29 Iowa 376; *Pennsylvania R. Co. v. Jones*, 50 Pa. St. 417.

The grant of a right of way by deed, "in consideration of the location and construction of the road, was for so long as it shall be required for the uses of said company." The company mortgaged the right of way but never constructed the road, and it was sold under foreclosure to A, who sold to B. Subsequently another company condemned the right of way and paid the damages assessed into court. It was held that the original grantor and not B was entitled to the damages. *Ingalls v. Byers*, 94 Ind. 134.

3. Contract to Convey Right of Way.—

The power to purchase lands carries necessarily the power to enter into a contract for the sale of lands. See *Dayton etc. R. Co. v. Lewton*, 20 Ohio St. 401; 1 *Wood's Ry. Law* 606.

But where a company had not secured its charter, nor filed its articles of association, etc., it has no power to enter into such a contract or to take a conveyance of land. *Gage v. New Market etc. R. Co.*, 18 Q. B. 457; *Boston etc. R. Co. v. Babcock*, 3 Cush. (Mass.) 228. A failure by the company to complete its road within the time required by its charter does not release a party from the obligation of his contract to convey. The State alone may take advantage of such failure. *Ross v. Chicago etc. R. Co.*, 77 Ill. 127.

Though specific performance of such contracts may be had in most cases, yet proof of a written agreement to sell land to a railroad company for a specified price within a certain time, and of a tender of the amount within the time and a refusal to accept it, will not authorize the company to enter upon the land afterwards and locate their road upon it, or defeat a petition for the damages sustained by reason of such

when made stands on the same footing as other contracts, and in proper cases a bill for specific performance will be sustained in equity, such enforcement being frequently the only adequate remedy after the location is fixed;¹ or damages may be recovered, and in such case the measure of damages is the difference between the price agreed on and that assessed in the condemnation

location. *Whitman v. Boston etc. R. Co.*, 3 Allen (Mass.) 133.

A railroad company having entered into possession under an agreement to purchase, and having constructive notice of a prior mortgage on the land sought to be used for a right of way, is bound to contribute to its payment to the extent of the value of the land so taken, and also damages at the time of the appropriation with interest thereon, without regard to the condition of the premises at the time of foreclosure or improvements made by the company. *North Hudson Co. R. Co. v. Booraen*, 28 N. J. Eq. 450; 1 Rorer on Railroad, p. 321.

1. Specific Performance of Contract for Right of Way.—*Chicago etc. R. Co. v. Swinney*, 38 Iowa 182 (may compel specific performance and enjoin *ad quod damnum* proceedings); *Ross v. Chicago etc. R. Co.*, 77 Ill. 127; *Boston etc. R. Co. v. Babcock*, 3 Cush. (Mass.) 228; *Dayton etc. R. Co. v. Lewton*, 20 Ohio St. 402.

See also SPECIFIC PERFORMANCE.

Where a party has contracted to convey to a railroad company a right of way it is no defense to a suit for specific performance that the railroad company did not commence or complete its work within the time limited by its charter. The State alone may take advantage of such failure. *Ross v. Chicago etc. R. Co.*, 77 Ill. 128.

To entitle any suitor to a decree for specific performance, such relief must not be inequitable (see SPECIFIC PERFORMANCE). Therefore where there is an agreement between two railroad companies, one, in consideration of a right to cross its road gave to the other a right to cross in future, specific performance will not be decreed where the crossing was to be at a place not contemplated by the parties, and where it would do very great damage to the company crossed. *Coe v. New Jersey etc. R. Co.*, 31 N. J. Eq. 107.

Specific performance to compel a conveyance of the right of way will not be decreed upon a bill filed by the

railroad company more than three years after the other party has refused to convey, and after they have located their road over other lands including only a small portion of this, and where no steps have been taken meanwhile by the company to enforce the agreement. *Boston etc. R. Co. v. Bartlett*, 10 Gray (Mass.) 384.

Specific performance will not be refused merely because the value of the land taken far exceeds the price agreed on where the building of the road is also a part of the consideration. *Ottumwa etc. R. Co. v. McWilliams*, 71 Iowa 164; 29 Am. & Eng. R. Cas. 544.

In order to secure specific performance the proper conditions must exist; *i. e.*, the contract must be complete, just, mutual, fair, and certain; free from doubt, misrepresentation, fraud, mistake, or illegality; and the remedy must not be harsh or oppressive. See SPECIFIC PERFORMANCE. *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105; 1 Wood's Ry. Law 601.

A party who had agreed to grant the right of way over his land to a railway company, after the construction of the road, brought ejectment for the land so taken, and also sued in trespass for damages; he afterwards dismissed the suit upon the agreement of the company operating the road to make a cattle pass, which was constructed at a cost of \$800. A bill for specific performance, and to enjoin the prosecution of the ejectment action, was brought by the company, and it was held that it would be inequitable to allow the owner to recover possession of the right of way after having induced the company to incur the expense solely for his benefit, and after his election to take damages instead of possession of the land. *Ross v. Chicago etc. R. Co.*, 77 Ill. 127.

Resulting Trust.—Where a party purchases lands for a railroad's right of way, but without the knowledge or consent of the company takes the legal title himself, equity will enforce the resulting trust arising from the purchase

proceedings.¹ A contract to convey confers no right to enter the land against the owner's will, and if entry is opposed the company must resort to its equitable remedy to obtain possession and title.² If there is a breach of the contract by the company the land owner has, of course, a remedy in an action for damages.³ For the purchase price and for the damages caused by the company's failure to comply with the provisions of the

money being of the funds of the company, and will compel the conveyance of the legal title to the railroad company. *Buffalo etc. R. Co. v. Lampson*, 47 Barb. (N.Y.) 533; *Pierce on Railroads*, 140; *Church v. Sterling*, 16 Conn. 388.

1. *Western R. Co. v. Babcock*, 6 Met. (Mass.) 346.

See also *Ross v. Chicago etc. R. Co.*, 77 Ill. 127.

2. *Whitman v. Boston etc. R. Co.*, 3 Allen (Mass.) 133; *Eggleston v. New York etc. R. Co.*, 35 Barb. (N.Y.) 162.

3. *Doe v. Leeds etc. R. Co.*, 16 Q. B. 796; *Hubbard v. Kansas City etc. R. Co.*, 63 Mo. 68; *Gallagher v. Fayette Co. R. Co.*, 38 Pa. St. 102.

But an action at law for the price of lands sold to a railroad company can not be maintained where there is no written contract as provided by the Statute of Frauds, subscribed by the parties to be charged, etc. *Reynolds v. Dunkirk etc. R. Co.*, 17 Barb. (N.Y.) 613; *Jacobs v. Petersburg etc. R. Co.*, 8 Cush. (Mass.) 223.

The measure of damages in such cases is not the full contract price, but the difference between that price and the market value of the land at the time of the breach. *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 25.

The plaintiff entered into a written contract with the defendant railroad company, by which he agreed to convey to it the right of way over a certain tract of land, in consideration of the payment of one dollar, the fencing of the tract through the land, and the construction of a crossing for his own use within a specified time. The road was built and afterwards transferred by foreclosure to another company, but neither company ever complied with the terms of the contract. A specific performance was decreed, and it was held—

1. That the measure of plaintiff's damages for the breach of contract was the difference in the rental value of the property caused thereby.

2. That the judgment for such dam-

ages would constitute a lien on the portion of the railroad located on the land covered by the contract. *Varner v. St. Louis etc. R. Co.*, 55 Iowa 677; *Davis v. St. Louis etc. R. Co.*, 56 Iowa 192; *Hull v. Chicago etc. R. Co.*, 65 Iowa 713; 20 Am. & Eng. R. Cas. 341 (as to measure of damages).

Relief in Equity.—An injunction may be had where it is necessary to prevent irreparable injury from which the company has agreed to refrain. *Unangst's Appeal*, 55 Pa. St. 128; *INJUNCTIONS*, vol. 10, p. 969.

In other cases it is said that the land owner has an equitable lien on the land in case of a breach of contract. *McAulay v. Western Vt. R. Co.*, 33 Vt. 311; 78 Am. Dec. 627; *Dayton etc. R. Co. v. Lewton*, 20 Ohio St. 401.

An injunction against a company will not be granted to restrain it from progressing with the construction of its road, and the erection of necessary buildings in such manner as they may deem proper, merely because of the violation of some contract which they may have previously made in relation to it. *Gallagher v. Fayette Co. R. Co.*, 38 Pa. St. 102.

In the case of *Stacy v. Vermont Cent. R. Co.*, 32 Vt. 551, it is held that if the railroad company enters land under a contract of purchase which is not carried into effect, an action for use and occupation cannot be maintained against it. See also *McAulay v. Western Vt. R. Co.*, 33 Vt. 311; 78 Am. Dec. 627. Compare, however, *Whitman v. Boston etc. R. Co.*, 2 Allen (Mass.) 133.

A lateral railroad was constructed over land under an agreement which stipulated that the road should be constructed in a particular manner and with a turn-out for the benefit of the land-owner. It was held that the remedy for a violation of this agreement was not by injunction to restrain the use of the road until the contract should have been complied with, but an action at law to recover damages. *Pusey v. Wright*, 31 Pa. St. 387.

contract of sale the land owner has a lien on the portion of the roadway covered by the contract.¹

A contract by a railroad company for a right of way, the plain purpose of which is to secure for itself the sole access to certain places to the exclusion of all other railroads, being contrary to the policy of the law, will not be upheld.²

5. Acquisition by License or Implied Grant.—A railway company may enter upon land and construct its road there under a mere parol license from the owner; this license, until revoked, affords the same protection to the company which it would enjoy under a deed or after regular condemnation proceedings.³ Such

1. *Davies v. St. Louis etc. R. Co.*, 56 Iowa 192; *Dayton etc. R. Co. v. Lewton*, 20 Ohio St. 401.

Action for Failure to Pay Purchase Money.—Where the company fails to pay the purchase price the owner of the land may have an action at law to recover it; he is not confined to the remedy by assessment of damages. *Kansas Pac. R. Co. v. Hopkins*, 18 Kan. 494.

2. *Kettle River R. Co. v. Easton R. Co.*, 41 Minn. 461; 40 Am. & Eng. R. Cas. 449; *Skrainka v. Scharinghausen*, 8 Mo. App. 523; *Greenhood on Pub. Policy* 672, *et seq.*; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 626.

But a third party, not interested in lands taken for a right of way by a railway company cannot raise the objection that the corporation has no power under its charter to acquire the specific lands for railway purposes. *Kettle River R. Co. v. Easton R. Co.*, 41 Minn. 461; 40 Am. & Eng. R. Cas. 449.

3. Where an individual consents that a railroad may pass through his lands, it is no trespass for the company to enter. *Louisville etc. R. Co. v. Thompson*, 18 B. Mon. (Ky.) 735. See generally LICENSE, vol. 13, p. 539, *et seq.*; *Pierce on Railroads*, 131; 1 *Wood's Ry. Law*, § 211, *et seq.*

A parol license to do a certain thing or series or succession of things on the land of another does not convey any interest in the land, but simply a privilege to be exercised upon the land; hence the Statute of Frauds does not apply in such a case. *Houston v. Lafce*, 46 N. H. 507 and cases cited; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; 30 Am. Dec. 60; *Blaisdell v. Portsmouth etc. R. Co.*, 51 N. H. 483.

And the doctrine of the text is sustained in other cases. *Miller v. Au-*

burn etc. R. Co., 6 Hill (N. Y.) 63; *Blaisdell v. Portsmouth etc. R. Co.*, 51 N. H. 483; *Tompkins v. Augusta etc. R. Co.*, 21 S. Car. 420; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72; 1 *Wood's Ry. Law* p. 609; *Pierce on Railroads*, 131.

An entry under license gives to the railway company the entire width of land authorized by law to be taken. *Hargis v. Kansas City etc. R. Co.*, 100 Mo. 210; 43 Am. & Eng. R. Cas. 599; *Campbell v. Indianapolis etc. R. Co.*, 110 Ind. 490; 30 Am. & Eng. R. Cas. 303.

In *New Orleans etc. R. Co. v. Moye*, 39 Miss. 374, it is said that a parol license is not within the Statute of Frauds, and is a good defense to an action of trespass against the company for entry on the land. But it must be noticed that while a mere license may not be within the Statute of Frauds, a permanent easement is and can be granted only in writing signed by the parties to be charged, etc. See *Pierce on Railroads* 131; **FRAUDS (STATUTE OF)**, vol. 8, p. 694.

If a company construct and operate its road by license from the landowner it is still liable for injury to his cattle on the land caused by its negligence. *Mathews v. St. Paul etc. R. Co.*, 18 Minn. 434.

In *Baltimore etc. R. Co. v. Algire*, 63 Md. 319; 23 Am. & Eng. R. Cas. 145, it is said that a railway company which has entered upon land under a license from the owner, and constructed its road cannot plead such license to an action of trespass for running its trains over said land after the revocation of the license; that a right of way is such an interest in land as cannot be acquired by license, but only in the manner provided by statute—*i. e.*, by deed duly executed and recorded.

license is, however, revocable at the will of the licensor, particularly in cases where it was granted in ignorance or under a misapprehension of the effect of its exercise.¹ But where a licensee has made expensive improvements of a permanent character so that a revocation would act as a fraud upon him, equity will enforce the license against the landowner, or will at least restrain the revocation until condemnation proceedings can be had.²

Hays v. Richardson, 1 Gill & J. (Md.) 366. And being in its nature revocable such license cannot protect him from an entry by the land owner. *Eggleston v. New York etc. R. Co.*, 35 Barb. (N. Y.) 162.

Such licenses are, under the Statute of Frauds, always void as the grant of an easement or incorporeal hereditament. *Fort v. New Haven etc. Co.*, 23 Conn. 214.

As to what constitutes a parol license in a particular case, see *Murdock v. Prospect Park etc. R. Co.*, 73 N. Y. 579.

1. *Hetfield v. Central R. Co.*, 29 N. J. L. 571 (even though money has been paid for it); *Campbell v. Indianapolis etc. R. Co.*, 110 Ind. 490; 30 Am. & Eng. R. Cas. 303; *Houston v. Laffee*, 46 N. H. 505; *Miller v. Auburn etc. R. Co.*, 6 Hill (N. Y.) 63; LICENSE, vol. 13; p. 548, *et seq.*; *Eggleston v. New York etc. R. Co.*, 35 Barb. (N. Y.) 162; *Selden v. Delaware etc. Co.*, 29 N. Y. 634; *Mathews v. St. Paul etc. R. Co.*, 18 Minn. 434; *Blaisdell v. Portsmouth etc. R. Co.*, 51 N. H. 483; *New Orleans etc. R. Co. v. Moyer*, 39 Miss. 374.

So of a parol license to enter and connect the tracks of two companies. *Richmond etc. R. Co. v. Durham etc. R. Co.*, 104 N. Car. 658; 40 Am. & Eng. R. Cas. 168 (even though valuable improvements have been made).

The law presumes that when a man assents to the doing of an act, he only assents to its being so done as not to injure him. *Bankhardt v. Houghton*, 27 Beav. 425; 1 Wood's Ry. Law. 611.

The owner, through her agent, granted permission to the company to build its road over her land, but with the understanding that it should not thereby acquire any rights to the soil. The permission was held not to be revoked, and its effect not changed by the fact that the agent from time to time thereafter claimed that the company was trespassing. *Harlow v. Marquette etc. R. Co.*, 41 Mich. 336.

The revocation may be by a subse-

quent as well as the original owner. *Foot v. New Haven etc. Co.*, 23 Conn. 214; unless such subsequent owner had notice. *Campbell v. Indianapolis etc. R. Co.*, 110 Ind. 490; 30 Am. & Eng. R. Cas. 304; *Masterson v. West End etc. R. Co.*, 72 Mo. 342; 4 Am. & Eng. R. Cas. 439 (mortgagee without notice).

See as to license coupled with an interest, *Wilmington etc. R. Co. v. Battle*, 66 N. Car. 540.

2. *Taylor v. Chicago etc. R. Co.*, 63 Wis. 327; 22 Am. & Eng. R. Cas. 123; *New Orleans etc. R. Co. v. Moyer*, 39 Miss. 374; *Brown v. Bowen*, 30 N. Y. 519; *Cook v. Prigden*, 45 Ga. 331; 12 Am. Rep. 582; *Campbell v. Indianapolis etc. R. Co.*, 110 Ind. 490; 30 Am. & Eng. R. Cas. 303 (subsequent purchaser with notice cannot revoke); *Pickert v. Ridgefield Park R. Co.*, 25 N. J. Eq. 316 (license by husband, the record owner, with wife's cognizance). Compare *Hetfield v. Central R. Co.*, 29 N. J. L. 571.

The rule that a license to do something on the licensor's land, followed by an expenditure on the faith of it, is irrevocable, rests upon the principle of estoppel, because the parties cannot be placed *in statu quo*. *Huff v. McCauley*, 53 Pa. St. 206; 91 Am. Dec. 203.

Or equity will in other cases restrain the landowner from proceeding against the company until it can acquire a right to the way occupied by condemnation proceedings. *Baltimore etc. R. Co. v. Algire*, 63 Md. 319; 23 Am. & Eng. R. Cas. 145.

Permission to build a road on one's land implies authority to use it afterward, and when a landowner allows the construction of a road on his land he is chargeable with knowledge that the road is of such a permanent character that it cannot well be removed or abandoned. *Harlow v. Marquette etc. R. Co.*, 41 Mich. 336.

In *Wisconsin* if the owner of land has permitted a railroad company to enter thereon and construct its road-bed, track, etc., he waives his remedy by

Acquisition by implied grant exists in cases where the owner of lands allows a railroad company to occupy and use them for the construction of its road without remonstrance or complaint; by his action, the landowner is considered to have acquiesced therein and to have waived his right to dispossess the company.¹

injunction, or action for the trespass, and is relegated to the statutory mode of obtaining compensation. *Milwaukee etc. R. Co. v. Strange*, 63 Wis. 178; 20 Am. & Eng. R. Cas. 413; *Cassidy v. Chicago etc. R. Co.*, 70 Wis. 441.

It is a rule of law that a license cannot be revoked so long as it is essential to the enjoyment of a vested interest created by the licensor's assent. Therefore an owner who, by not insisting on prepayment as a condition precedent to a surrender of the land, nor attempting to impede the progress of the road-making, induces a railroad company to expend large sums therein, cannot maintain ejectment on the ground of the failure to prepay. *Provolt v. Chicago etc. R. Co.*, 57 Mo. 256; *McAuley v. Western Vt. R. Co.*, 33 Vt. 311; 78 Am. Dec. 627. The owner in such a case has a remedy, however, in a suit for damages or specific performance. *Provolt v. Chicago etc. R. Co.*, 57 Mo. 256.

Where the railroad company obtains, by deed, the consent of the landowner to enter and construct its road over a fixed route, the deed containing a covenant for further assurance by formal conveyance, the landowner cannot revoke his consent and sue the company in trespass. *New Jersey etc. R. Co. v. Van Syckle*, 37 N. J. L. 496.

1. *Lawrence v. Morgan's L. & T. R. etc. Co.*, 39 La. Ann. 427; 30 Am. & Eng. R. Cas. 309; *St. Julien v. Morgan etc. R. Co.*, 35 La. Ann. 924; *Taylor v. Chicago etc. R. Co.*, 63 Wis. 327; 22 Am. & Eng. R. Cas. 123, note; *Omaha etc. R. Co. v. Redick*, 16 Neb. 313; 17 Am. & Eng. R. Cas. 107. Compare *Conger v. Burlington etc. R. Co.*, 41 Iowa 419.

As to what acquiescence constitutes an estoppel in such cases, see *Richards v. Buffalo etc. R. Co.*, 137 Pa. St. 524; *Denver etc. R. Co. v. School District No. 22*, 14 Colo. 327.

In the case of *St. Julien v. Morgan etc. R. Co.*, 35 La. Ann. 924, the principle was thus stated: "One who permits a railroad company to occupy and use his lands and construct its road (a quasi public work) thereon without

remonstrance or complaint, cannot afterwards reclaim it free from the servitude he has permitted to be imposed upon it. His acquiescence in the company's taking possession and constructing its works under circumstances which made imperative his resistance, if he ever intended to set up illegality, will be considered a waiver. But while this presumed waiver is a bar to his action to dispossess the company, he is not deprived of his action in damages for the value of the land or for injuries done him by the construction or operation of the road."

And in *McAuley v. Western Vt. R. Co.*, 33 Vt. 311; 78 Am. Dec. 627, the court by Redfield, C. J., said: "In these great public works the shortest period of clear acquiescence so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to include the right to assert the claim in any such form as to stop the company in the progress of the work, and especially stop the running of the road after it has been put in operation whereby the public acquire important interests in its continuance."

In *Conger v. Burlington etc. R. Co.*, 41 Iowa 419, it is said that the fact that the owner of lands permits a railway company to enter upon it and construct its road does not give the company title to the right of way, or estop the owner from maintaining an action of ejectment against the company. But this was a case where the damages had been assessed and the company had neglected to pay them. Even though ejectment was allowed, it was held that its execution would be stayed until the company should have reasonable time to pay.

Right to Damages.—But such acquiescence on the part of the landowner, though acting as a waiver of his right to maintain ejectment, is by no means a waiver of his right to damages such as would have been recovered in regular condemnation proceedings. *Lawrence v. Morgan's L. & T. R. etc. Co.*, 39 La. Ann. 427; 30 Am. & Eng. R. Cas. 309; *Harlow v. Marquette etc. R.*

6. Width of Way.—The width of the way which may be acquired by any railroad company by the exercise of the right of eminent domain, is usually fixed by statute.¹ Where the way is obtained by purchase, its width is determined by the terms of the conveyance or agreement; there seems to be no limit to the amount which may be acquired by purchase except the limit fixed to the power of the corporation to hold and acquire lands.² A conveyance, in the absence of specific provisions as to the width, will be presumed to convey a strip of the same width as is allowed to be acquired by condemnation proceedings.³

Co., 41 Mich. 336; Western Pa. R. Co. v. Johnston, 59 Pa. St. 290; Perkins v. Maine Cent. R. Co., 72 Me. 95; Galveston etc. R. Co. v. Pfeuffer, 56 Tex. 66; 11 Am. & Eng. R. Cas. 373; Thornton v. Sheffield etc. R. Co., 84 Ala. 109; 33 Am. & Eng. R. Cas. 226.

Unless the delay has been so long as to constitute a waiver or to be barred by the Statute of Limitations. Texas etc. R. Co. v. Sutor, 59 Tex. 29.

1. Thus in *New Jersey* it is one hundred feet. *State v. Hudson* etc. R. Co., 46 N. J. L. 289; 20 Am. & Eng. R. Cas. 294. And so in almost every other State. *Stark v. Sioux City* etc. R. Co., 43 Iowa 501 (road need not be in center of way); *Johnston v. Chicago* etc. R. Co., 58 Iowa 537; *Booker v. Venice* etc. R. Co., 101 Ill. 333; 5 Am. & Eng. R. Cas. 357; *Lewis on Eminent Domain*, 279-80; *Pittsburgh Nat. Bank v. Shoenberger*, 111 Pa. St. 95 (twenty feet for a lateral railroad); *Prather v. Western Union Tel. Co.*, 89 Ind. 501; 14 Am. & Eng. R. Cas. 1 (sixty feet only allowed); *EMINENT DOMAIN*, vol. 6, p. 501; *Eaton v. European* etc. R. Co., 59 Me. 520 (six rods allowed); *Spofford v. Bucksport* etc. R. Co., 66 Me. 26 (four rods); *Booker v. Venice* etc. R. Co., 101 Ill. 333; 5 Am. & Eng. R. Cas. 357 (more than one hundred feet when necessary).

And if a corporation presents a petition for the condemnation of more land than it is authorized to condemn, the proceedings will be set aside *in toto*. *State v. Hudson* etc. R. Co., 46 N. J. L. 289; 20 Am. & Eng. R. Cas. 294.

Where the railway company seeks to condemn a strip more than one hundred feet wide, and the necessity for such greater width is controverted by the landowners, the burden of proof is upon the company. *Wisconsin Cent. R. Co. v. Cornell University*,

52 Wis. 537. In this case a strip two hundred feet wide was condemned. As to widening the roadway, see *Childs v. Central R. Co.*, 33 N. J. L. 323.

2. See *CORPORATIONS*, vol. 4, p. 230, *et seq.*; *Georgia Pac. R. Co. v. Wilks*, 86 Ala. 478; 38 Am. & Eng. R. Cas. 665; *Case v. Kelly*, 133 U. S. 21; 43 Am. & Eng. R. Cas. 1.

A deed conveyed a right of way "not exceeding one hundred feet in width" within which limit the company were to "use so much of the land as they may deem necessary." It was held that this was not an absolute grant of one hundred feet, but was, until located, a floating right, exercisable over any portion of the land within the limit specified. *Vicksburg* etc. R. Co. v. Barrett, 67 Miss. 579; 43 Am. & Eng. R. Cas. 595. So that the company by occupying a narrower strip for a year was estopped to eject other grantees in order to widen its way.

Where a statute provides that a railroad company may receive, from owners of land over which its road is to pass, grants of rights of way, not exceeding a specified width, and one of such owners grants such a right without specifying the width thereof, the company is authorized to appropriate and use an area across the lands of such owner of any width, in its discretion, not exceeding that specified by the statute. *Indianapolis* etc. R. Co. v. Rayl, 69 Ind. 424.

3. **Presumption as to Width of Way.**—*Hargis v. Kansas City* etc. R. Co., 100 Mo. 210; 43 Am. & Eng. R. Cas. 598; *Duck River* etc. R. Co. v. Cochran, 3 Lea (Tenn.) 482; *Philadelphia* etc. R. Co. v. Obert, 109 Pa. St. 193; 23 Am. & Eng. R. Cas. 65 (presumption exists, but after a purchase, in a contest involving the exact lines, the company must establish the extent of its ownership in same manner and by same

VIII. CONSTRUCTION AND OPERATION OF THE ROAD.—1. Liability for Injuries Caused by Construction.—In the construction of its road-bed and tracks, and of its yards, machine shops, stations, etc., a railroad company is bound to use due care to have such construction done in a skillful manner, and to keep strictly within the bounds of the authority granted.¹ So long as it does so, there is no liability on its part for consequential damages sustained by landowners from the construction of the road; the rightful and proper exercise of a lawful authority can never afford a basis for an action.² It is only when such authority is negligently,

measure of proof as others); *Morris etc. R. Co. v. Bonnell*, 34 N. J. L. 477; *Indianapolis etc. R. Co. v. Rayl*, 69 Ind. 424; 3 Am. & Eng. R. Cas. 182.

In *Day v. New York etc. R. Co.*, 41 Ohio St. 392; 20 Am. & Eng. R. Cas. 559, the agreement conveyed a right of way to a railway company; it recited that a description of the plat, etc., granted "is hereto attached and made a part of this agreement." No such description was ever attached. It was held that the company was entitled under the agreement to as much ground on either side of the track as was reasonably necessary for the convenient use and maintenance of the railway in the customary mode; and such possession was notice to a subse-quent purchaser of its title.

The presumption arises that a grant of the right of way is limited to the strip between fences built by the landowner, and unless this is rebutted a railroad cannot encroach upon land beyond the fences without making compensation. And proof that some time after the road was built the president had reported that a right of way for a double track had been obtained, will not rebut the presumption. *West Chester etc. R. Co. v. Goddard* (Pa. 1888), 33 Am. & Eng. R. Cas. 195.

1. *Lafayette Plankroad Co. v. New Albany etc. R. Co.*, 13 Ind. 90; *Rockwell v. Third Ave. R. Co.*, 64 Barb. (N. Y.) 438; *Wooster v. Forty-Second St. R. Co.*, 50 N. Y. 203; *Biscoe v. Great Eastern R. Co.*, 16 L. R. Eq. 636; 7 Moak's Rep. 630; 21 W. R. 902; *Georgetown etc. R. Co. v. Doyle*, 9 Colo. 540; 30 Am. & Eng. R. Cas. 231; *Rathburn v. Burlington etc. R. Co.*, 16 Neb. 441; 19 Am. & Eng. R. Cas. 137; *Gudger v. Western etc. R. Co.*, 87 N. Car. 325; 19 Am. & Eng. R. Cas. 144. See also *Hortzman v. Covington etc. R. Co.*, 18 B. Mon. (Ky.) 218. See also EMINENT DOMAIN, vol. 6, p.

563, *et seq.* The right of the public in a highway is paramount to the mere convenience of the railroad company; the company is therefore not justified in building a depot upon a public highway or so near it as to injuriously obstruct the public travel, when its own convenience only is concerned. *State v. Morris etc. R. Co.*, 25 N. J. L. 437.

See also *infra*, this title, *Effect of Legislative Grant as Affecting Liability*.

In the assessment of damages for a right of way, it is presumed that the company will execute its work properly and keep within the bounds of its authority. To all damages resulting the special remedy for damages for taking by eminent domain apply. See *Pierce on Railroads*, p. 179. But when the company exceeds its authority or makes an unlawful use of it, it becomes a trespasser and is liable in tort just as private individuals would be. *Pierce on Railroads* p. 179; *Mason v. Kennebec etc. R. Co.*, 31 Me. 215; *Rogers v. Kennebec etc. R. Co.*, 35 Me. 215; *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365; *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 63; 28 Vt. 142; *Dearbron v. Boston etc. R. Co.*, 24 N. H. 187; *Dodge v. County Comr's*, 3 Met. (Mass.) 380; *Fowle v. New Haven etc. R. Co.*, 112 Mass. 334; *Canals v. Nashua etc. R. Co.*, 10 Cush. (Mass.) 385; *Hooker v. New Haven etc. Co.*, 14 Conn. 146; 15 Conn. 312; *Brown v. Cayuga etc. R. Co.*, 12 N. Y. 486; *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42; *Pittsburgh etc. R. Co. v. Gilleland*, 56 Pa. St. 445; *Baltimore etc. R. Co. v. Reaney*, 42 Md. 130; *Fleming v. Chicago etc. R. Co.*, 34 Iowa 458; *McCormick v. Kansas City etc. R. Co.*, 57 Mo. 433; *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 344.

2. *Slattern v. Des Moines etc. R. Co.*, 29 Iowa 154; 4 Am. Rep. 205; *Ellis v. Iowa City*, 29 Iowa 229; *Dodge v. Essex Co.*, 3 Met. (Mass.)

380; *Boston Gas Light Co. v. Old Colony R. Co.*, 14 Allen (Mass.) 444; *Carson v. Western R. Co.*, 3 Gray (Mass.) 423; *Stone v. Fairbury etc. R. Co.*, 68 Ill. 394; *Bordentown etc. Tp. Co. v. Camden etc. R. Co.*, 17 N. J. L. 314; *Philadelphia etc. R. Co. v. Yeiser*, 8 Pa. St. 366; *Sunbury etc. R. Co. v. Hummel*, 27 Pa. St. 99; *Burroughs v. Housatonic R. Co.*, 15 Conn. 124; *Salin v. Vermont Cent. R. Co.*, 25 Vt. 363; *Richardson v. Vermont etc. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283; *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; *Thomas v. Androscoggin Co.*, 54 N. H. 556; *Fowle v. Eastern R. Co.*, 17 N. H. 519; 18 N. H. 547; 47 Am. Dec. 153; *Hahn v. Southern Pac. R. Co.*, 51 Cal. 605; *Lessee v. Buchanan*, 51 N. Y. 476; 10 Am. Rep. 623; *reversing* 61 Barb. (N. Y.) 86; *Lansing v. Smith*, 8 Cow. (N. Y.) 146; *Conklin v. New York etc. R. Co.*, 102 N. Y. 107; 26 Am. & Eng. R. Cas. 365; *Sweetser v. Boston etc. R. Co.*, 66 Me. 583; *Whitehouse v. Androscoggin R. Co.*, 52 Me. 208; *Pierce on Railroads*, p. 263-4; *Vaughn v. Tuff Vale R. Co.*, 3 H. & N. 743; 5 H. & N. 679; *Lynn etc. R. Co. v. Boston etc. R. Co.*, 114 Mass. 88.

But see *Baltimore etc. R. Co. v. Reaney*, 42 Md. 117, where it was held that damage done to a house of a party by reason of the excavation of a street by a railroad company, even when acting in the proper exercise of a lawful authority, is not *damnum absque injuria* and a recovery may be had therefor. See also *Fletcher v. Auburn etc. R. Co.*, 25 Wend. (N. Y.) 462; *Alton etc. R. Co. v. Deitz*, 50 Ill. 210.

The leading cases, *Hatch v. Vermont Cent. R. Co.*, 29 Vt. 49 (opinion by Redfield, C. J.), and *Slatten v. Des Moines etc. R. Co.*, 29 Iowa 154; 4 Am. Rep. 205 (opinion by Cole, C. J.), both review exhaustively the cases on the subject, and lay down substantially the rule stated in the text.

In the case of *Dodge v. Essex Co.*, 3 Met. (Mass.) 380, the court, holding that, under the statute, consequential damages might be recovered, went on to say by Shaw, C. J.: "It is a reasonable and now well settled principle that when the legislature under the right of eminent domain and for the prosecution of works for public use authorizes an act or series of acts, the natural and necessary consequence of

doing which will be damage to the property of another, and provides a mode for the assessment and payment of the damages occasioned by such work, the party authorized, acting within the scope of his authority, is not a wrongdoer; an action will not lie as for a tort, and the remedy is by a statute, not at common law."

In *Pennsylvania*, in the case of *Woodward v. Webb*, 65 Pa. St. 254, the doctrine is laid down that "consequential damages are never recoverable from a corporation of this nature, except when expressly given, and on terms on which they are allowed." The corporation in that case was authorized by an act of the legislature to improve a stream, and the action was brought to recover damages from the proper exercise of the corporate power. The *Iowa* court, in commenting upon this case, by Cole, C. J., said: "This, it seems to us, is sound doctrine; and, indeed, it must be true, as a general proposition, that the rightful and *bona fide* exercise of a lawful power or authority cannot afford a basis for an action. If the power or right is exercised carelessly, negligently, wrongfully, improperly, and, may be, maliciously, the party so exercising it may be liable to respond in damages for any injury, direct or consequential, resulting to another from thus exercising the right or power; but such liability can only arise upon and for the manner of doing the act, and not for the act itself. *Slatten v. Des Moines Valley R. Co.*, 29 Iowa 154.

The case of *Evansville etc. R. Co. v. Dick*, 9 Ind. 433, is difficult to reconcile with the rule of the text. The plaintiff, D, was the owner of real estate on the banks of the White River, below the place where the railroad crossed that stream. The land was one-half mile from the railroad, separated from it by lands of one W. During the floods in the river the embankment raised by the railroad company caused the water to overflow on D's land, thereby greatly injuring his crops, etc. It was held that even though the embankment was constructed in a proper manner and place, yet if it necessarily injured D, the company was liable; that the legislature cannot authorize either a direct or consequential injury to property without making due compensation to the owner. This case is followed in *Protzman v. Indianapolis etc. R. Co.*,

wrongfully, or improperly exercised that the company is liable to respond in damages for injuries resulting as a consequence of such improper exercise of authority, and then it is not the mere exercise of the authority, but the manner of its exercise which constitutes the ground of recovery.¹

9 Ind. 467; Indiana Cent. R. Co. v. Boden, 10 Ind. 96.

Compare, however, *Wabash etc. Canal v. Spears*, 16 Ind. 441. And in the case of *State v. Louisville etc. R. Co.*, 86 Ind. 114; 10 Am. & Eng. R. Cas. 286, it was held that a railroad is not liable for injuries caused by such temporary obstructions as result from the reasonable and necessary transaction of its railroad business. The court by Elliott, J., said: "As long as a railroad company uses proper care, and makes a reasonable effort to so conduct its business as to cause no unnecessary obstruction, it cannot be deemed the author of a nuisance. While it has no right to unnecessarily obstruct the streets, it has a right to use them in a reasonable manner for the necessary transaction of its business."

1. A review of the cases in which railroad companies have been held liable for damages to property adjacent to their right of way, caused by the construction, will show that in every case the ground of liability was the unlawful exercise of the authority granted. See *infra*, this title, *Effect of Legislative Grant as Affecting Liability*. Thus in *Georgetown etc. R. Co. v. Eagles*, 9 Colo. 544; 30 Am. & Eng. R. Cas. 228, the railroad company, in constructing its roadbed threw rock and debris upon the adjoining land during its blasting operations. The landowner, a hotel keeper, brought suit to recover damages for the injury he sustained, alleging and proving that as a consequence of the blasting many guests had left his hotel and his business had thereby suffered. The court held that he had a right to recover, but assigned as a ground for such holding that the blasting under such conditions was not a proper exercise of the general authority granted. *Georgetown etc. R. Co. v. Doyle*, 9 Colo. 549; 30 Am. & Eng. R. Cas. 231.

In *Brewer v. Boston etc. R. Co.*, 113 Mass. 52, a party sustaining injury from the construction of the road was allowed to recover; but the principle was distinctly recognized that the company was liable only for such acts as

were done in excess of its authority, or negligently done.

In *Lawrence v. Great Northern River Co.*, 16 Ad. & El. 643; 71 E. C. L. 643; 6 Ry. Cas. 656; 20 L. J. Q. B. 293, the company was held liable for injuries resulting from the overflow of water caused by the railroad embankments. But as in the other cases the ground of the holding was that the company had been negligent in the construction of the embankment; that there had been an improper exercise of authority.

In *Jones v. Festing R. Co.*, 3 L. R. Q. B. 733; 17 W. R. 28; 18 L. T. N. S. 902, the railway company was held liable because it had no lawful authority. So in *Biscoe v. Great Eastern R. Co.*, 16 L. R. Eq. 636; 7 Moak's Rep. 630; 21 W. R. 902, the company was restrained from the exercise of its granted powers in a negligent manner.

In *Hazen v. Boston etc. R. Co.*, 2 Gray (Mass.) 574, the company was held liable for constructing its road outside its location. *Eaton v. European etc. R. Co.*, 59 Me. 537.

In *Parson v. Howe*, 41 Me. 218, it was held liable for appropriating materials without authority.

In *Proprietors etc. v. Nashua etc. R. Co.*, 10 Cush. (Mass.) 385, for unlawfully obstructing an easement. In *Brown v. Cayuga etc. R. Co.*, 12 N. Y. 486, the company was authorized by its charter to cross any stream in a manner not to impair its usefulness or value to its owner. It was held liable to a riparian proprietor for damages caused by so crossing the stream as to obstruct it and divert it from its channel.

In *Memphis etc. R. Co. v. Hicks*, 5 Sneed (Tenn.) 427, a company was authorized by its charter to build a bridge over a navigable stream, providing that the navigation should not be obstructed thereby. There was a temporary obstruction while the bridge was building, but only such as was caused by the necessary framework and scaffolding used in the erection of the bridge. It was held that the company was liable for the injury caused to any one by such

2. Highway Crossings—(See also **CROSSINGS**, vol. 4, p. 906).—Wherever its road crosses a highway the duty rests upon the company to restore the highway to its former condition as nearly as possible and to construct and to maintain a safe and convenient crossing;¹ a failure to perform this duty renders it liable for injuries

obstruction; that the charter did not authorize it.

In *Gudger v. Western etc. R. Co.*, 87 N. Car. 325; 19 Am. & Eng. R. Cas. 144, a person was injured by tripping over a stake negligently left in the street by the engineer constructing the road. The company was held liable for the injury.

See also *Lake Shore etc. R. Co. v. Hutchins*, 37 Ohio St. 282; 4 Am. & Eng. R. Cas. 219 (conversion of timber by the company); *Rathburn v. Burlington etc. R. Co.*, 16 Neb. 441; 19 Am. & Eng. R. Cas. 137; *Woodman v. Metropolitan R. Co.*, 149 Mass. 335; 38 Am. & Eng. R. Cas. 484 (obstruction of street); *Shaw v. New York etc. R. Co.*, 150 Mass. 182; 41 Am. & Eng. R. Cas. 547 (negligent obstruction); *Cairo etc. R. Co. v. Worsley*, 85 Ill. 370 (company liable for trespass of its servants in digging up soil); *St. Louis etc. R. Co. v. Capps*, 72 Ill. 188.

Compare Alton etc. R. Co. v. Deitz, 50 Ill. 210.

1. See **CROSSINGS**, vol. 4, p. 906, *et seq.*; *Missouri etc. R. Co. v. Long*, 27 Kan. 684; *Masterson v. New York Cent. R. Co.*, 84 N. Y. 247; 38 Am. Rep. 510; *People v. New York Cent. R. Co.*, 74 N. Y. 302; *Lincoln v. St. Louis etc. R. Co.*, 75 Mo. 27 (company must construct crossing without being notified); *Ellis v. Wabash etc. R. Co.*, 17 Mo. App. 126; *Brown v. Hannibal etc. R. Co.*, 99 Mo. 310; 72 Am. & Eng. R. Cas. 87; *Eatman v. New Orleans Pac. R. Co.*, 35 La. Ann. 1018; *Jamestown v. Chicago etc. R. Co.*, 69 Wis. 648; 32 Am. & Eng. R. Cas. 263 (mandatory injunction issued); *Louisville etc. R. Co. v. Smith*, 91 Ind. 119; *State v. Minneapolis etc. R. Co.*, 39 Minn. 219; 35 Am. & Eng. R. Cas. 250; *Terre Haute etc. R. Co. v. Clem*, 123 Ind. 15; 42 Am. & Eng. R. Cas. 229; *Allen v. New Haven etc. R. Co.*, 50 Conn. 215; *Mann v. Central Vt. R. Co.*, 55 Vt. 484; 45 Am. Rep. 628; *Paducah etc. R. Co. v. Com.*, 80 Ky. 147; 10 Am. & Eng. R. Cas. 318 (company indictable for failure to maintain crossing); *Gulf etc. R. Co. v. Greenlee*, 62 Tex. 344 (company bound to

leave the approaches of the highway in as good a condition as they were in before, even though the statute does not expressly so direct).

A provision requiring a railway company to place a highway crossed or diverted "in such condition as not to impair its former usefulness," is a condition inseparable from the right or franchise granted to the company to cross the highway with its road. *State v. Dayton etc. R. Co.*, 36 Ohio St. 434. And if the company continues in the exercise of its franchise the equity powers of the court may be invoked to compel a performance of the condition. *State v. Dayton etc. R. Co.*, 36 Ohio St. 434; 5 Am. & Eng. R. Cas. 312.

As to what is a proper compliance with such provisions, see *Appeal of North Manheim* (Pa. 1888), 14 Atl. Rep. 137; 36 Am. & Eng. R. Cas. 194; *Dallas etc. R. Co. v. Able*, 72 Tex. 150; 37 Am. & Eng. R. Cas. 453.

An injunction will be granted at the instance of a city to prevent the use of four tracks across a street at grade in addition to five already there. *Newark v. Delaware etc. R. Co.*, 42 N. J. Eq. 196.

Statutory Duty.—This duty to construct crossings is almost universally provided for by statute, and is considered to apply as well to highways built after the completion of the road as those constructed before. See *Allen v. New Haven etc. R. Co.*, 50 Conn. 215; *Clawson v. Chicago etc. R. Co.*, 95 Ind. 152; 20 Am. & Eng. R. Cas. 56; *State v. Shardlow*, 43 Minn. 524; 45 Am. & Eng. R. Cas. 106; *Worcester etc. R. Co. v. Nashua*, 63 N. H. 593.

Compare People v. Lake Shore etc. R. Co., 52 Mich. 277; 13 Am. & Eng. R. Cas. 611, in which it is held that the duty applies only to such after constructed highways as are made necessary by the existence of the railroad.

In *Evansville etc. R. Co. v. Carver*, 113 Ind. 51; 32 Am. & Eng. R. Cas. 134, the track was left nine inches above the surface, and a horse died

resulting as a proximate consequence of its negligence.¹ There

from over exertion in pulling a load over it. The company was held liable in spite of the fact that the load might have been lightened.

The *Kansas* statute requiring railroad companies to erect crossings at the intersection of their road with every regularly laid out public highway does not embrace a way generally traveled by the public for more than fifteen years as a road, but not regularly laid out under the statute or set apart upon the public records as a highway or street. *Missouri etc. R. Co. v. Long*, 27 Kan. 684; 6 Am. & Eng. R. Cas. 554; *Flint etc. R. Co. v. Willey*, 47 Mich. 88; 5 Am. & Eng. R. Cas. 305. Compare *Missouri Pac. R. Co. v. Bridges (Tex.)*, 39 Am. & Eng. R. Cas. 604.

The *New York* statute authorizes railroad companies to carry the highway over or under their tracks "as may be found most expedient." Under this the company may elect the mode of crossing, but under the general railroad law of 1850 it seems that a mode of crossing would not be permitted which made it impracticable to restore the highway to a reasonable state of usefulness. *People v. New York Cent. R. Co.*, 74 N. Y. 302.

Connecticut Laws (1883), ch. 107, § 2, provide that "no new highway or portion of a highway shall be constructed across a railroad at grade." See *New York etc. R. Co. v. Waterbury*, 55 Conn. 19. See also *Central Vt. R. Co. v. Royalton*, 58 Vt. 432, for construction of *Vermont Rev. St.*, § 3381, providing that a way "may be made so as to pass over or under a railroad."

Indiana Rev. St. 1881, § 3915, provide that whenever the track of a railroad shall cross a road or highway, the latter may be carried under or over the track as may be most expedient; and where a change in the road is desirable, additional land may be taken. See *Clawson v. Chicago etc. R. Co.*, 95 Ind. 152.

Definitions.—The term "crossing" includes the necessary embankments and approaches. *Moberly v. Kansas City etc. R. Co.*, 17 Mo. App. 518; *Gulf etc. R. Co. v. Greenlee*, 62 Tex. 344; 23 Am. & Eng. R. Cas. 322; *Maltby v. Chicago, etc. R. Co.*, 52 Mich. 108; 13 Am. & Eng. R. Cas. 606,

though in another case it is said that if the company agrees forever to maintain a crossing over A's land, and afterwards raises the grade of its road, A must bear the expense of making new approaches. *Williams v. Clark*, 140 Mass. 238.

If a portion of a highway in a city is lowered for the purpose of having a railroad pass over it by means of a bridge, such portion is not included in the "approaches" to the bridge. *Whitcher v. Somerville*, 138 Mass. 454.

1. CROSSINGS, vol. 4, p. 916 and cases cited; *Scanlan v. Boston*, 140 Mass. 84 (company liable and not the city); *Carter v. Boston etc. R. Co.*, 139 Mass. 525; *Maltby v. Chicago etc. R. Co.*, 52 Mich. 108; 13 Am. & Eng. R. Cas. 606 (makes no difference that injured party was aware of the defect); *East Line etc. R. Co. v. Brinker*, 68 Tex. 500 (horse's foot caught in a hole in the crossing whereby rider was thrown); *Domingues v. New Orleans R. Co.*, 35 La. Ann. 751 (liability not affected by city's authority to operate the road); *Eatman v. New Orleans Pac. R. Co.*, 35 La. Ann. 1018 (duty to construct crossing created by contract); *Kimes v. St. Louis etc. R. Co.*, 85 Mo. 611; *Spooner v. Delaware etc. R. Co.*, 115 N. Y. 22; 39 Am. & Eng. R. Cas. 599 (child's foot caught between rail and plank where it was crushed by passing train); *Gulf etc. R. Co. v. Walker*, 70 Tex. 126; 37 Am. & Eng. R. Cas. 34; *Dallas etc. R. Co. v. Able*, 72 Tex. 150; 37 Am. & Eng. R. Cas. 453; *Tobin v. Portland etc. R. Co.*, 59 Me. 183.

Circumstances may be such that the company will not be liable for an injury caused by a defective crossing; *e. g.*, where the highway was changed by the county commissioners so as to run it in a peculiar position, without any notice being given to the company. *Hill v. Portland etc. R. Co.*, 31 S. Car. 393; 39 Am. & Eng. R. Cas. 607.

Where a road over a railroad track is used openly and notoriously by the public as a highway, and the company recognizes it as such by permitting the public to cross, and by assuming to maintain a crossing at that point, the company is as much bound to repair as if it were a legal highway. *Kelly v. Southern Minn. R. Co.*, 28 Minn. 98.

Private Crossing Acquired By Prescription.—A proprietor of lands may by

is no duty to construct crossings for private ways unless it is created by contract or by special statutory provisions.¹

As to the duty of the railroad company in regard to signals, signboards, etc., at crossings, and its liability for injuries occurring, see a previous article.²

3. Railroads Crossing Each Other.—Every railroad corporation

open, adverse, and uninterrupted use for more than twenty years, acquire a right of way by prescription notwithstanding the existence of statutes which prohibit, under penalty, the traveling upon or crossing of a railroad without consent of the company. *Turner v. Fitchburgh R. Co.*, 145 Mass. 433; 35 Am. & Eng. R. Co. 433.

1. **Road Crossing Private Ways.**—*Kansas City etc. R. Co. v. Kregel*, 32 Kan. 608; 20 Am. & Eng. R. Cas. 241; *Atchison etc. R. Co. v. Gongle*, 29 Kan. 94; 10 Am. & Eng. R. Cas. 151; *Curtis v. Chicago etc. R. Co.*, 62 Iowa 418; 13 Am. & Eng. R. Cas. 593; *Flint etc. R. Co. v. Willey*, 47 Mich. 88; 5 Am. & Eng. R. Cas. 305; *Louisville etc. R. Co. v. Chalcraft*, 14 Ill. App. 516 (crossing may not be "necessary," though it would add greatly to the convenience of the land owner); *Georgia R. Co. v. Cox*, 61 Ga. 455. Compare *Canada So. R. Co. v. Clouse*, 13 Sup. Ct. (Can.) 139; 35 Am. & Eng. R. Cas. 296; *Jones v. Seligam*, 81 N. Y. 190. And there being no duty on the part of the company in this respect it is not liable for injuries occasioned by a defect in the crossing. *Mann v. Chicago etc. R. Co.*, 86 Mo. 347; *NEGLIGENCE*, vol. 16, p. 415.

Nor is the company bound to construct crossings where it intersects with unfrequented ways, even where the road laws require crossings for private ways. *Berry v. Northeastern R. Co.*, 72 Ga. 137; 28 Am. & Eng. R. Cas. 575.

A charter provision that the railroad shall be so constructed as not to obstruct the safe and convenient use of any private way imposes a duty on the company to maintain a safe and convenient crossing for private ways which it crosses. *Kiefe v. Sullivan Co. R. Co.*, 63 N. H. 271; 23 Am. & Eng. R. Cas. 301.

Though the statute may not require railroad companies to construct farm crossings, yet where the plan of the road shows such crossings, and in awarding damages the commissioners

took them into account, the company becomes bound to construct them. *Kansas City etc. R. Co. v. Kregelo*, 32 Kan. 608.

Where by the terms of its charter the company must erect farm crossings on each farm through which its road passes the company may select the place of crossing. *Holmes v. Philadelphia etc. R. Co.*, 1 Pa. L. J. Rep. 348. Compare, *Van Vrankin v. Wisconsin etc. R. Co.*, 68 Iowa 576.

In *Nebraska*, a railroad company is bound to provide adequate means of crossing its way where it passes through a farm. *Fremont etc. R. Co. v. Lamb*, 11 Neb. 592; 5 Am. & Eng. R. Cas. 367.

So in *New York*, and the landowner is not confined to an action for damages; he may compel the company to construct a crossing. *Jones v. Seligman*, 81 N. Y. 191; 3 Am. & Eng. R. Cas. 256. And so in *Illinois* and *Iowa*. *Illinois Cent. R. Co. v. Willenborg*, 117 Ill. 203; 26 Am. & Eng. R. Cas. 358; *Van Vrankin v. Wisconsin etc. R. Co.*, 68 Iowa 576 (owner may select place of crossing); *Henderson v. Chicago etc. R. Co.*, 48 Iowa 216 (crossing need not be built unless landowner's interest and convenience require it). See also for particular cases *Grasse v. Milwaukee etc. R. Co.*, 36 Wis. 582; *Chalcraft v. Louisville etc. R. Co.*, 113 Ill. 86; *Boggs v. Chicago etc. R. Co.*, 54 Iowa 435; *Williams v. Clark*, 140 Mass. 238.

A stipulation in a conveyance of a right of way that railroad shall construct crossings raises no privity of contract between the railroad and an employé of the grantee; but the construction of a farm crossing is an implied invitation to the farm hands to use it, and the company is liable for injuries occasioned by defects. *Stewart v. Cincinnati etc. R. Co.*, 80 Mich. 154; 42 Am. & Eng. R. Cas. 101; *Stewart v. Pennsylvania R. Co.* (Ind. 1883), 14 Am. & Eng. R. Cas. 679.

2. **CROSSINGS**, vol. 4, p. 906, *et seq.* **NEGLIGENCE**, vol. 16, p. 386, *et seq.*

holds the land covered by its right of way subject to the right of the State to have other railroads constructed across it, whenever the public exigency demands it.¹ But in view of the increased danger to public travel arising from railroads crossing each other at grade, such crossings are not allowed unless absolutely necessary;² and a general authority to condemn a right of way across

1. See EMINENT DOMAIN, vol. 6, p. 537, 579 and cases cited; *Lake Shore etc. R. Co. v. Chicago etc. R. Co.*, 97 Ill. 506; 2 Am. & Eng. R. Cas. 437, 440; *East St. Louis etc. R. Co. v. East St. Louis etc. R. Co.*, 108 Ill. 265; 17 Am. & Eng. R. Cas. 163; *Northern R. Co. v. Concord etc. R. Co.*, 27 N. H. 183; *Hannibal v. Hannibal etc. R. Co.*, 49 Mo. 480; *Fitchburg R. Co. v. New Haven etc. R. Co.*, 134 Mass. 547; *North Carolina etc. R. Co. v. Carolina Cent. R. Co.*, 83 N. Car. 489.

A provision that a railroad company "shall be deemed to be seised and possessed of the land" appraised by the commissioners cannot exclude a new company from acquiring a right of way across its track except at the older road's dictation. *Central Vt. R. Co. v. Woodstock R. Co.*, 50 Vt. 452.

One railroad is not restricted in its right to cross the tracks of another, as authorized by law, because the title of the latter company to its land was derived from the commonwealth. *Western Pa. R. Co.'s Appeal*, 99 Pa. St. 155.

Under the *Minnesota* statute a railroad company has no absolute right to cross the road of another company. It is for the court to determine whether the crossing is necessary. *In re St. Paul etc. R. Co.*, 37 Minn. 164. See also *State v. Hennepin Co. Ct.*, 35 Minn. 761.

Special Statutory Provisions.—*California* Code, § 1244, providing for one railroad acquiring a right of way over another, is held to authorize the joinder of a proceeding to acquire a right of way over a right, and a right of way over the land owned in fee. *California So. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59.

Nebraska Gen. Sts. 195, §§ 97, 113, respecting the crossing and connecting of railroads and the condemnation of property for their use, applies as well to foreign as to domestic corporations. *Union Pac. R. Co. v. Burlington etc. R. Co.*, 1 McCrary (U. S.) 463.

Under the *New York* statute (Laws

of 1850, ch. 140, § 28), where one company seeks to condemn a right of way to cross another railroad, it must first appear that the two companies were unable to agree. After this, in the condemnation proceedings, the commissioners are to determine the necessity of the crossing, the manner in which it should be done, and must determine generally of such particulars as would ordinarily be provided for by the contract between the companies had they been able to agree; and this both as to their own interests and the public safety; for example, whether a train shall come to a full stop; whether a flagman shall be employed, etc. *In re Lockport etc. R. Co.*, 19 Hun (N. Y.) 38; 77 N. Y. 557; *In re Boston etc. R. Co.*, 79 N. Y. 69. See also *Boston etc. R. Co. v. Troy etc. R. Co.*, 58 How. Pr. (N. Y.) 167; *In re New York etc. R. Co.*, 44 Hun (N. Y.) 215; aff'd 110 N. Y. 374; 36 Am. & Eng. R. Cas. 576, note.

Damages.—For the measure of damages where a right of way is condemned for a railroad crossing, see EMINENT DOMAIN, vol. 6, p. 579-580.

"Intersection" and "Crossing."—A distinction is to be noticed between the meaning of these two terms. Every intersection is a crossing, but every crossing may not be an intersection. Intersection is used to denote a crossing at grade, and not where a crossing is above or below the other road. *In re Lockport etc. R. Co.*, 77 N. Y. 563; *People v. New York Cent. R. Co.*, 25 Barb. (N. Y.) 199; 113 N. Y. 78.

2. *Pennsylvania R. Co.'s Appeal*, 116 Pa. St. 84; *Northern Cent. R. Co.'s Appeal*, 103 Pa. St. 621; *Pittsburgh etc. R. Co. v. Southwest Pa. R. Co.*, 77 Pa. St. 173; *Missouri etc. R. Co. v. Texas etc. R. Co.*, 10 Fed. Rep. 297; 6 Am. & Eng. R. Cas. 594.

Therefore, except under some paramount necessity demanded by the public service, a railroad cannot be allowed to be constructed so as to cross on the same plane line of another railroad at

a railroad is not to be extended by implication, but is rather to be restricted.¹

two points within 200 feet of each other and less than a mile from another crossing of the same road. *Missouri etc. R. Co. v. Texas etc. R. Co.*, 4 Wood (U. S.) 360; 6 Am. & Eng. R. Cas. 597.

In the case of *Pittsburgh etc. R. Co. v. Southwest Pa. R. Co.*, 77 Pa. St. 173, the court, by Mercur, J., said: "The evident intentment of the statute is to discourage crossing at grade. This is a question in which the company, whose road is to be crossed, is not the only party liable to injury thereby. It involves the safety and security of the public. Crossings at grade are always attended with danger. As our population becomes more dense, travel and traffic will increase, and the injuries resulting from grade crossings will be multiplied. Each succeeding year will increase the necessity for avoiding them. Their construction should now and henceforth be discouraged." *Pennsylvania R. Co.'s Appeal*, 116 Pa. St. 84.

Injunction.—Since the right of way of a railroad company is held subject to the right of eminent domain and the courts of law afford an adequate remedy for the recovery of compensation, etc., an injunction will not ordinarily be granted to prevent the condemnation of a portion of the right of way for a crossing. *Lake Shore etc. R. Co. v. Chicago etc. R. Co.*, 97 Ill. 506; 2 Am. & Eng. R. Cas. 440; *East St. Louis R. Co. v. East St. Louis R. Co.*, 108 Ill. 265; 17 Am. & Eng. R. Cas. 162.

But the taking and condemnation by a railroad company of any part of the road-bed of another company is interference with the rights and franchises of such other company and unless plainly authorized will be enjoined. *Alexandria etc. R. Co. v. Alexandria etc. R. Co.*, 75 Va. 780; 40 Am. Rep. 743; *Boston etc. R. Co. v. Salem etc. R. Co.*, 2 Gray (Mass.) 1.

Texas Const., art. 10, § 1, gives the right to railroads to cross each other. But this provision is not self-enacting, and the exercise of the right conferred may be enjoined until, by negotiation or legal proceedings, it is established with proper limitations. *Missouri etc. R. Co. v. Texas etc. R. Co.*, 4 Wood (U. S.) 360; 10 Fed. Rep. 297; 6 Am. & Eng. R. Cas. 597.

A company proceeding in good faith to acquire land and construct its road under the general railroad law may have an injunction against another corporation which maliciously and in bad faith takes a lease of the land and lays a switch thereon for the purpose of harassing and delaying plaintiff corporation. *Rochester etc. R. Co. v. New York etc. R. Co.*, 44 Hun (N. Y.) 26.

If practicable the crossing should be over or under the first road, and equity will enjoin a crossing at grade when it is practicable to avoid it. *Missouri etc. R. Co. v. Texas etc. R. Co.*, 4 Wood (U. S.) 360; 10 Fed. Rep. 297; 6 Am. & Eng. R. Cas. 597; *Toledo etc. R. Co. v. Detroit etc. R. Co.*, 63 Mich. 645; 28 Am. & Eng. R. Cas. 280; *Pittsburg Junction R. Co.'s Appeal (Pa.)*, 28 Am. & Eng. R. Cas. 266; *Baltimore etc. R. Co.'s Appeal (Pa.)*, 10 W. N. C. 530; 3 Am. & Eng. R. Cas. 42; *Humeston etc. R. Co. v. Chicago etc. R. Co.*, 74 Iowa 554; 35 Am. & Eng. R. Cas. 263; *Central Vt. R. Co. v. Woodstock R. Co.*, 50 Vt. 452.

The *Iowa* statute granting the right of one railroad to cross another, provides that the crossing shall be so constructed so as not unnecessarily to impede the travel or transportation upon the railroad crossed. In the case of *Humeston etc. R. Co. v. Chicago etc. R. Co.*, 74 Iowa 554; 35 Am. & Eng. R. Cas. 263, it appeared that the track of the old road at the point at which it was proposed to construct the crossing was upon a heavy grade, so that if loaded trains were stopped within two hundred feet of the crossing, as required by statute, it would be impossible to acquire sufficient momentum to ascend the grade, and that trains going the other way, being on a down grade, would be unable to stop except with great difficulty. It was shown that an under crossing could be constructed at a cost less than \$15,000 in excess of the crossing at grade. The court held that the old road was entitled to an injunction against a crossing at a grade, and the fact that the new company, pending the proceedings, had constructed various works at a cost of \$6,000, which would become useless in case the crossing at grade was enjoined, was not sufficient reason for the refusal of the injunction.

1. *Pittsburg etc. R. Co. v. South-*

Both in the construction and maintenance of these crossings, due regard is to be had to the public safety, and proper care exercised to prevent the occurrence of accident.¹

4. **Construction of Fences, Cattle Guards, Culverts, etc.**—(See FENCES, vol. 7, p. 906; SURFACE WATERS; WATERS AND WATER COURSES.)

5. **Bridges**—(See also BRIDGES, vol. 2, p. 540, *et seq.*)—As a part of its duty to construct and maintain crossings, a railroad company must construct bridges over its track, wherever it passes under a highway,² and its liability for injuries caused by defects in such

west Pa. R. Co., 77 Pa. St. 173; Boston etc. R. Co. v. Lowell, 124 Mass. 368.

Thus authority to a railway company "to cross, intersect, join and unite its railways with any other railway before constructed, at any point in its route," is not to be construed to authorize a condemnation longitudinally for a number of miles. Illinois Cent. R. Co. v. Chicago etc. R. Co., 122 Ill. 473; 30 Am. & Eng. R. Cas. 287.

Power to appropriate the property of a railroad company in such a manner as to destroy or greatly injure its franchise, or render it impossible or very difficult to carry out the objects for which it was formed cannot be inferred from a general grant of power to construct a road across the right of way of such company. Hannibal v. Hannibal etc. R. Co., 49 Mo. 480.

But a statute restricting railroads incorporated under the general railroad law of the State, from crossing or intersecting other railroads terminating in any city, near such terminus, is contrary to public policy, because in the nature of special legislation and tending to benefit particular localities at the expense of the commerce of the State generally; and is therefore not to be extended by construction. Aurora etc. R. Co. v. Lawrenceburgh, 56 Ind. 80.

1. Baltimore etc. R. Co. v. Walker, 45 Ohio St. 577; 35 Am. & Eng. R. Cas. 271; California Southern R. Co. v. Southern Pac. R. Co., 67 Cal. 59; 20 Am. & Eng. R. Cas. 309; New York etc. R. Co. v. Grand Rapids etc. R. Co., 116 Ind. 60; 35 Am. & Eng. R. Cas. 283 (where agreement has been made regulating use of the crossing the employes of a train having a right to pass are not bound to anticipate a breach of the agreement). CROSSINGS, vol. 4, pp. 907, *et seq.*

Under the Wisconsin statute it is

not necessary that the train be stopped exactly at the 400 foot post on approaching a railroad crossing; it is sufficient if it be stopped anywhere between the post and the crossing. Lockwood v. Chicago etc. R. Co., 55 Wis. 50; 6 Am. & Eng. R. Cas. 151.

Injuries Occurring at Railroad Crossings.—For the rules of law relating to recovery for injuries sustained by collisions or accidents at railroad crossings, see CROSSINGS, vol. 4, pp. 907, *et seq.*; NEGLIGENCE, vol. 16, p. 387, *et seq.*; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15, *et seq.*

2. Newton v. Chicago etc. R. Co., 66 Iowa 422; 23 Am. & Eng. R. Cas. 298; State v. Minneapolis etc. R. Co., 39 Minn. 219; 35 Am. & Eng. R. Cas. 250; New York etc. R. Co. v. State, 50 N. J. L. 303; 32 Am. & Eng. R. Cas. 186; Montclair v. New York etc. R. Co., 45 N. J. Eq. 436; Titcomb v. Fitchburg R. Co., 12 Allen (Mass.) 254; Rouse v. Somerville, 130 Mass. 361; 6 Am. & Eng. R. Cas. 598; People v. Troy etc. R. Co., 37 How. Pr. (N. Y.) 427; Hanley v. Harlem R. Co., 1 Edm. Sel. Cas. (N. Y.) 359; Vosburg v. Lake Shore etc. R. Co., 94 N. Y. 374; 15 Am. & Eng. R. Cas. 249 (purchasing company bound to maintain bridges established by purchased road; People v. New York etc. R. Co., 89 N. Y. 266; 10 Am. & Eng. R. Cas. 230; Caldwell v. Vicksburg etc. R. Co., 41 La. Ann. 624; 39 Am. & Eng. R. Cas. 245; White v. Quincy, 97 Mass. 430 (company bound to keep bridge and its abutments in repair, although a portion of the structure lies outside of the boundaries of the location of the railroad); Mayor etc. of Bury v. Lancashire etc. R. Co., L. R., 20 Q. B. Div. 485; 14 App. 467, 42-56.

Such bridges must be altered from time to time to meet the exigencies of travel. The fact that when first built they were sufficient does not relieve the company from the duty of alteration

bridges or their approaches is the same as in case of other crossings.¹

In the construction of its bridges over which its trains are to pass, the company is bound to exercise the greatest practicable care to have them safe and secure, and to prevent the occurrence of accident from their giving way.² And they must be so constructed that no injury will result to its servants who ride upon the top of its cars, unless due provision otherwise is made.³ It is

when the increased use demands a change. *Cooke v. Boston etc. R. Co.*, 133 Mass. 185; 10 Am. & Eng. R. Cas. 328.

A way belonging to a party over his own farm is not a "road" within the meaning of a charter provision that the company shall erect bridges at all road crossings. *Green v. Morris etc. R. Co.*, 24 N. J. L. 486; *Cox v. East Tennessee etc. R. Co.*, 68 Ga. 446; *Georgia Code*, § 706.

In the case of *People v. Troy etc. R. Co.*, 37 How. Pr. (N. Y.) 427, it is held that this duty to construct bridges is not affected by the mere abandonment of the railroad and the removal of its track; the company cannot incur a forfeiture at its own pleasure and in disregard of the rights of others.

1. *Titcomb v. Fitchburg R. Co.*, 12 Allen (Mass.) 254 (defect in railing of an approach to the bridge); *Dickie v. Boston etc. R. Co.*, 131 Mass. 516; *Vicksburg etc. R. Co. v. State*, 64 Miss. 51; *Rembert v. South Carolina R. Co.*, 31 S. Car. 309; 39 Am. & Eng. R. Cas. 252; *Gulf etc. R. Co. v. Gascamp*, 69 Tex. 545; 39 Am. & Eng. R. Cas. 6; *Chesapeake etc. R. Co. v. Dyer Co.*, 87 Tenn. 712; 38 Am. & Eng. R. Cas. 676; *Mayor etc. of Bury v. Lancashire etc. R. Co.*, L. R., 20 Q. B. Div. 485; 14 App. Cas. 467; 42 Am. & Eng. R. Cas. 56; *Quimby v. Boston etc. R. Co.*, 69 Me. 340 (party injured by foot bridge leading to company's station); *Baltimore etc. R. Co. v. Botler*, 38 Md. 568; *Cincinnati etc. R. Co. v. Jones*, 111 Ind. 259; 31 Am. & Eng. R. Cas. 491 (burden of proof on company to show that it had adopted reasonable precautions to prevent animals from entering on approaches to its bridge).

The charter of a railroad company required them to build certain bridges and ways, and provided that, in case of omission of this duty, the landowner might build the bridges and recover their value. The remedy thus af-

forded was merely cumulative and did not affect the liability of the company to an action of tort. *Green v. Morris etc. R. Co.*, 24 N. J. L. 486.

2. This duty arises from the character of the company as a carrier of passengers. It is well understood that carriers of passengers are under a high and special duty, and this rule as to the care to be exercised by them in the construction of bridges is but one of the many cases in which this special duty is insisted upon. See *Pershing v. Chicago etc. R. Co.*, 71 Iowa 56; 34 Am. & Eng. Cas. 405; *Bedford etc. R. Co. v. Rainboat*, 99 Ind. 551; 21 Am. & Eng. R. Cas. 466.

Where the case does not involve the relation of carrier and passenger, the care required of the company is not the same. Thus in *Omaha etc. R. Co. v. Brown*, 14 Neb. 170; 11 Am. & Eng. R. Cas. 501, the plaintiff sued for damages alleged to have been sustained by him in the destruction of his mill by an overflow of water and ice, caused by the faulty plan and construction of a railway bridge. The court laid down the rule that it was the duty of a company in planning and constructing a bridge to bring to their execution the engineering knowledge and skill ordinarily known and practiced in such works, and to see to the practical application of such knowledge and skill to the work in hand; approving the case of *Pittsburg etc. R. Co. v. Gilleland*, 56 Pa. St. 445, and held that an instruction was error, which charged the jury that the company was bound to do anything further.

3. **Overhead Bridges.**—A brakeman injured by coming in contact with a low bridge of which he had neither knowledge nor notice, is entitled to recover; such an injury is not one of the risks assumed by him. *Louisville etc. R. Co. v. Wright*, 115 Ind. 378; 33 Am. & Eng. R. Cas. 370; *Baltimore etc. R. Co. v. Rowan*, 104 Ind. 88; 23

not bound, however, to anticipate that its bridges, made solely for the use of its trains, will be used by foot passengers, and it is not liable for injuries caused to persons attempting to use them, except in cases where it has extended an express or implied invitation.¹

As to construction of bridges over navigable streams, see a previous article.²

6. Construction Contracts.—Under this head is included contracts entered into by the railroad company to build its road within a certain time, or along a certain route, and contracts for the construction of the road by "contractors." The former exist

Am. & Eng. R. Cas. 390; *Warden v. Old Colony R. Co.*, 137 Mass. 204; 21 Am. & Eng. R. Cas. 612 (injured by bridge guard); *Baltimore etc. R. Co. v. Stricker*, 51 Md. 47; *Riley v. Connecticut River R. Co.*, 135 Mass. 292; 15 Am. & Eng. R. Cas. 181.

See also MASTER AND SERVANT, vol. 14, p. 850.

But when he has been warned of such low bridges, or from his long service is fully aware of their existence, he is not entitled to recover. *Hooper v. Columbia etc. R. Co.*, 21 S. Car. 541; 28 Am. & Eng. R. Cas. 433; *Clark v. Richmond etc. R. Co.*, 78 Va. 709; 18 Am. & Eng. R. Cas. 78; *Stunback v. Thomas Iron Co.* (Pa. 1886), 4 Atl. Rep. 721; 24 Am. & Eng. R. Cas. 458, note.

The company is not liable where the fault was on the part of a company crossing over its road. *Gibson v. Midland R. Co.*, 2 Ont. Rep. 658; 15 Am. & Eng. R. Cas. 507. Or when the negligence of the injured servant was the proximate cause of the injury. *Riley v. Connecticut River R. Co.*, 135 Mass. 292; 15 Am. & Eng. R. Cas. 181.

In the case of *Louisville etc. R. Co. v. Hall*, 37 Ala. 708; 39 Am. & Eng. R. Cas. 298, the rule is laid down that when, in crossing a street or other public highway, it becomes necessary for a railroad company to span it with a bridge, it is its duty, if reasonably practicable, to place the structure at such an elevation as that trains can pass under it without danger to employés. *Smoot v. Mobile etc. R. Co.*, 67 Ala. 17; *Louisville etc. R. Co. v. Allen*, 78 Ala. 501; *Wilson v. Louisville etc. R. Co.*, 85 Ala. 269; *Houston etc. R. Co. v. Oran*, 49 Tex. 341. This is not an absolute or unbending requirement, but yields to circumstances;

and if inequality of surface or other hindrance renders such elevation impossible or impracticable, the bridge may be so constructed as to extend below the line of absolute safety. But in such case it is the duty of the company to take all reasonable precautions against injury. *Alabama etc. R. Co. v. Hawk*, 72 Ala. 112; 18 Am. & Eng. R. Cas. 194; *Wells v. Burlington etc. R. Co.* (Iowa); 2 Am. & Eng. R. Cas. 243; *Rains v. St. Louis etc. R. Co.*, 71 Mo. 164; 5 Am. & Eng. R. Cas. 610. In no case is it permissible to place a bridge so low that a brakeman on top of a train in the discharge of his duties could not avoid danger by bending or stooping. *Illinois Cent. R. Co. v. Welsh*, 52 Ill. 183; *Chicago etc. R. Co. v. Gregory*, 58 Ill. 272; *Chicago etc. R. Co. v. Russell*, 91 Ill. 298.

The risk of being struck by an overhead bridge, which is constructed too low, is not one of the risks assumed by the servant on entering the employment of the company. *Louisville etc. R. Co. v. Wright*, 115 Ind. 378; 33 Am. & Eng. R. Cas. 378; unless he has had sufficient notice, or is fully aware of such danger. *Carbine v. Bennington etc. R. Co.*, 61 Vt. 348; 38 Am. & Eng. R. Cas. 45; MASTER AND SERVANT, vol. 14, pp. 843, 850; *Hooper v. Columbia etc. R. Co.*, 21 S. Car. 541; 28 Am. & Eng. R. Cas. 433.

1. *Koontz v. Chicago etc. R. Co.*, 65 Iowa 224; 18 Am. & Eng. R. Cas. 85; *State v. Philadelphia etc. R. Co.*, 60 Md. 555; 15 Am. & Eng. R. Cas. 481.

2. See BRIDGES, vol. 2, p. 540, 548.

See also *Attorney Gen'l v. Stevens*, 1 N. J. Eq. 369; *Little Rock etc. R. Co. v. Brooks*, 39 Ark. 403; 43 Am. Rep. 277; 17 Am. & Eng. R. Cas. 152, 157, note; *Green etc. Nav. Co. v. Chesapeake etc. R. Co.* (Ky. 1888), 10 S. W. Rep. 6; 37 Am. & Eng. R. Cas. 238; *Silver v.*

principally as conditions in deeds granting a right of way,¹ or in bonds issued in aid of the road, or in subscriptions to stock.² The law relating to them is not peculiar and their construction and enforcement is governed by the ordinary rules of law applicable in such cases.³

The latter class of contracts constitutes an important branch of railroad law. As to the parties to the contract, the only question arising is as to the right of directors of a company to give the contract of construction to themselves or to any of their number. It is a well settled rule that public policy forbids the contract to be so given,⁴ and for the same reason, a valid

Missouri etc. R. Co., 101 Mo. 79; 44 Am. & Eng. R. Cas. 67.

1. See *infra*, this title, *Acquisition by Purchase or Private Grant*. *Waterson v. Alleghany Valley R. Co.*, 74 Pa. St. 208 (measure of damages for failure to erect depot.)

No one other than the grantor or his heirs can take advantage of a breach of such conditions when subsequent. *ESTATES*, vol. 6, p. 903-4. Therefore, in case of grants by the government no one can object to a non-performance of the condition except the government. *Hughes v. Northern Pac. R. Co.*, 18 Fed. Rep. 106; 13 Am. & Eng. R. Cas. 157.

A railroad company in return for "borrowed land" belonging to the plaintiff, agreed to forever maintain a side track opposite certain of the plaintiff's lots. The railroad having changed hands, the new company discontinued the side track, and took up the rails which composed it. *Held*, that the true measure of damages was not the difference in the annual rental value of the lots with the side track operated, and without it; but the difference in value of the lots, irrespective of the rental value. *Amsden v. Dubuque etc. R. Co.*, 28 Iowa 542.

In *Crane v. Chicago etc. R. Co.*, 20 Fed. Rep. 402; 17 Am. & Eng. R. Cas. 174, the specific performance of a contract to build a road through a city was sought, but was denied because of the absence of proper parties.

2. See *MUNICIPAL SECURITIES*, vol. 15, pp. 1242, 1284-6; *STOCK*; *STOCKHOLDERS*.

A subscription to stock contained a condition that the road should be constructed within a certain time, "so that cars may be run over the same between" two named points. It is a sufficient performance of such a con-

dition if the road is so constructed within the time stated that cars may be run between the two points though it be by no means completed, or perfectly built. *Wemple v. St. Louis etc. R. Co.*, 120 Ill. 196; 30 Am. & Eng. R. Cas. 246.

A party agreed to pay a fixed sum to a railroad company, one-half within thirty days after the construction of the road from T to M, and the other half when the company should establish and construct its general repair shops at M. It was held that the agreement required that the company should have a road under its control, covering the entire distance, and should have its repair shops at M for the whole road, and that the contract was not satisfied by the company's securing access to T over another road. *Brown v. Dibble*, (Mich. 1887), 32 N. W. Rep. 656; 30 Am. & Eng. R. Cas. 241.

3. See generally *CONTRACTS*, vol. 3, p. 823; *CONDITIONS*, vol. 3, p. 422; *ESTATES*, vol. 6, p. 900, *et seq.*; *MUNICIPAL SECURITIES*, vol. 15, pp. 1242, 1284-6; *REAL COVENANTS*; *STOCK*; *STOCKHOLDERS*; *SPECIFIC PERFORMANCE*.

Expiration of Time for Construction of Road.—Only the State can object to a railroad company's proceeding in the construction of its road, on the ground that the time allowed by law for completing it has expired. The landowner whose lands have been taken, or a city in whose streets the track is being laid, cannot object. *Atlantic etc. R. Co. v. St. Louis*, 66 Mo. 228. See also *infra*, this title, *Corporate Powers*.

4. *Paine v. Lake Erie etc. R. Co.*, 31 Ind. 283; *Thomas v. Brownsville etc. R. Co.*; 109 U. S. 522; 16 Am. & Eng. R. Cas. 557; *Blake v. Buffalo etc. R. Co.*, 56 N. Y. 485; *Flint etc. R. Co. v.*

assignment of such a contract cannot be made to any of the directors.¹

Stipulations in a contract that an engineer shall make estimates as to the value and character of the work, and of compensation to be paid, and that both parties shall be bound by them, are frequent in these contracts, and, in the absence of fraud or such gross error as to imply bad faith or a failure to exercise an honest judgment, such estimates are conclusive and binding.² Such

Dewey, 14 Mich. 478 ("fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his one private interest to disregard that of his principal"); *European etc. R. Co. v. Poor*, 59 Me. 277; *Ryan v. Leavenworth etc. R. Co.*, 21 Kan. 365; *Gilman etc. R. Co. v. Kelly*, 77 Ill. 426; *Wardell v. Union Pac. R. Co.*, 4 Dill. (U. S.) 330; *U. S. v. Union Pac. R. Co.*, 98 U. S. 610; OFFICERS AND AGENTS (PRIVATE CORPORATIONS), vol. 17, p. 95 *et seq.*

An agreement by the directors with a contractor whereby they are to share in the profits of the contracts for the construction of the road can only be valid by the confirmation of the stockholders and not by the directors themselves. *Paine v. Lake Shore etc. R. Co.*, 31 Ind. 283.

In the case of *Wardell v. Union Pac. R. Co.*, 4 Dill. (U. S.) 330, the court by Miller, J., said: "Such a contract is void upon the clearest principles of public policy. The corporation is represented by an agent who controls both sides of the contract, and whose interest is in every way against his principal and in his own favor. All the selfishness of human nature is brought into play to secure terms most favorable to the party who acts for both parties, himself being one of them. While the glaring evil of this thing may be obscured by using the name of the corporation as one party, and that of individuals having no connection with the corporation as the other party, the danger that selfish greed will make with the agents of the corporation a contract of which they will reap the advantage and in which the corporation will suffer all the losses, is only increased by the fact that the names of the parties really interested do not appear in the transaction."

1. *Paine v. Lake Erie etc. R. Co.*, 31 Ind. 283; *Flint etc. R. Co. v. Dewey*, 14 Mich. 478.

See also OFFICERS AND AGENTS (PRIVATE CORPORATIONS), vol. 17, p. 95-98.

Who Are Contractors.—In the case of *Hart's Appeal*, 96 Pa. St. 355; 11 Am. & Eng. R. Cas. 618, it is held that one who has contracted to furnish 5,000 ties is not a "contractor" within the meaning of the *Pennsylvania* Act giving a special remedy, and special directors and laborers of such person are also not contractors.

In *Atchison etc. R. Co. v. McConnell*, 25 Kan. 370, proof that a railroad company paid a bridge builder for work done on one of its bridges upon estimates made by the company's agent as the work progressed, was held sufficient proof that such bridge builder was a "contractor" within the mechanics' lien law.

A, having contracted with a railroad company to construct its road and furnish iron therefor and to receive certain bonds in payment, made a contract with B for the iron required, payments to be made in bonds of the same class. A contract was then made by A, B, and the company providing for the deposit of bonds in a bank and their withdrawal on the joint order of the parties to pay B for his iron. It was held that this last named contract did not operate to make the company a party to the contract between A and B. *Blatzer v. Raleigh etc. R. Co.*, 115 U. S. 634; 24 Am. & Eng. R. Cas. 354.

2. Engineers' Estimates.—Validity of Agreement to be Bound By.—*McMalen v. New York etc. R. Co.*, 20 N. Y. 463; *Delaware etc. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Wilson v. York etc. R. Co.*, 11 Gill & J. (Md.) 38; *Martinsburg etc. R. Co. v. March*, 114 U. S. 549; *Mitchell v. Kavanaugh*, 38 Iowa 286; *Condon v. Southside R. Co.*, 14 Gratt. (Va.) 402; *Mansfield etc. R. Co. v. Verder*, 17 Ohio 385; *Eaton v. Pennsylvania etc. Canal Co.*, 13 Ohio 81; *Vanderwerker v. Vermont Cent. R. Co.*, 27 Vt. 130; *Howard v.*

Allegheny Valley R. Co., 69 Pa. St. 489; *Lauman v. Young*, 31 Pa. St. 306; *Keller v. McAuley*, 130 Pa. St. 53; 40 Am. & Eng. R. Cas. 509; *Snell v. Brown*, 71 Ill. 133; *Fox v. Railroad Co.*, 3 Wall. Jr. (C. C.) 243; **ARBITRATION AND AWARD**, vol. 1, p. 646, 706.

Upon the question as to the validity of such stipulations, there is some conflict of authority. In *Kistler v. Indianapolis etc. R. Co.*, 88 Ind. 460; 12 Am. & Eng. R. Cas. 314, there was a stipulation that if any dispute or misunderstanding should arise among the parties, it should be referred to the company's engineer whose decision should be final. It was held that if this stipulation was intended to make the engineer sole umpire, and to preclude resort to the courts, it was against public policy and void, the court relying upon 1 Redfield on Railways, p. 454, where it is said that "a stipulation that no action shall ever be brought upon a contract, or what is equivalent, that all disputes under it shall be referred to arbitration is a repugnancy, which if carried out literally, must render the contract itself as a mode of legal redress wholly idle." This case is followed and approved in *Louisville etc. R. Co. v. Donnegan*, 111 Ind. 179; 34 Am. & Eng. R. Cas. 116; *Bauer v. Sampson Lodge*, 102 Ind. 262 and cases cited.

But in the case of *Lauman v. Young*, 31 Pa. St. 306, it is held that such a stipulation precludes an action at law, in reference to matters embraced in the submission. The case of *Fox v. Hempfield R. Co.*, 2 Abb. (U. S.) 151, tried before Grier, J., was cited, where it was held that a stipulation "that the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relating to, or touching the same, and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy in law or otherwise by virtue of such covenant; so that the decision of the engineer shall be final and conclusive on the rights and claims of the said parties," was valid and binding. Other cases, constituting the great weight of authority, sustain the doctrine laid down by the *Pennsylvania* court. *Grant v. Savannah etc. R. Co.*, 51 Ga. 348; *Martinsburg etc. R. Co. v. March*, 114 U. S. 549; *Chicago etc. R. Co. v. Price*, 138 U. S. 135; 47 Am. & Eng. R.

Cas. 298; *McMahon v. New York etc. R. Co.*, 20 N. Y. 463; *Wilson v. York etc. R. Co.*, 11 Gill & J. (Md.) 73; *Denver etc. R. Co. v. Riley*, 7 Colo. 494; *Vanderwerker v. Vermont Cent. R. Co.*, 27 Vt. 130 (no recovery can be had for work done under such a contract beyond the engineer's estimate, without the most irrefragable proof of mistake in fact, corruption in the engineer, or positive fraud in the opposite party in procuring an under estimate. Opinion by Redfield, C. J.); *Hostetter v. Pittsburg*, 107 Pa. St. 433; **ARBITRATION AND AWARD**, vol. 1, p. 646.

It is even said that a provision is valid that the company itself shall be the sole arbiter. *Gray v. Central R. Co.*, 11 Hun (N. Y.) 70.

But the engineer's estimate is an adjudication which is conclusive only upon the condition that it is made according to the terms of the submission: in order to oust the jurisdiction of the courts upon any matter, it must clearly appear that the special subject of the controversy was within the submission. The right to resort to the courts cannot be taken away by implication. *Lauman v. Young*, 31 Pa. St. 306; *Drhew v. Altoona*, 121 Pa. St. 420; *Hostetter v. Pittsburgh*, 107 Pa. St. 433.

What Engineer May Act—It is indispensable that the engineer chosen should himself measure and examine the work and make estimates, and it is error to hold that the estimates of a third person are binding, provided they are adopted by the engineer himself. *Wilson v. York etc. R. Co.*, 11 Gill & J. (Md.) 38; *Snell v. Brown*, 71 Ill. 133.

Compare Herrick v. Belknap, 27 Vt. 673, where it was held otherwise under the terms of the particular contract under consideration.

Where the estimates of a certain person are contemplated by the contract and by reason of his death it becomes impossible to procure such estimates, equity will afford relief to the contractor. *Firth v. Midland R. Co.*, L. R., 20 Eq. 100.

Where it is specially provided that the estimates are to be made by the chief engineer, the chief engineer in office at the time the question arises is meant, and not the former incumbent at the time of the contract. *North Lebanon R. Co. v. McGrann*, 33 Pa. St. 530. If the old engineer has

stipulations are founded upon a consideration which enters into, and is a part of, the contract, and in the absence of fraud in the procurement of the contract, are irrevocable. They are in this respect unlike a submission in arbitration, which is usually revocable at any time before the award is made.¹ Where an

resigned and no new one has been appointed, immediate recourse may be had to the courts for relief without waiting for an estimate.

Where the contract provided for monthly payments to the contractor "on the certificate of the engineer," and that the determination of the chief engineer should be conclusive on the parties as to quantities and amounts, and where in executing the contract each monthly contract as made up by the division engineer was sent to the chief engineer, and the monthly payments were made on the certificate of the latter officer, his action in making such a certificate was a "determination" under the contract, and conclusive upon the parties in an action at law in the absence of fraud or gross error. *Chicago etc. R. Co. v. Price*, 138 U.S. 185; 47 Am. & Eng. R. Cas. 298.

Duty of the Company.—Such stipulations impose upon the party employing the engineer to select competent, upright and trustworthy engineers, and to see to it that they perform the service expected of them at a proper time and in the proper manner. *Herrick v. Belknap*, 27 Vt. 673.

The company must have proper estimates and measurements made. If they neglect to do so, the contractor may prove the value of his work otherwise, and may recover, with interest, from the time the measurement should have been made. *McMahon v. New York etc. Co.*, 20 N. Y. 463; *Herrick v. Belknap*, 27 Vt. 673; *Kistler v. Indianapolis etc. R. Co.*, 88 Ind. 460.

Where under the contract for construction of a railroad by which all measurements are to be made and the amount of labor determined by the employer's engineer, whose decision is to be final, the contractor is entitled to notice and an opportunity to be present; he is not concluded by measurements made *ex parte*. *McMahon v. New York etc. R. Co.*, 20 N. Y. 463.

Engineer's Discretion as to How Work is to be Done.—Contracts often provide that the work shall be done "according to the directions of the engineer," or "after such plans and of such dimen-

sions as may be adopted by the engineer." Where this is the case the contractors are not entitled to any additional allowance or compensation, because a plan prepared before the execution of the contract is departed from, or because the engineer causes more work to be done than he verbally stated at the time of the execution of the contract would be required. *Philadelphia etc. R. Co. v. Howard*, 13 How. (U. S.) 307; *Cannon v. Wildeman*, 28 Conn. 472.

Estoppel.—Where a contractor does not, at the time of the making of an estimate, object thereto, but accepts it, he is estopped from subsequently averring the illegality of the same. *Kidwell v. Baltimore etc. R. Co.*, 11 Gratt. (Va.) 676.

Extent of Engineers' Authority.—A contract for railroad ties to be paid for upon the monthly certified estimates of a certain engineer contained a provision that he should decide all disputes that might arise during the execution of the contract, and that his estimates should be final and conclusive. It was held that this did not constitute the engineer a final umpire to determine mixed questions of law and fact which might arise, nor prevent a recovery by the plaintiffs in an action on a *quantum meruit* for the ties actually delivered. *Jemison v. Gray*, 29 Iowa 537.

The engineer can create no new contract between the parties, and where the contract provides for embankment measurement, he has no authority to say that contractors are to be paid by excavation measurement. *Galveston etc. R. Co. v. Henry*, 65 Tex. 685; 25 Am. & Eng. R. Cas. 265.

If the engineer's decision be honest and does not appear to be tainted with fraud it is conclusive upon the parties, no matter how erroneous. *Kidwell v. Baltimore etc. R. Co.*, 11 Gratt. (Va.) 776; *Gray v. Central R. Co.*, 11 Hun (N. Y.) 70; *Zaleskie v. Clark*, 44 Conn. 218; *Gibson v. Crange*, 39 Mich. 219; *Martinsburg etc. R. Co. v. March*, 114 U. S. 549; *Keller v. McCauley*, 130 Pa. St. 53; 40 Am. & Eng. R. Cas. 509.

1. *Denver etc. Construction Co. v. Stout*, 8 Colo. 61.

inspection and estimate by the engineer in charge are required by the terms of the agreement before either monthly or final payment may be demanded, this inspection and estimate form a condition precedent, and no right of action accrues until they have been made; and if a dispute arises between the contracting parties as to the quality and sufficiency of any work under the contract, the dispute must be settled in a manner provided for by the contract before resort can be had to another forum.¹

Various decisions have been made in the construction and interpretation of this class of contracts, but they present nothing more than an application of familiar rules.²

The remedy for a breach of such contracts is an action for damages, or where extra work is done, for *quantum meruit*.³

1. Delaware etc. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250; Hudson v. McCartney, 33 Wis. 331; Jackson v. Cleveland, 19 Wis. 400; Reynolds v. Caldwell, 51 Pa. St. 298; Snell v. Brown, 71 Ill. 133; Fox v. Railroad Co., 3 Wall. Jr. (C. C.) 243; Chicago etc. R. Co. v. Price, 138 U. S. 185; 47 Am. & Eng. R. Cas. 298.

In a suit on a construction contract containing the usual provision concerning engineer's estimates, such estimates must be produced or there must be averment and proof of legal cause for their non-production. Loup v. California Southern R. Co., 63 Cal. 97; 11 Am. & Eng. R. Cas. 589; Herrick v. Belknap, 27 Vt. 673; Kidwell v. Baltimore etc. R. Co., 11 Gratt. (Va.) 676; Finnegan v. L'Engle, 8 Fla. 413.

2. Reference may be made to cases in which particular contracts have been construed. Mansfield v. New York Cent. R. Co., 102 N. Y. 205; 24 Am. & Eng. R. Cas. 628 (assignment of contract by partner, though invalid, no bar to an action on contract by assignee—other matters); Campbell v. Cincinnati etc. R. Co. (Ky. 1888), 6 S. W. Rep. 337; 34 Am. & Eng. R. Cas. 113 (contractor to receive a certain sum per mile for stone "hailed by wagon"—company not bound to pay for transportation otherwise); Wright v. Kentucky etc. R. Co., 117 U. S. 72; 24 Am. & Eng. R. Cas. 312 (contract of construction company held subject to prior contract for conditional sale of right of way); Hutchinson v. New Sharon etc. R. Co., 63 Iowa 727; 16 Am. & Eng. R. Cas. 617; Galveston etc. R. Co. v. Henry, 65 Tex. 685; 25 Am. & Eng. R. Cas. 265; Louisville etc. R. Co. v. Hollerbach, 105 Ind. 137; 24 Am. & Eng. R. Cas. 340; Dudley v. Toledo etc. R. Co., 65

Mich. 655; 30 Am. & Eng. R. Cas. 236; Hendrie v. Canada Bank, 49 Mich. 401; 11 Am. & Eng. R. Cas. 610; Western Union R. Co. v. Smith, 75 Ill. 406 (meaning of the word "surfaced"—properly to be determined from evidence of witnesses conversant with the subject to which it related.)

Evidence.—Where the question as to the time required to complete work is material, the testimony of builders as to length of time in which it might be reasonably completed is competent. Louisville etc. R. Co. v. Donnegan, 111 Ind. 179; 34 Am. & Eng. R. Cas. 116.

See also for various questions of evidence, Phelps v. George's Creek etc. R. Co., 60 Md. 536; 16 Am. & Eng. R. Cas. 600; Galveston etc. R. Co. v. Henry, 65 Tex. 685; 25 Am. & Eng. R. Cas. 265.

3. Extra work done upon promise of payment by the company must be sued for separately, and not upon the original contract. Hinkle v. San Francisco etc. R. Co., 55 Cal. 627; 6 Am. & Eng. R. Cas. 595. See also Jemmisson v. Gray, 29 Iowa 537.

One for whom extra work is done not contemplated by the contract, but which is done under the supervision of an engineer placed there by the employer to direct and supervise the work to be performed under the contract, must, when the work is received by the employer, pay for it according to its value, the engineer having made the original contract, and no limitation on his power to contract being shown. Houston etc. R. Co. v. Trentem, 63 Tex. 442.

Where delay in the construction is caused by the railroad company the contractor may recover damages therefor. Louisville etc. R. Co. v. Holler-

Equity will not enforce the specific performance of a contract of this character for the reason that a decree of specific performance would entail upon the court the duty of supervising the performance of a great number of acts involving a great amount of labor and detail.¹ But where the construction of the road is necessary to prevent a valuable land grant from lapsing, and to secure the

bach, 105 Ind. 137; 24 Am. & Eng. R. Cas. 340. In this case interest at six per cent. was allowed on contractor's investments lying idle during the suspension of work.

In *Kistler v. Indianapolis etc. R. Co.*, 88 Ind. 460; 12 Am. & Eng. R. Cas. 314, it is said that a receipt by the contractor of the money adjudged by the engineer to be due him does not estop him to maintain a suit for recovering the remainder due. The holding of this case as to the effect of the engineer's estimates has already been adverted to as being opposed by the weight of authority.

Liquidated Damages—Stipulated Forfeiture.—In the case of *Wolf v. Des Moines etc. R. Co.*, 68 Iowa 380, there was a provision in the contract that an estimate should be made once a month as to the value of the work done, and that within twenty days of the estimate the company should pay to the contractors ninety per cent. of such estimate, and that in case of a failure to carry on the work properly the reserved ten per cent. should be retained by the railroad company as liquidated damages. The court held that the ten per cent. reserved should be treated as liquidated damages rather than as a penalty. It was said that the failure, either as to time or manner of performing the work, would necessarily delay the final completion of the road and derange all plans for its equipment and operation, and the damage and injury which would result would be matters of mere conjecture, and it was therefore competent for the parties to agree in advance upon a certain measure of damages in case of failure properly to prosecute the work. *Citing* *Eaton v. Pennsylvania etc. Canal Co.*, 13 Ohio 79; *Pierce v. Jung*, 10 Wis. 30; *Faunce v. Burke*, 16 Pa. St. 469; *Geiger v. Western Maryland R. Co.*, 41 Md. 4. And in the case of *Elizabethtown etc. R. Co. v. Geoghegan*, 9 Bush (Ky.) 56, it is said that the character and importance of the work, and the great difficulty in estimating damages result-

ing from a failure to perform the contract for the construction of any portion of the railroad, render it just and proper that the party so failing should be held to pay the stipulated forfeiture unless it be so exorbitant that to enforce its payment would be to inflict a penalty on the party in default, instead of merely making good the injury.

The same view is taken in *Hennessy v. Farrell*, 4 Cush. (Mass.) 267; *Dwinel v. Brown*, 54 Me. 468; *Jackson v. Cleveland*, 19 Wis. 400.

1. Specific Performance of Contract to Construct.—*South Wales v. Wythes*, 1 K. & J. 186; *Ross v. Union Pac. R. Co.*, 1 Woolw. (U. S.) 26 (Miller, J.); *Fallon v. Missouri etc. R. Co.*, 1 Dill. (U. S.) 121; *Ranger v. Great Western R. Co.*, 1 Eng. Ry. Cas. 51; *Danforth v. Philadelphia etc. R. Co.*, 30 N. J. Eq. 12; 18 Am. Ry. Rep. 66; 1 Story's Eq. (10th ed.) 778, n.; *Rorer on Railroads*, p. 466; SPECIFIC PERFORMANCE.

And since equity will never enforce specific performance against one party, unless it can also enforce performance against the other party as well, it will not enforce the contract against a railroad company in favor of the contractor. *Munro v. Wivenhoe etc. R. Co.*, 4 De G. J. & S. 723; *Peto v. Brighton etc. R. Co.*, 1 H. & M. 468; *Heathcote v. N. Staffordshire R. Co.*, 20 L. T., N. S. Ch. 82; *Waring v. Manchester etc. R. Co.*, 7 Hare 492; *Ross v. Union Pac. R. Co.*, 1 Woolw. (U. S.) 26.

Equity will not specifically enforce such contracts, even in cases where the equities are strongly in favor of the complainant, and the court is anxious to grant him all the relief in its power. Thus, in *Peto v. Brighton etc. R. Co.*, 1 H. & M. 468, Wood, V. C., said: "I have every possible inducement to afford the plaintiffs as large a measure of relief as I can give them consistently with the established principle of this court, but I feel the difficulties to be quite insuperable." *Note to Chicago etc. R. Co. v. New York etc. R. Co.* (U. S.), 22 Am. & Eng. R. Cas. 272.

rights of stockholders, it seems that a receiver may be appointed with power to complete the road.¹

As to the liability of the company for injuries committed by contractors in the execution of their work, see a previous article.²

7. Services and Material.—The liability of a railroad company for services rendered or materials furnished in the construction of its road is governed by the law of mechanics' liens, and needs no special treatment here.³ The principle applicable to maritime cases, which gives a priority of lien to the last creditor furnishing supplies and repairs for the conservation of a ship on a voyage does not apply to railroads;⁴ liens on railroad property take priority according to the date when they attached.⁵ For the

1. *Kennedy v. St. Paul etc. R. Co.*, 2 Dill. (U. S.) 448. See also RECEIVERS.

2. See MASTER AND SERVANT, vol. 14, p. 829, *et seq.*

3. See MECHANICS' LIENS, vol. 15, p. 1, *et seq.*; LIENS, vol. 13, p. 574, *et seq.*; Digest of Am. & Eng. R. Cas. (1890), p. 607.

See also *Schuster v. Kansas City etc. R. Co.*, 60 Mo. 290; *Wells v. Kavanaugh*, 70 Iowa 519; *Jemison v. Gray*, 29 Iowa 537.

4. *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459.

5. As to the liens of laborers and material men on railroads, the common-law rule prevails; *Qui prior est in tempore, potior est in jure*. *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; MECHANICS' LIENS, vol. 15, p. 86, *et seq.*; *Fox v. Seal*, 22 Wall. (U. S.) 424.

See also *Farmers' L. & T. Co. v. Candler* (Ga. 1891), 47 Am. & Eng. R. Cas. 296; *Farmers' L. & T. Co. v. Canada etc. R. Co.*, 127 Ind. 250; 47 Am. & Eng. R. Cas. 271; *Arbuckle v. Illinois etc. R. Co.*, 81 Ill. 429 (statute giving sub-contractor a lien for labor and materials, relates only to labor and materials furnished after its passage); *Vaughn v. Smith*, 58 Iowa 553; 7 Am. & Eng. R. Cas. 82 (sub-contractor entitled to benefit of mechanics' lien under Iowa statute); *Templin v. Chicago etc. R. Co.*, 73 Iowa 548; 34 Am. & Eng. R. Cas. 107 (where company sells road and enters into contract with third party for construction, such third party cannot acquire a lien against purchasing company unless they are sub-contractors); *Missouri etc. R. Co. v. Brown*, 14 Kan. 557; *Missouri etc. R. Co. v. Baker*, 14 Kan. 563 (one who is in the employ of a contractor with

the company simply as a timekeeper and superintendent, is not a "laborer" within the meaning of a statute concerning the lien of laborers); *Peters v. St. Louis etc. R. Co.*, 24 Mo. 586; *Ireland v. Atchison etc. R. Co.*, 79 Mo. 572; 20 Am. & Eng. R. Cas. 493 (mechanics' lien must be enforced against the whole of that part of the road lying within the State, and not against a section of that part only); *St. Louis etc. R. Co. v. Memphis etc. R. Co.*, 72 Mo. 664; 6 Am. & Eng. R. Cas. 600; *Knapp v. St. Louis etc. R. Co.*, 74 Mo. 374; 7 Am. & Eng. R. Cas. 394 (lien must be enforced against whole road and not against all of rolling stock); *Martin v. Michigan etc. R. Co.*, 62 Mich. 458; 26 Am. & Eng. R. Cas. 351; *Chicago etc. R. Co. v. Sturgis*, 44 Mich. 358; 6 Am. & Eng. R. Cas. 619 (contractors and sub-contractors are not "laborers" within the meaning of the statute); *Delaware etc. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq. 192; 1 Am. & Eng. R. Cas. 205, 211 note; *Balch v. New York etc. R. Co.*, 46 N. Y. 521 (statute giving lien to a "laborer" does not extend to one who contracts for and furnishes the labor of others or the labor of teams whether with or without his own services); *Cummings v. New York etc. R. Co.*, 1 Lans. (N. Y.) 68; *Chapman v. Black River R. Co.*, 4 Lans. (N. Y.) 96; *Atcherson v. Troy etc. R. Co.*, 1 Abb. App. Dec. (N. Y.) 13; *Pusey v. New Jersey etc. R. Co.*, 14 Abb. Pr., N. S. (N. Y.) 434; *Austin etc. R. Co. v. Rucker*, 59 Tex. 587; 12 Am. & Eng. R. Cas. 258 (lien may be assigned); *Chicago etc. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702; 16 Am. & Eng. R. Cas. 626 (when lien to be filed); *Boston v. Chesapeake etc. R. Co.*, 76 Va. 180; 12 Am. & Eng. R.

reason that a railroad partakes of the nature of a public use the ordinary lien laws which give to mechanics, laborers, and materialmen a lien upon buildings constructed by them are not to be construed to give a lien upon the roadway, bridges and other property of a railroad company essential to the operation and maintenance of the road. Such liens exist only where express provision is made for them.¹

8. Operation of the Road; Extent of Care Exercised, etc.—In case of willful injuries the question as to whether proper care was exercised is not involved. Where the injuries result from negligence in the operation of the road, the extent of care required must depend upon the relation the parties sustain to each other, and upon the various circumstances of time, place, and attendant conditions.² There can be, therefore, no invariable rule laid down as to what care a railroad company must use in the operation of its road, in order to prevent the occurrence of injury.³ But it has already been seen that in their character of carriers of passengers, railroad companies are bound to exercise the greatest possible care to secure the safety of their passengers;⁴ this duty

Cas. 263 (when contractor's lien not entitled to priority over mortgage); *Mundt v. Sheboygan etc. R. Co.*, 31 Wis. 451; *King v. Alford*, 9 Ch. Div. 643; 24 Am. & Eng. R. Cas. 331 (mechanics' lien not analogous to vendor's lien).

1. *Buncombe Co. v. Tomney*, 115 U. S. 122; 20 Am. & Eng. R. Cas. 495.

2. See NEGLIGENCE, vol. 16, p. 398, 434; CROSSINGS, vol. 4, p. 910; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 19, 22; *Chicago etc. R. Co. v. Pillsbury*, 123 Ill. 9; 31 Am. & Eng. R. Cas. 24; *Louisville City R. Co. v. Weams*, 80 Ky. 420; 8 Am. & Eng. R. Cas. 399; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *Northern Cent. R. Co. v. State*, 29 Md. 420; *Gordon v. Grand Street etc. R. Co.*, 40 Barb. (N. Y.) 546.

The duty is dictated and measured by the exigencies of the occasion. *Baltimore etc. R. Co. v. Jones*, 95 U. S. 441.

3. See NEGLIGENCE, vol. 16, p. 398, 426-7.

4. See NEGLIGENCE, vol. 16, p. 428; CARRIERS OF PASSENGERS, vol. 2, p. 738, *et seq.* See also *Topeka City R. Co. v. Higgs*, 38 Kan. 375; 34 Am. & Eng. R. Cas. 529 ("all possible skill and care" defined); *Raymond v. Burlington etc. R. Co.*, 65 Iowa 152; 18 Am. & Eng. R. Cas. 217 (to use "extraordinary care and caution" is the carrier's duty); *Georgia R. Co. v. Homer*, 73 Ga. 251; 27 Am. & Eng. R. Cas. 186 ("extraordi-

nary diligence"); *Kellow v. Central Iowa R. Co.*, 68 Iowa 470; 21 Am. & Eng. R. Cas. 485 (duty of carrier exceeds reasonable care; safety of passengers must be provided for as far as human foresight can go); *Louisville etc. R. Co. v. Pedigo*, 108 Ind. 481; 27 Am. & Eng. R. Cas. 310; *Thayer v. St. Louis etc. R. Co.*, 22 Ind. 26 ("utmost care of cautious persons"); *New York etc. R. Co. v. Daugherty* (Pa. 1882), 11 W. N. C. 437; 6 Am. & Eng. R. Cas. 139; *Black v. New Orleans etc. Co.*, 10 La. Ann. 33; *Chicago etc. R. Co. v. Pillsbury*, 123 Ill. 9; 31 Am. & Eng. R. Cas. 24; *Gibson v. Jackson Co. R. Co.*, 76 Mo. 282; 12 Am. & Eng. R. Cas. 132; *Fuller v. Naugatuck etc. R. Co.*, 21 Conn. 557; *Nashville etc. R. Co. v. Messino*, 1 Sneed (Tenn.) 220; *Pennsylvania R. Co. v. Roy*, 102 U. S. 451; *Hutchison on Carriers*, § 495; 2 *Shear. & Red. on Neg.* (4th ed.), § 495, where numerous other cases are cited. But though the law exacts from carriers of passengers the greatest practicable care and holds them liable for the slightest failure of duty, it does not make them insurers of the safety of passengers. *Gibson v. Jackson Co. R. Co.*, 76 Mo. 282; 12 Am. & Eng. R. Cas. 132; *Renneker v. South Carolina R. Co.*, 20 S. Car. 219; 18 Am. & Eng. R. Cas. 149; *Dougherty v. Missouri R. Co.* (Mo. 1888), 21 Am. & Eng. R. Cas. 497; 2 *Red. on Ry's* (6th ed.), § 192; *Brunswick etc. R. Co. v. Gale*, 56 Ga.

resting, not upon the contract alone, but being founded on the policy of the law.¹ In all other cases, in determining the duty of such companies as to the care which they must exercise, regard is to be had to the dangerous agencies which they are allowed to employ, the unusual privileges granted to them, and the great injury which must result to the public generally from the negligent or careless management of a railroad; a greater degree of vigilance and care is exacted in consequence.²

322; Chicago etc. R. Co. v. Stumps, 69 Ill. 409; Kansas Pac. R. Co. v. Miller, 2 Colo. 442.

The requirement that carriers of passengers exercise the highest degree of care applies irrespective of the character of the train; there is no reason for relaxing the rule because a passenger is carried on a freight train. *Indianapolis etc. R. Co. v. Horst*, 93 U. S. 291; *Edgerton v. New York etc. R. Co.*, 39 N. Y. 227. See also *Philadelphia etc. R. Co. v. Derby*, 14 How. (U. S.) 486; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

This requirement applies to the receiving, keeping, carrying, and discharging of passengers. It does not, however, apply to precautions adopted to prevent their being left if they are unnecessarily late in taking their places after full opportunity has been afforded. *Central R. etc. Co. v. Perry*, 58 Ga. 461.

1. 2 Shear. & Red. on Neg. (4th ed.), § 486; *Nolton v. Western R. Co.*, 15 N. Y. 444; affirming 10 How. Pr. (N. Y.) 97; *Gillenwater v. Madison etc. R. Co.*, 5 Ind. 339.

2 Redfield on Ry's (6th ed.), § 192; *Hutchison on Carriers*, § 496-7; *NEGLIGENCE*, vol. 16, p. 416.

As a consequence, in a suit by a passenger for injuries received owing to the negligence of the carrier, he is not bound to sue on the contract, but may bring an action in tort for the breach of the carrier's duty. See *NEGLIGENCE*, vol. 16, p. 425; *Shear. & Red. on Neg. (4th ed.)*, § 22. *Baltimore etc. R. Co. v. Kemp*, 61 Md. 74; 48 Am. Rep. 134; 18 Am. & Eng. R. Cas. 220.

2. *Chicago etc. R. Co. v. Stumps*, 69 Ill. 409; *Hicks v. Pacific R. Co.*, 64 Mo. 430; *Baltimore etc. R. Co. v. State*, 29 Md. 252; *Cook v. New York Cent. R. Co.*, 1 Abb. App. Dec. (N. Y.) 432; *Illinois Cent. R. Co. v. Phillips*, 49 Ill. 234 ("when they are employing so dangerous an element as steam, for their gain and profit, a proper regard for human life and safety requires

that a high degree of care and skill should be employed"); *Indianapolis etc. R. Co. v. Galbreath*, 63 Ill. 436; *Klien v. Jewett*, 26 N. J. Eq. 474.

Thus in an *Indiana* case it is laid down that it is no defense to an action for an injury caused by fire communicated from a passing locomotive, that the company used on its locomotives such machinery as was in common and general use, and approved by experience to prevent fire from being communicated; for, though the law does not require absolute scientific perfection in the construction of engines, it does require the exercise of a high degree of care and skill to ascertain, as near as may be, the best plan for their construction; and it also requires not only that skilled and experienced workmen shall be employed in their construction, but that due skill be exercised in the particular instance where injury has resulted from the use of a particular engine. *Pittsburgh R. Co. v. Nelson*, 51 Ind. 150; *FIRES BY RAILWAYS*, vol. 8, p. 1.

The same principle is upheld in *Cos-tello v. Syracuse etc. R. Co.*, 65 Barb. (N. Y.) 92; *Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa 14; *St. Louis etc. R. Co. v. Valirius*, 56 Ind. 511.

The same degree of diligence in the selection or construction of tools, apparatus, machinery, etc., to be used in operating a railroad, is not required when the question is between an employé of the company who habitually uses the tool, etc., in question, and has opportunity to know its defects, as is exacted when the question is between the company and a passenger. *West-ern etc. Co. v. Bishop*, 50 Ga. 465.

And in an *Illinois* case where a bystander had been injured by the explosion of a boiler, the doctrine is stated that railroad companies must exercise their franchises in such manner as does not endanger the security of persons, so far as the employment of human sagacity and foresight can rea-

IX. RAILROADS IN STREETS AND HIGHWAYS; ELEVATED RAILROADS.—See *EMINENT DOMAIN*, vol. 6, pp. 534, 552-3; *HIGHWAYS*, vol. 9, p. 408; *STREETS*.

X. ROLLING STOCK AND SIMILAR PROPERTY—WHETHER REALTY OR PERSONALTY.—The question as to whether the rolling stock and other similar property of a railroad company is to be regarded as personalty or realty often arises in cases involving the validity and effect of railroad mortgages. It is now regulated by statute in many jurisdictions; independently of these statutory provisions the weight of authority seems to be that such property is personalty, though there is much conflict of opinion on the subject.¹

sonably anticipate and prevent. They must provide good and safe machinery, constructed of proper materials, and free, so far as known and well recognized tests can determine, from defects; and must exercise care and vigilance in examining it, and keeping it in proper repair and safe condition; and must employ skillful and experienced servants. And while they are not liable, in general, for injuries that may result from using their franchises, which skill and experience are unable to foresee and avoid, nor for acts of persons not in their employment and over whom they have no control, they are responsible for injuries that result from a failure to exercise judgment and skill in the selection of material in the construction of their machinery, or in the use of it upon their roads. *Illinois Cent. R. Co. v. Phillips*, 49 Ill. 234.

This is particularly true where the railroad occupies a public highway. *Toledo etc. R. Co. v. Harman*, 47 Ill. 298; *Hicks v. Pacific R. Co.*, 64 Mo. 430; *Wilson v. Cunningham*, 3 Cal. 241 (owners of a railroad running through city streets bound to use extraordinary care); *Murray v. South Carolina R. Co.*, 10 Rich. (S. Car.) 227.

There is no such thing as a reasonable increase of danger to passengers. An engineer is not justified in diminishing the speed of a train to avoid injury to live stock, if he thereby augments the danger to passengers. *Sandham v. Chicago etc. R. Co.*, 38 Iowa 88.

Arrival and Departure of Trains.

The publication of a time table, in common form, imposes upon a railroad company the obligation to use due care and skill to have the trains arrive and depart at the precise moments indicated therein; but it does not import

an absolute and unconditional engagement for such arrival and departure, and does not make the company liable for want of punctuality which is not attributable to their negligence. *Gordon v. Railroad*, 52 N. H. 506.

1. Authorities Holding Rolling Stock, etc., to be Realty.—In *Tiedeman on Real Property*, § 2, it is said that such property is realty so as to pass in a conveyance of real property without being specifically mentioned.

In the case of *Palmer v. Forbes*, 23 Ill. 301, it is laid down that the railroad itself, including the superstructure as well as the depot grounds, buildings, turn-tables, and the like, is real estate, and so are its rolling stock, rails, ties, chairs, spikes, and all other materials brought upon the ground of the company and designed to be attached to the realty. See also *Hunt v. Bullock*, 23 Ill. 320.

In the case of *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb. (N. Y.) 484, it is held that as between mortgagees and judgment creditors of the mortgage, the rolling stock of a company, such as locomotives, engines, passenger, baggage and freight cars, hand-cars, snow-plows, etc., are to be deemed fixtures and will pass under a mortgage of the track or road-way and the lands occupied by the company for depot buildings and the like.

In the case of *Milwaukee etc. R. Co. v. James*, 6 Wall. (U. S.) 750, it is said, that the rolling stock owned by a railroad company and used and employed in connection with the road is made a fixture by the statute of *Wisconsin*, "and such we think is the true construction of the charter independent of the statute." *Citing Pennock v. Cox*, 23 How. (U. S.) 117.

In *Louisville etc. R. Co. v. State*, 25

Ind. 177, the rolling stock "is treated as realty for the purpose of taxation, as being intimately connected with the purposes and uses of the railroad track and superstructure."

In *Farmers' L. & T. Co. v. St. Joseph etc. R. Co.*, 3 Dill. (U. S.) 412, the court by Miller, J., said: "In my opinion rolling stock and other property strictly and properly appurtenant to the road is part of the road and covered by the mortgage in question." The mortgage was recorded only as a mortgage of realty, though it embraced expressly the rolling stock. See also *Green's Brice's Ultra Vires*, p. 238, note and authorities cited; *Morrill v. Noyes*, 56 Me. 458; *Strickland v. Parker*, 54 Me. 263; *Titus v. Mabree*, 25 Ill. 257; *State v. Northern Cent. R. Co.*, 18 Md. 193; *Pennock v. Coe*, 23 How. (U. S.) 117; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; *Farmers' L. & T. Co. v. Commercial Bank*, 11 Wis. 207.

Authorities Holding Rolling Stock, etc., to Be Personalty.—But the better and more recent authorities decline to accept the view of the preceding cases, and hold that such property is personalty. Thus, in the case of *Randall v. Elwell*, 52 N. Y. 521; 11 Am. Rep. 747, it is expressly held that the rolling stock of a railroad company is personal property and not fixtures, and, as such, is liable to be sold for the collection of taxes. *Hill v. La Crosse etc. R. Co.*, 11 Wis. 214.

In *Stevens v. Buffalo etc. R. Co.*, 31 Barb. (N. Y.) 602, the case of *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb. (N. Y.) 484, is directly overruled.

Again in *Hoyle v. Plattsburgh etc. R. Co.*, 54 N. Y. 315; 13 Am. Rep. 594, in an action to foreclose two mortgages on a railroad and its franchises and equipments, it appeared that the rolling stock had, subsequent to the giving of the mortgage, been sold on execution, and purchased at a sheriff's sale under judgment. The court held that the rolling stock was personal property and the mortgage should therefore have been filed as a chattel mortgage. The opinion of Johnson, C., in this case contains citations of many authorities upon this subject.

In *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311, it is said engines and rolling stock must be regarded as chattels, which have not lost their distinctive character as personalty, by being affixed to the railroad, so that

a mortgage of such property is a chattel mortgage. The court in this case reviewed at great length the authorities on the subject and arrived at the conclusion that "wherever the question has been directly presented as to whether the rolling stock of a railroad is real or personal property, the great weight of authority is in favor of its being considered as personalty." Citing, *Stevens v. Boston etc. R. Co.*, 31 Barb. (N. Y.) 590; *Chicago etc. R. Co. v. Ft. Howard*, 21 Wis. 44; *Boston etc. R. Co. v. Gilmore*, 37 N. H. 410; *Coe v. Columbus etc. R. Co.*, 10 Ohio St. 372; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *State Treasurer v. Somerville etc. R. Co.*, 28 N. J. L. 21; *Beardsley v. Ontario Bank*, 31 Barb. (N. Y.) 619. In this last case it was held that locomotives, engines, and all other rolling stock of a railroad company, the stock, materials, rails, ties, and other things on hand for running or repairing the road, the platform scales, tools and implements, and all articles not constituting a part of the road-bed or firmly affixed to the land or to some building which is itself a fixture, are not embraced in and will not pass by a mortgage of "the railroad real estate, chattels real, and franchises" of the company, and are subject to execution as personal property. See also *Michigan Cent. R. Co. v. Chicago etc. R. Co.*, 1 Ill. App. 399.

In *Rorer on Railroads*, p. 10, it is said that "there is much diversity of rulings in the State courts as to the character of the rolling stock and appliances, but with a decided preponderance of authority, it is regarded as personal property when not influenced by statute."

In *Green's Brice's Ultra Vires*, p. 238, note a, the subject is considered at length and the same conclusion reached. So also in 1 *Minor's Inst.* (3rd. ed.) [541] 609. *Pingrey on Chattel Mortgages*, § 428, *et seq.* See also *Pacific R. Co. v. Cass Co.*, 53 Mo. 17.

In the case of *Milwaukee etc. R. Co. v. James*, 6 Wall. (U. S.) 750, such property was considered a fixture, and therefore real property, but it was because it was declared to be so by statute. And in a later case, under the same statute, it is said that though such property is a fixture by statute, it is such only for the purposes contemplated in that section, and so liable to seizure and sale for delinquent taxes as personal property. *Chicago etc.*

XI. STATE REGULATION OF RAILROADS.—This portion of the subject has received considerable treatment elsewhere.¹ It is settled that the construction and operation of a railroad is a business "affected with a public interest," such as that the State has a right to control and regulate it.²

R. Co. v. Fort Howard, 21 Wis. 44; 91 Am. Dec. 458.

Iron Rails.—Iron rails when fastened to the road-bed so that engines and cars can pass over them are a part of the realty, unless by agreement between the parties to a transfer they remain personalty. But as between the vendor and those who remain entitled to the possession as security for prior claims, such rails continue to be personalty only so far as such prior mortgagees have consented to such agreement. *Hunt v. Bay State Iron Co.*, 97 Mass. 279.

Statutory Provisions.—In *Wisconsin*, such property is declared by statute to be a fixture. *Milwaukee etc. R. Co. v. James*, 6 Wall. (U. S.) 550.

In *Mississippi*, it is made personalty. *Const. of Mississippi* (1890), § 185.

See **RAILROAD SECURITIES**, where the statutes on the subject are collected; also *Jones on Railroad Securities*, § 150, *et seq.*

1. See **FREIGHT**, vol. 8, pp. 906-925; **TICKETS AND FARES; CORPORATIONS**, vol. 4, p. 209; **FRANCHISES**, vol. 8, p. 620, *et seq.* See also *infra* this title, **Legal Status**; *Baltimore etc. R. Co. v. Maryland*, 21 Wall. (U. S.) 456, note in L. ed.

2. **Business Affected with a Public Interest.**—The principle that a State may regulate the conduct of any business "affected with a public interest" was announced in *Munn v. Illinois*, 94 U. S. 113, and though at first opposed is now established beyond controversy. See **POLICE POWER**, vol. 18, p. 739, and cases; *Cooley's Const. Lim.* (6th ed.), p. 738, where are enumerated the various classes of business which are included; **FRANCHISES**, vol. 8, p. 621; *People v. Budd*, 117 N. Y. 1; 24 Am. L. Rev. 908; *Carton v. Illinois Cent. R. Co.*, 59 Iowa 148; 44 Am. Rep. 676; *Wisconsin Cent. R. Co. v. Taylor Co.*, 52 Wis. 77; 1 Am. & Eng. R. Cas. 532; *Sloan v. Missouri Pac. R. Co.*, 61 Mo. 24; *Nelson v. Vermont etc. R. Co.*, 26 Vt. 717.

That railroads come within the term "business affected with a public interest" is settled by the "*Granger*

Cases." *Chicago etc. R. Co. v. Cutts*, 94 U. S. 155-164, 183-187; *Peik v. Chicago etc. R. Co.*, 94 U. S. 164. Compare *Mobile etc. R. Co. v. Sessions*, 28 Fed. Rep. 594.

The fact that the income of such railroads had been pledged as security for the payment of the obligations incurred upon the faith of the charter in no wise affects the right of the State to regulate their charges. *Chicago etc. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago etc. R. Co.*, 94 U. S. 164-176.

In *People v. Boston etc. R. Co.*, 70 N. Y. 569, the court by Earl, J., said: "Railroad corporations hold their property and exercise their functions for the public benefit, and they are therefore subject to legislative control. The legislature which has created them may regulate the way in which they shall transact their business, the price which they shall charge for the transportation of freight and passengers, the speed at which they may run their trains, and the way in which they may cross or run upon highways or turnpikes used for public travel. It may make all such regulations as are appropriate to protect the lives of persons carried upon railroads or passing upon highways crossed by railroads. All this is within the legislative power, although the power to alter and amend the charters of such corporations has not been reserved." See also *Fitchburgh etc. R. Co. v. Grand Junction R. etc. Co.*, 4 Allen (Mass.) 198.

The time and manner in which a railroad company will carry persons and property, and the price to be paid therefor are subject to legislative regulation, but in the absence of such regulation it owes only such duties to the public, or to individuals, associations, or corporations as the common law, or some custom having the force of law, has established. *Atchison etc. R. Co. v. Denver etc. R. Co.*, 110 U. S. 667; 16 Am. & Eng. R. Cas. 57. See also *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; 23 Am. & Eng. R. Cas. 577.

1. **Is an Exercise of Police Power.**—The right of every State to control or regulate railroads within its borders is a necessary accompaniment of the duty imposed upon it to provide for the general welfare of its citizens. It is a part of the power of police regulation which is inherent in every government, and is bounded only by the limitations provided in the State and Federal constitutions.¹

2. **Regulation of Freight Charges and Passenger Rates.**—See FREIGHT, vol. 8, pp. 906-925; TICKETS AND FARES.

3. **Railroad Commissions.**—See RAILROAD COMMISSIONERS.

4. **As to Speed of Trains.**—A State legislature has an undoubted right to provide that railway trains shall not exceed a certain rate of speed at particular places, *e. g.*, at crossings, in passing

Interstate Consolidation.—Certain railroad companies of *Wisconsin* were consolidated with others of *Illinois* on terms which, in effect, required that the consolidated company should, when operating in *Wisconsin*, be subject to its laws. *Held*, that *Wisconsin* could legislate for the company, in that State precisely as it could have legislated for its own original companies if no consolidation had taken place. *Peik v. Chicago etc. R. Co.*, 94 U. S. 164; *CORPORATIONS*, vol. 3, p. 272.

In Case of Leases.—A corporation of one State, operating a road in another State as lessee, subjects itself as to that road to such local legislation as would have been applicable to the lessor had no such lease been made. *Stone v. Farmers' L. & T. Co.*, 116 U. S. 347; 23 Am. & Eng. R. Cas. 577.

1. *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573; *POLICE POWER*, vol. 18, p. 739; *Tiedeman's Lim. of Police Power*, pp. 593-602; *Cooley's Const. Lim.* (6th ed.) 707-716; *Toledo etc. R. Co. v. Jacksonville*, 67 Ill. 37; 16 Am. Rep. 611; *Thorpe v. Rutland etc. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625; *Boston etc. R. Co. v. County Com'rs*, 79 Me. 386; *Pittsburg etc. R. Co. v. Southwest Pa. R. Co.*, 77 Pa. St. 186; 1 *Rorer on Railroads*, p. 557.

A charter granted to a railroad corporation by a territorial legislature does not confer nor secure rights beyond the reach of the police power of the State. The chartered rights of a corporation are not more sacred than the individual's rights of person and property, and all must give way to any legitimate exercise of the police power of the State. *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573; *Sloan v. Pacific R. Co.*, 61 Mo. 24; 21 Am. Rep. 397.

Police Regulations Apply Both to Existing Corporations and those Subsequently Created.—*Portland etc. R. Co. v. Boston etc. R. Co.*, 65 Me. 122; *Wilder v. Maine Cent. R. Co.*, 65 Me. 332; 20 Am. Rep. 698; *New Albany etc. R. Co. v. Tilton*, 12 Ind. 3, 10; *Indianapolis etc. R. Co. v. Kercheval*, 16 Ind. 84; *Western Union R. Co. v. Fulton*, 64 Ill. 271; *Indianapolis etc. R. Co. v. Blackman*, 63 Ill. 117; *Cincinnati etc. R. Co. v. Cole*, 29 Ohio St. 126; *Pittsburg etc. R. Co. v. Southwest Pa. R. Co.*, 77 Pa. St. 173; *Bulkley v. New York etc. R. Co.*, 27 Conn. 479; *Rodemacher v. Milwaukee etc. R. Co.*, 41 Iowa 297; 20 Am. Rep. 592; *Sawyer v. Vermont etc. R. Co.*, 105 Mass. 196 (fencing statute); *Galena etc. R. Co. v. Loomis*, 13 Ill. 548; *Jeffersonville R. Co. v. Gabbert*, 25 Ind. 431; *Suydam v. Moore*, 8 Barb. (N. Y.) 358. Unless, of course, the terms of the statute provide otherwise. See *Stearns v. Old Colony etc. R. Co.*, 1 Allen (Mass.) 493; *Baxter v. Boston etc. R. Co.*, 102 Mass. 383. Compare *Wellcome v. Leeds*, 51 Me. 313.

See also *Gulf etc. R. Co. v. Rowland*, 70 Tex. 298; 35 Am. & Eng. R. Cas. 286, where it is held that a statute requiring farm crossings to be constructed is unconstitutional so far as it applies to companies which had secured a right of way before its passage.

Must Be Police Regulations in Fact.—The exercise of a State's power in this regard must be strictly limited to police regulations in fact. Essential rights and privileges cannot be impaired under pretense of regulation. *Sloan v. Pacific R. Co.*, 61 Mo. 24; *People v. Jackson etc. Co.*, 9 Mich. 285; *Hegeman v. Western R. Co.*, 13 N. Y. 9.

through towns or cities, etc. Such regulations are not an infringement of the charter rights of companies, nor do they violate any constitutional provision.¹

5. As to Crossings, Signals, etc.—A State legislature may also make all necessary provisions as to the crossings of railroads over public highways or over other railroads; such, for example, as prescribing how and in what cases crossings shall be built,² the

1. The charter privilege of a railroad company to fix the rate of speed of its trains, is, like the business of an individual, subordinate to the police laws of the State. *Mobile etc. R. Co. v. State*, 51 Miss. 137; *Merz v. Missouri Pac. R. Co.*, 88 Mo. 677; *Haas v. Chicago etc. R. Co.*, 41 Wis. 44; *Horn v. Chicago etc. R. Co.*, 38 Wis. 463; *People v. Boston etc. R. Co.*, 70 N. Y. 569; *Buffalo etc. R. Co. v. Buffalo*, 5 Hill (N. Y.) 209; *2 Dillon's Mun. Corp.*, § 713; *Cooley's Const. Lim.* (6th ed.) 710; *Chicago etc. R. Co. v. Haggerty*, 67 Ill. 113; *Rockford etc. R. Co. v. Hillmer*, 72 Ill. 235; *Chicago etc. R. Co. v. People*, 120 Ill. 667 (any person injured may recover the penalty); *Whitson v. Franklin*, 34 Ind. 393; *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33; *Clark v. Boston etc. R. Co.*, 64 N. H. 323; 31 Am. & Eng. R. Cas. 548 (regulations may apply to roads extending beyond State limits); *Chicago etc. R. Co. v. Reidy*, 66 Ill. 43.

In *State v. New Jersey R. etc. Co.*, 29 N. J. L. 170, the right was recognized but held not to apply to a particular case.

Within certain limits a municipal corporation has the same right. *2 Dillon's Mun. Corp.*, § 713; *2 Redf. on Ry's* 577-8; *Gratiot v. Missouri Pac. R. Co.*, 16 S. W. Rep. 384; *Toledo etc. R. Co. v. Deacon*, 63 Ill. 91.

The *Georgia* statute regulating the speed of trains at public crossings does not apply to cases in which the train is started at or upon the crossing. *Harris v. Central R. Co.*, 78 Ga. 525.

A city ordinance forbidding the running of trains at a greater speed than ten miles an hour within the city limits does not license trains to run at this rate. The trains must conform their rate of speed to the safety of the public. *Wabash R. Co. v. Henks*, 91 Ill. 406.

Effect of a Violation of Such Statute.—In some jurisdictions a violation of a statute regulating the speed of trains is considered to constitute negligence

per se so that the plaintiff need only prove damage in order to recover. *South Ala. R. Co. v. Donovan*, 84 Ala. 141; 36 Am. & Eng. R. Cas. 151; *Keim v. Union R. etc. Co.*, 90 Mo. 314; *Karle v. Kansas City R. Co.*, 55 Mo. 476; *Winstanley v. Chicago etc. R. Co.*, 72 Wis. 375; *Enders v. Lake Shore etc. R. Co.* (Supreme Ct.), 2 N. Y. Supp. 719; *Correll v. Burlington etc. R. Co.*, 38 Iowa 120; *Dodge v. Burlington etc. R. Co.*, 34 Iowa 276; *New Orleans etc. R. Co. v. Toulme*, 59 Miss. 284. See also *Chicago etc. R. Co. v. Reidy*, 66 Ill. 43.

The error in such doctrines is adverted to in *NEGLIGENCE*, vol. 16, pp. 420, 421.

But contributory negligence is a defense even when an unlawful rate of speed is proven. *Strong v. Canton etc. R. Co.* (Miss. 1888), 3 So. Rep. 46; *Blanchard v. Lake Shore etc. R. Co.*, 126 Ill. 416; 37 Am. & Eng. R. Cas. 319.

In other jurisdictions such violation is made merely some evidence of negligence. *Toledo etc. R. Co. v. Deacon*, 63 Ill. 91; *Chicago etc. R. Co. v. Engle*, 58 Ill. 381; *Clark v. Boston etc. R. Co.*, 64 N. H. 323; *Archer v. New York etc. R. Co.*, 106 N. Y. 589; *Wheeler v. New York etc. R. Co.*, 38 Fed. Rep. 15.

And this is the more correct doctrine. See *NEGLIGENCE*, vol. 16, pp. 420, 421.

In *Mississippi* it is held that § 1047 (Code 1880), prohibiting the running of railroad trains through incorporated cities and towns at a greater rate of speed than six miles per hour, and making the railroad company liable for any damage or injury which may be sustained by any one from such trains, while running at a greater speed than six miles per hour, through any such incorporated city or town, applies to injuries done to real estate, such as injury to a house by vibrations, as well as to personal property. *Porterfield v. Bond*, 38 Fed. Rep. 391.

2. *Portland etc. R. Co. v. Deering*, 78

signals which shall be given upon approaching them,¹ and that

Me. 61; 23 Am. & Eng. R. Cas. 51; Cooley's Const. Lim. (6th ed.) 715; State v. Minneapolis etc. R. Co., 39 Minn. 219; 35 Am. & Eng. R. Cas. 250; Albany etc. R. Co. v. Brownell, 24 N. Y. 345; Pierce on Railroads 457; Pittsburg etc. R. Co. v. Southwest Pa. R. Co., 77 Pa. St. 173.

Where commissioners attempt to regulate the mode in which the tracks of one road may cross those of another, the style and pattern of the crossing-frogs should be definitely fixed, or the report will be set aside. *In re New York etc. R. Co.*, 35 Hun (N. Y.) 232.

Where railroad commissioners are empowered, when public safety requires an alteration of any highway crossed at grade by a railroad, to order such alterations as they shall deem best, they may join two converging highways so as to make a single crossing, although the distance by one highway is increased thirty rods, and by the other fifteen. *Suffield v. New Haven etc. Co.*, 53 Conn. 367.

Power of State to Authorize Crossings to be Made.—Railroad corporations accept their charters and franchises subject to the power of the State to authorize the construction of other railroads across their tracks whenever the public welfare may require. Neither the priority of one charter over the other, nor the prior location or construction of a railroad thereunder, affects this right. *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, 30 Ohio St. 604; 5 Cent. L. Jour. 492-3; *In re Kerr*, 42 Barb. (N. Y.) 119; *EMINENT DOMAIN*, vol. 6, p. 537; *infra*, this title, *Railroads Crossing Each Other*.

See also *Missouri etc. R. Co. v. Texas etc. R. Co.*, 10 Fed. Rep. 497.

Compare *Gulf etc. R. Co. v. Ellis*, 70 Tex. 307; 35 Am. & Eng. R. Cas. 292.

A statute requiring railroad companies to erect farm crossings is not unconstitutional even as to companies chartered before the enactment of the statute. *Illinois Cent. R. Co. v. Willenborg*, 117 Ill. 203; 57 Am. Rep. 862; 26 Am. & Eng. R. Cas. 358.

An act providing that at railroad crossings the railroads crossing there should erect and maintain suitable depots and waiting rooms to accommodate passengers, is also a legitimate exercise of police power. *Missouri v. Kansas City etc. R. Co.*, 32 Fed. Rep. 722;

State v. Wabash etc. R. Co., 83 Mo. 144; 25 Am. & Eng. R. Cas. 133.

So also of a statute providing that the expense of maintaining so much of the highway as is within the limits of the right of way where the track is crossed at grade, shall be borne by the company. *Boston etc. R. Co. v. County Com'rs*, 79 Me. 386; 32 Am. & Eng. R. Cas. 271.

But a statute requiring the company to make a crossing outside of any inclosure, on demand of any two citizens, was held unconstitutional in *Gulf etc. R. Co. v. Ellis*, 70 Tex. 307; 35 Am. & Eng. R. Cas. 292.

Under the *New York* statute a commission appointed to ascertain and determine the points and manner of the crossing by one railroad of another, has no power to locate the crossing at any place other than that stated in the petition and order; nor to review any fact on which the order was based, nor to question the right of the petitioner to a crossing; nor has such commission power to regulate the rate of speed at which trains on the intersecting roads shall pass the crossing. *Matter of Cent. R. Co. of L. I.*, 1 *Thomp. & C.* (N. Y.) 419.

1. *Kaminitsky v. Northeastern R. Co.*, 25 S. Car. 53; *Pittsburgh etc. R. Co. v. Brown*, 67 Ind. 45; 33 Am. Rep. 73; *Galena etc. R. Co. v. Loomis*, 13 Ill. 548; Cooley's Const. Lim. (6th ed.) 714; *Com. v. Eastern R. Co.*, 103 Mass. 254; 4 Am. Rep. 555.

An act which exempts a railroad corporation from the duty of ringing a bell or blowing a whistle may be repealed by another act, notwithstanding the repealing act is rejected by such company, so as to render the company liable for a breach of such duty. *Galena etc. R. Co. v. Appleby*, 28 Ill. 283.

The *New York* railroad act (1850) provided that a penalty should be inflicted for every failure by a railroad company to make certain specified signals. It was held that a company incurred the penalty as often as it crossed a public road, etc., without giving the required signal; and that the section applied as well to cases where the railroad crossed the highway by a bridge at a sufficient elevation to allow travel to pass beneath, as to the case of a crossing on a level. *People v. New York Cent. R. Co.*, 25 Barb. (N. Y.) 199.

the omission to observe such provisions shall constitute negligence, etc.¹

6. **As to Fencing Tracks.**—See *FENCES*, vol. 7, pp. 906-939.

7. **As to Formation of Pools.**—See *RAILROAD POOLS*.

8. **Miscellaneous Instances.**—There are numerous other instances of the State regulation of railroads, which admit of no special classification.²

Where Two Railroads Cross.—A statute providing that where two railroads cross each other a watchman shall be kept, and other precautions taken, such as that trains shall come to a full stop before passing such crossing is valid. *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, 30 Ohio St. 604; *Mobile etc. R. Co. v. People*, 29 Ill. App. 428.

1. The general rule is that the violation of such regulations does not necessarily make the company liable for injuries caused at the time; the defense of contributory negligence, or of the absence of proximity of cause is still available. See *NEGLIGENCE*, vol. 16, p. 421; *CROSSINGS*, vol. 4, p. 921; *Cooley's Const. Lim.* (6th ed.) 714, and cases cited; *Jackson v. Rutland etc. R. Co.*, 25 Vt. 150; 60 Am. Dec. 246; *Orcutt v. Pacific Coast R. Co.*, 85 Cal. 291.

But the legislature may exclude such defenses and impose an absolute liability for all injuries caused by a violation of the regulations. *Quackenbush v. Wisconsin etc. R. Co.*, 62 Wis. 411; *Kaminitzky v. Northeastern R. Co.*, 25 S. Car. 53; *Cooley's Const. Lim.* (6th ed.) 718; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512 (double damage act); *FENCES*, vol. 7, p. 906, 910, *et seq.*

An ordinance of Orleans requiring railroad companies to have watchmen with prescribed signals at all points where their tracks intersect streets on which street cars are running, and which imposes imprisonment on the person in charge of a train who crosses such street without being signaled as therein provided, is a valid exercise of the power conferred on the city by its charter to "authorize the use of the streets for horse or steam railroads, and to regulate the same." *State v. Cozzens*, 42 La. Ann.—, 8 So. Rep. 265.

2. **Running Mixed Trains—Air Brakes.**—An *Arkansas* statute provides that in making up mixed trains the baggage and freight cars shall be placed in front of the passenger coaches. *Mansfield's*

Dig. Arkansas, § 5477. Under this it was held that where it was permissible for the road to use mixed trains, the law would not require bell pulls and air brakes to be used on such trains, unless it was practicable to do so, and they were necessary to the security of the passengers. *Arkansas etc. R. Co. v. Canman*, 52 Ark. 517. See also *How. Ann. Stat. (Michigan)*, § 3363; *Public Acts (Michigan)* 1889, p. 211, as to statutory provisions concerning air-brakes.

Delay in Transportation.—In the exercise of its general police power, the legislature can impose on railroads within the State a penalty for each day's delay to transport goods duly delivered to them for the purpose. *Branch v. Wilmington etc. R. Co.*, 77 N. Car. 347.

Keeping Ticket Office Open.—*Tennessee Code*, § 2359 makes it an indictable offense for a ticket agent not to keep the office open for an hour before the departure of a train. *Held*, that if the company has dispensed with the necessity for tickets on the particular train to which the indictment relates, this constitutes a defense. *Brady v. State*, 15 Lea (Tenn.) 628.

In the case of *Bordeaux v. Erie R. Co.*, 8 Hun (N. Y.) 579, it is held that under the charter of the Erie Railway Company, that company is not bound to keep its ticket offices open at or for any particular time; and the fact that a passenger is unable to procure a ticket in consequence of the office being shut, does not entitle him to be carried to his place of destination, upon payment of the amount for which he could have procured a ticket at the office, if it had been open. It may well be doubted, however, whether this case states the true doctrine. See 16 Am. L. Rev. 818-827.

Killing Stock—Indictment of Conductor.—A statute providing that where stock is killed by an engine the conductor with certain other officers, including the engineer, shall be liable to indictment, and that the fact of kil-

ing shall be *prima facie* evidence of their negligence in the trial on the indictment is unconstitutional and void, as lacking uniformity and equality, and as subverting the principle that innocence is to be presumed. *State v. Divine*, 98 N. Car. 778; 31 Am. & Eng. R. Cas. 574.

Stopping Trains at Stations.—A statute of *Texas* requiring a stoppage of five minutes at every way station to be made by every passenger train may be valid. *Davidson v. State*, 4 Tex. App. 545; 30 Am. Rep. 166; unless it plainly appear that the vested charter or other important rights of the railroad company were unduly prejudiced thereby. *Galveston etc. R. Co. v. Le Gierse*, 51 Tex. 201.

See also *Davis v. State*, 6 Tex. App. 166. Compare *State v. Noyes*, 47 Me. 189, where a statute requiring trains to wait twenty minutes for each other at points where two roads crossed, was held unconstitutional.

Posting Schedules of Rates and Time Tables.—It is within the power of the legislature of a State to require that each railway company in the State shall in a certain month annually fix its rates for the transportation of passengers and of freights; and that a printed copy of such rates shall be posted at each station or depot of such road, and be kept there. Such a provision is not a regulation of interstate commerce but a proper exercise of police power. *Chicago etc. R. Co. v. Fuller*, 17 Wall. (U. S.) 560; affirming 31 Iowa 187.

Heating Cars.—Statutes providing the manner in which cars are to be heated exist in several States.

Laws of New York 1887, ch. 616, prohibit railroads doing business in the State from using a stove or furnace kept inside the car for heating their passenger cars. The act is intended to apply only to railroads more than fifty miles in length. It is held, however, that it applies to roads over that length though less than fifty miles are within the State. The fact that the road is only partly within the State does not affect the validity of the act. See *People v. New York etc. R. Co.* (Supreme Ct.), 5 N. Y. Supp. 945; *People v. New York etc. R. Co.*, 55 Hun (N. Y.) 409.

A similar provision exists in *Michigan*. Act June 28, 1889; Pub. Acts 1889, p. 298, amending Pub. Acts 1887,

p. 134, §§ 1-2. And in *Massachusetts*, Acts 1891, ch. 249, p. 127.

Where the directors of a railroad cause the cars to be heated contrary to the statute, they are subject to the penalty; but not merely because they are officers of the road; it must be shown that they personally participated in the offense. *People v. Clark* (Ct. of Oyer and Terminer), 14 N. Y. Supp. 642.

Lighting the Line of Railway.—A statute may be valid as a police regulation which requires railway companies to light such portions of their roadway as pass through a city or village. *Cincinnati etc. R. Co. v. Sullivan*, 32 Ohio St. 152.

And to light and heat its station houses. *Texas etc. R. Co. v. Mayes* (Tex. 1891), 15 S. W. Rep. 43.

Motive Power.—A statute giving a city corporation power to regulate the running of railroad cars within the corporate limits, authorizes the corporation to prohibit the propelling of the cars by steam through any part of the city. *Buffalo etc. R. Co. v. Buffalo*, 5 Hill (N. Y.) 209.

Providing Separate Passenger Coaches.—In the case of *Louisville etc. R. Co. v. State*, 66 Miss. 662; affirmed 133 U. S. 587; 41 Am. & Eng. R. Cas. 36, the right of a State to provide that railroads within its borders shall provide separate accommodations for white and colored passengers, is upheld. So long as they do not interfere with interstate commerce such regulations are entirely within the police power of the States. See also *Hall v. DeCuir*, 95 U. S. 485.

Establishment of Stations and Depots.—(See STATIONS.) A statute requiring a railroad company to reopen and maintain a station on its road, which it has abandoned, is not in the nature of an amendment of the charter, requiring acceptance by the company before it can take effect, but is an exercise of the legislative authority to direct the management of the road, and is obligatory from time of enactment. *State v. New Haven etc. R. Co.*, 43 Conn. 351.

A statute requiring railroad companies to erect and maintain depots and passenger stations where two railroads cross, cannot be considered as violating any constitutional provisions. It is a proper exercise of police power. *State v. Wabash etc. R. Co.*, 83 Mo. 144; 25 Am. & Eng. R. Cas. 133. In a prosecution under this statute

the defendant urged a defect of parties in that both railroad companies were not joined. But it was held that neither was released from liability by the failure of the other. *Missouri v. Kansas City etc. R. Co.*, 32 Fed. Rep. 722. But the indictment must allege that both roads are carriers of passengers. *State v. Wabash etc. R. Co.*, 83 Mo. 144; 25 Am. & Eng. R. Cas. 133.

Color-blind Conductors or Engineers.—An act authorizing an indictment against any railroad company employing a conductor or engineer without a certificate as to color-blindness is within the police power of the State and therefore not unconstitutional. *Nashville etc. R. Co. v. State*, 83 Ala. 71, aff'd 128 U. S. 96; 38 Am. & Eng. R. Cas. 1. In the opinion of the Federal Supreme Court by Justice Field it was said that that portion of the act providing that the examinations should be made at the expense of the railroad companies seek to employ such persons was not a deprivation of property without due process of law within the meaning of the 14th Amendment, but was also a proper exercise of police power. But in the case of *Louisville etc. R. Co. v. Baldwin*, 85 Ala. 619; 38 Am. & Eng. R. Cas. 5, the Supreme Court of *Alabama* held that that portion of the statute relating to examiners' fees was unconstitutional.

The court declined to follow the decision of the Federal court on the ground that the question was not involved in that case, and that Justice Field's remarks were mere *obiter dicta*. See also *Baldwin v. Kouns*, 81 Ala. 272; 31 Am. & Eng. R. Cas. 347.

Other Qualifications of Railroad Employees.—The principle announced in the preceding paragraph is applicable to legislative acts in regard to other qualifications to be possessed by railroad employes. *Smith v. Alabama*, 124 U. S. 465; 33 Am. & Eng. R. Cas. 425; *McDonald v. State*, 81 Ala. 279; 33 Am. & Eng. R. Cas. 420.

Changing Gauge of Road.—A company in which the State had a controlling interest, and which had the charter right to change the gauge of its track at will, leased its road. The lessees changed the gauge and were indicted for the violation of a statute prohibiting such change. It was held that the statute was unconstitutional as impairing the obligation of the charter. *State v. Richmond etc. R. Co.*, 73 N. Car. 527, 21 Am. Rep. 473.

Right of Way Free of Combustible

Material.—A requirement that railroad corporations shall keep their roadway free of combustible material does not trench upon the charter rights of such companies, even though they are incorporated under act of Congress. *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580.

Imposing Liability for Fires.—A law making a railroad company liable for fires caused by its engines when there is no negligence on the part of the injured party cannot be assailed as unconstitutional on the ground that it denies to such corporations the equal protection of the laws, or that it takes their property without due process of law, or that it impairs their charter rights of using fire, steam, and locomotive engines. *Grissell v. Housatonic etc. R. Co.*, 54 Conn. 447; 32 Am. & Eng. R. Cas. 349; *Rodemacher v. Milwaukee etc. R. Co.*, 41 Iowa 297. See also *FIRES BY RAILWAYS*, vol. 8, p. 1.

Damages and Penalties.—A State may provide for penalties in the nature of damages where injuries are occasioned by the negligence of the railroad company. Thus a statute in *Missouri* providing that where the negligence of the company is established, damages double the value of the actual injury sustained may be recovered, is upheld as valid and constitutional. *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512; 22 Am. & Eng. R. Cas. 557; *Hudson v. St. Louis etc. R. Co.*, 53 Mo. 525; *Fickle v. St. Louis etc. R. Co.*, 54 Mo. 219; *Daniels v. St. Louis etc. R. Co.*, 62 Mo. 43; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239; 26 Am. & Eng. R. Cas. 268.

The statute of *Kansas* (Laws 1874, ch. 97, § 2) allowing "a reasonable attorney's fee" to the plaintiff in case of a recovery, for the prosecution of his suit against a railroad corporation for the value of stock killed or injured, is constitutional. Such provision is in the nature of a penalty, and is not beyond the power of the legislature. *Kansas Pac. R. Co. v. Mower*, 16 Kan. 563. See also *Kansas Pac. R. Co. v. Yanz*, 16 Kan. 583.

Section 2899 of the Code of *Alabama*, (1876,) provided that "when the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company or private association of persons, the father of such child, or if the father be not living, the mother, may maintain an action against such corporation or private

9. Limitations: Effect of Charter as a Contract, etc.—The most prominent limitation to State control of railroads is found in the well settled principle that the charter of a private corporation is a contract and as such its obligation cannot be impaired by State legislation.¹ The contract exists not only between the corporation and the State but also between the several members of the corporation.² This principle has been successfully invoked to protect the corporation from additional burdens and restrictions in many cases.³ And while the right to alter, amend, or repeal

association of persons, for such wrongful act or omission, and may recover such damages as the jury may assess." It was held that this created a new cause of action, was highly penal in its terms, and was therefore to be strictly construed. It was held also that the section violated the State Constitution (art. 14, § 12), providing that "all corporations shall have a right to sue, and shall be subject to be sued in all courts in like cases as natural persons," and was therefore void. The opinion was also expressed that the said section was a violation of the 14th Amendment, providing that no State shall deny any person within its jurisdiction the equal protection of the laws. *Smith v. Louisville etc. R. Co.*, 75 Ala. 449; 21 Am. & Eng. R. Cas. 157. See also *San Matteo v. Southern Pacific R. Co.*, 8 Am. & Eng. R. Cas. 1; *Strander v. West Virginia*, 100 U. S. 303.

Other Instances.—The *Illinois* act of 1855, making railroad companies liable for all expenses of a coroner and his inquest, and the burial of all persons who may die on its cars, or who may be killed by collision or other accident occurring to such cars, or otherwise, is unconstitutional and void, so far as it attempts to make such companies liable in cases where they have violated no law, or have been guilty of no negligence. *Ohio etc. R. Co. v. Lackey*, 78 Ill. 55.

1. Charter As a Contract.—See *FRANCHISES*, vol. 8, p. 620, *et seq.*; *CORPORATIONS*, vol. 4, p. 207; *Dartmouth College v. Woodward*, 4 Wheat. (U.S.) 518; *Pierce on Railroads* 448; *Georgia R. etc. Co. v. Smith*, 128 U. S. 174; 35 Am. & Eng. R. Cas. 511.

2. New Orleans etc. R. Co. v. Harris, 27 Miss. 517; 1 Rorer on Railroads 16, 17; *State v. Noyes*, 47 Me. 205; *Zabriskie v. Hackensack etc. R. Co.*, 18 N. J. Eq. 178; 90 Am. Dec. 617; *Mobile etc. R. Co. v. Steiner*, 61 Ala. 459. The reservation of right to alter,

modify or repeal a charter is a reservation made by the State for its own benefit and is not intended to affect or change the rights of corporators as between each other. *Zabriskie v. Hackensack etc. R. Co.*, 18 N. J. Eq. 178; 90 Am. Dec. 617; *Black v. Delaware etc. Canal Co.*, 24 N. J. Eq. 455, reversing 22 N. J. Eq. 130.

Owing to the principle stated in the text a legislature has no right to confer authority upon the stockholders of a corporation owning more than one-half the company's stock to accept of amendments to the charter under which they act. *New Orleans etc. R. Co. v. Harris*, 27 Miss. 517.

3. Cases in Which Railroad Corporations Have Been Protected from Adverse Legislation by Their Charter.—A *North Carolina* statute provided that all dividends declared by any corporation which should not be claimed within five years, by persons entitled thereto, should be devoted to a public use. It was held that this was a violation of the charter contract. *University v. North Carolina R. Co.*, 76 N. Car. 103; 22 Am. Rep. 671.

Where a corporation is granted the right to build a bridge across a navigable stream, a State cannot by subsequent legislation impose on the corporation an obligation to pay damages which could not have been enforced under the original grant. *Bailey v. Philadelphia etc. R. Co.*, 4 Harr. (Del.) 389; 44 Am. Dec. 593.

A new constitution of *Pennsylvania* provided a system of cumulative voting in cases of election of corporate officers, etc. This was held not to apply to corporations created before the adoption of the constitution. Charters of private corporations remained unchanged until the corporations holding them entered into some new contract with the State, either expressly or by implication. *Hays v. Com.* 82 Pa. St. 518; *Pennsylvania R. Co. v. Langdon*,

a charter is now almost invariably reserved to the State, it is still maintained that vested rights cannot be interfered with under color of an amendment or repeal.¹ The constitutional provisions concerning the exclusive power of Congress over interstate

92 Pa. St. 21; 1 Am. & Eng. R. Cas. 21.

A law undertaking to impose upon stockholders without their assent, individual liabilities not imposed by their charters, or by the laws under which they had been organized, is invalid as being an impairment of the charter contract. *Ireland v. Palestine etc. Turnpike Co.*, 19 Ohio St. 369. In such case, however, the law may become valid by the assent of the stockholders. *Zabriskie v. Cincinnati etc. R. Co.*, 23 How. (U. S.) 381.

An act compelling a railroad to stop its trains at a certain point to wait for other trains, etc., is an impairment of the obligation of the charter contract where only public convenience is concerned. *State v. Noyes*, 47 Me. 189.

An exemption, by charter, of the capital stock from taxation, is a contract, and a State cannot impose such taxes unless the right was reserved, or was afterwards properly acquired. *Com. v. Richmond etc. R. Co.*, 81 Va. 355; 24 Am. & Eng. R. Cas. 482; *Tennessee v. Whitworth*, 22 Fed. Rep. 81; *aff'd* 117 U. S. 129; 29 Am. & Eng. R. Cas. 205 (case of perpetual exemption); *Memphis etc. R. Co. v. Gaines*, 97 U. S. 697.

Compare Little v. Bowers, 46 N. J. L. 300; 17 Am. & Eng. R. Cas. 405.

Other cases may be seen in *Zabriskie v. Hackensack etc. R. Co.*, 18 N. J. Eq. 193; *Northern Pac. R. Co. v. Carland*, 5 Mont. 146; 17 Am. & Eng. R. Cas. 164 (charter impaired by tax on right of way. Such tax is unconstitutional); *State v. Weldon*, 47 N. J. L. 59; 23 Am. & Eng. R. Cas. 134; *Northern Pac. R. Co. v. Shimmell*, 6 Mont. 161; 24 Am. & Eng. R. Cas. 1; *Georgia R. etc. Co. v. Smith*, 128 U. S. 174; 35 Am. & Eng. R. Cas. 511; *Chicago etc. R. Co. v. People*, 105 Ill. 657; 12 Am. & Eng. R. Cas. 156.

Liability to New Duties.—Railroad corporations, however, when brought into existence, except so far as is otherwise provided in their charters, become liable to perform all duties to the public which may be required of private persons, to the extent to which they are capable of their performance.

Illinois Cent. R. Co. v. Bloomington, 76 Ill. 447. See also *Illinois Cent. R. Co. v. Willenborg*, 117 Ill. 203; 26 Am. & Eng. R. Cas. 358.

The legislature, in creating a railroad corporation and during its existence, has the undoubted right to increase or lessen the liability of the company in regard to injuries to stock committed upon its road by the company or its agents. *O'Bannon v. Louisville etc. R. Co.*, 8 Bush (Ky.) 348.

1. Reservation of Right to Amend or Repeal Cannot Affect Vested Rights.—In the case of *Zabriskie v. Hackensack etc. R. Co.*, 18 N. J. Eq. 178; 90 Am. Dec. 617, the doctrine was clearly laid down that the power to alter or modify is limited to the powers and franchises granted by the charter. It does not authorize the legislature to change the object of the incorporation or to substitute another for it. An alteration or modification is necessarily of the grant or thing to be altered or modified; it cannot be effected by substituting a different thing. See also *Pierce on Railroads* 459 and cases cited; *Miller v. New York etc. R. Co.*, 21 Barb. (N. Y.) 513; *Shields v. Ohio*, 95 U. S. 324; *People v. O'Brien*, 111 N. Y. 46; *FRANCHISES*, vol. 8, pp. 627-634; *Sage v. Dillard*, 15 B. Mon. (Ky.) 357.

In *Sinking Fund Cases*, 99 U. S. 700, 748, the court by Waite, C. J., said: "All agree that it (*i. e.*, this reserved power) cannot be used to take away property already acquired, or to deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made."

Therefore the *Alabama* act of March 8, 1876, repealing the provisions of the act of Dec. 29, 1868, giving to railroad companies the power to acquire and hold lands granted to aid in the construction of the roads, could not take away the vested right to acquire and hold such property, which existed in companies organized under the act of 1868 before its repeal. *Georgia Pac. R. Co. v. Wilks*, 86 Ala. 478; 38 Am. & Eng. R. Cas. 665.

Rights of Mortgage.—A mortgage of a railroad and its franchises, made by

commerce and forbidding any State to deprive any person of life, liberty, or property without due process of law, and other guaranties, furnish additional limitations to a State's control over railroads within her borders.¹

permission of the legislature, does not confer on the mortgagee any greater rights than the mortgagor had, nor affect the power of the legislature to alter the franchises. *Attorney Gen'l v. Chicago etc. R. Co.*, 35 Wis. 425.

1. See generally CONSTITUTIONAL LAW, vol. 3, pp. 702-726; POLICE POWER, vol. 18, p. 761; Const. U. S., art. 1, § 8, par. 3; Amd'ts, art. 14, § 1; INTERSTATE COMMERCE, vol. 11, p. 539, *et seq.*; *Gulf etc. R. Co. v. State*, 72 Tex. 404; *State v. Chicago etc. R. Co.*, 40 Minn. 267; *Stanley v. Wabash etc. R. Co.*, 100 Mo. 435; 42 Am. & Eng. R. Cas. 328 (act requiring railroads to furnish double-deck cars for sheep—interstate commerce.)

The power of the State remains, however, unlimited by the commerce clause as to matters entirely within its borders; and transportation of property from one point to another in the State does not become interstate commerce by reason of the mere fact that in the course of such transportation the property is carried out of the State. *Com. v. Lehigh Val. R. Co.*, 129 Pa. St. 308.

See also as to regulation of passenger trains passing from one point in the State to another, even though the carrier's lines run through more than one State, *Louisville etc. R. Co. v. State*, 66 Miss. 662; 133 U. S. 587; 41 Am. & Eng. R. Cas. 36; *Providence Coal Co. v. Providence etc. R. Co.*, 15 R. I. 303 (act prohibiting discrimination); *Stanley v. Wabash etc. R. Co.*, 100 Mo. 435; 42 Am. & Eng. R. Cas. 328.

A *Texas* statute imposing a penalty upon railway companies for refusing to deliver goods upon the payment of charges as shown in the bill of lading was held not to be a regulation of interstate commerce, even as applied to goods shipped from a point without the State. *Gulf etc. R. Co. v. Dwyer*, 75 Tex. 572; 42 Am. & Eng. R. Cas. 503. (The opinion in this case, by Gaines, J., contains a thorough review of the authorities.)

A railroad which "has become a link in a through line of road, over which as part of its business freight

and passengers are carried into and out of a State," is engaged in interstate commerce, and as such Congress has exclusive power over it. *Norfolk etc. R. Co. v. Pennsylvania*, 136 U. S. 114 reversing 114 Pa. St. 256.

A statute rendering a railroad company liable for all cattle killed by them, at a valuation to be conclusively fixed by appraisers, is unconstitutional as denying the right of trial by jury. *Graves v. Northern Pac. R. Co.*, 5 Mont. 556; 51 Am. Rep. 81. See also *Biedenberg v. Montana Union R. Co.*, 8 Mont. 271; 38 Am. & Eng. R. Cas. 275.

See also in this immediate connection *Baird v. St. Louis etc. R. Co.*, 41 Fed. Rep. 592; *Wigton v. Pennsylvania R. Co.*, 8 Pa. Co. Ct. Rep. 191; *Stanley v. Wabash etc. R. Co.*, 100 Mo. 435; 42 Am. & Eng. R. Cas. 328; *McCall v. California*, 136 U. S. 104; *Bain v. Richmond etc. R. Co.*, 105 N. Car. 363.

State Cannot Impose an Absolute Liability.—A State legislature has no authority to pass a statute imposing an absolute liability upon railroad companies for all injuries to animals, caused by the operation of the railroad irrespective of whether or not there was negligence. Such a statute would be a deprivation of property without due process of law. *Zeigler v. South & North Ala. R. Co.*, 58 Ala. 594; *Memphis etc. R. Co. v. Lyon*, 62 Ala. 71; *Pierce on Railroads* 463; *Biedenberg v. Montana Union R. Co.*, 8 Mont. 271; 38 Am. & Eng. R. Cas. 275; *Oregon R. & M. Co. v. Smalley* (Wash.) 23 Pac. Rep. 1008; 42 Am. & Eng. R. Cas. 550.

But a statute which imposes an absolute liability and contains a proviso that it shall not apply to such companies as fence their tracks properly, is upheld in *Kansas* by a long line of decisions. See *Kansas Pac. R. Co. v. Mower*, 16 Kan. 583, where all the cases are cited; *Hopkins v. Kansas Pac. R. Co.*, 18 Kan. 462; *FENCES*, vol. 7, p. 906, 910. And the same is true in other States. See opinion of Brewer, J., in *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573; *FENCES*, vol. 7, pp. 906, 910, *et seq.*

XII. FEDERAL CONTROL OF RAILROADS.—Except under the power granted it to regulate interstate commerce, the Federal government has no authority to control or regulate railroads within the States.¹ To this rule there are apparent exceptions in the case of the Pacific roads, which were constructed through the Territories and by Congressional aid.² Even in these cases, however,

And railroad companies may, by statute, be made liable for double the actual damage. *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512; 22 Am. & Eng. R. Cas. 557; 52 Am. Rep. 369.

1. See *POLICE POWER*, vol. 18, p. 739, *CONSTITUTIONAL LAW*, vol. 3, p. 701; *INTERSTATE COMMERCE*, vol. 11, pp. 551, 557, 560; *Cooley's Const. Lim.* (4th ed.) 578, 580*.

The regulation and control of railroads is an exercise of police power, which, it is conceded, belongs solely to the several States. See *POLICE POWER*, vol. 18, p. 745, and cases cited. *Toledo etc R. Co. v. Jacksonville*, 67 Ill. 37; 16 Am. Rep. 611; *Thorpe v. Rutland etc. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625; *Com. v. Alger*, 7 Cush. (Mass.) 84.

2. **Congressional Power Over Pacific Railroads.**—In 1862 while the civil war was in progress and a war with England seemed not improbable, Congress, alarmed for the safety of the Pacific possessions, passed an act (12 Stat. at L. 489) providing for the construction of a railroad to connect the extreme Western portion of the country with the East, and incorporating the Union Pacific Railroad Company to accomplish that object. The history of the enterprise, the causes leading to it, and the doubts expressed at the time as to the right of Congress to undertake such a measure are referred to by Justice Davis in *U. S. v. Union Pac. R. Co.*, 91 U. S. 72. The act was entitled "An act to aid in the construction of a railroad from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes." 12 Stat. at L. 489. Its principal provisions may be found set forth in *U. S. v. Union Pac. R. Co.*, 91 U. S. 72; *U. S. v. Union Pac. R. Co.*, 99 U. S. 402. See also *Union Pac. R. Co. v. U. S.*, 99 U. S. 700.

The Union Pacific Railway Company is therefore a creation of the Federal government, and subject to have its charter altered or repealed by it whenever it may seem necessary for the pub-

lic welfare. Hence Congress has peculiar powers in regard to this company. The government sustains two distinct relations to it, viz: 1. It is its creator and therefore has in its sovereign and legislative capacity, a very great authority over it. 2. It is its creditor for many millions, and possesses a lien on the road and all its appurtenances. See *U. S. v. Union Pac. R. Co.*, 98 U. S. 569.

The Texas Pacific railway company is also a corporation created by the United States and occupying a relation very similar to that of the Union Pacific. See *Union Pac. R. Co. v. Myers*, 115 U. S. 1.

The several State railway corporations incorporated into the Pacific railroad system by the act of Congress of July 1, 1862, chartering the Union Pacific Railroad Company, and which were authorized to construct branches, and receive aid from the United States, are subject to the terms and conditions imposed by the act. *Western Union Teleg. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 418.

For various cases concerning Congressional supervision of these roads see *U. S. v. Union Pac. R. Co.*, 91 U. S. 72 (payment of railroad bonds at "maturity"); *Union Pac. R. Co. v. U. S.*, 99 U. S. 402 (company bound to pay 5 per cent. of its net earnings towards payment of debts); *U. S. v. Central Pac. R. Co.*, 99 U. S. 449 (same); *U. S. v. Sioux City etc. R. Co.*, 99 U. S. 491 (payment on first mortgage bonds); *U. S. v. Kansas Pac. R. Co.*, 99 U. S. 455 (lien of U. S. bonds on 5 per cent. of earnings); *U. S. v. Denver Pac. R. Co.*, 99 U. S. 460 (same). See generally, *NATIONAL CORPORATIONS*, vol. 16, p. 216.

Rendering Services to the Federal Government.—An act making a grant of land to a railroad provided that the road should remain a public highway for the use of the government free from all toll or other charges of transportation. It was held that gave the government no right to use the rolling stock of the road free of charge for the

the power of police regulation over roads within a State belongs exclusively to that State.¹

XIII. LEASES OF RAILROADS—1. Authority to Lease.—A railroad

transportation of its troops. *Lake Superior etc. R. Co. v. U. S.*, 93 U. S. 443.

By the act of 1862 assistance was granted to various roads and stipulations were made concerning services to be rendered to the government in return. The Denver Pacific Railway Company was one of these, and was held bound by the stipulations in the act of 1862 and those acts passed supplementary to it. *U. S. v. Denver Pac. R. Co.*, 99 U. S. 460.

The provisions of the act of 1862 concerning the carriage of mails constituted a contract not to be impaired by subsequent legislation. *Union Pac. R. Co. v. U. S.*, 104 U. S. 662. See also as to reduction of rates for carrying the mails by act of 1876, *Chicago etc. R. Co. v. U. S.*, 104 U. S. 687.

Act of 1866 providing against higher charges for transportation of mails, of troops, etc., was held not to affect the stipulations contained in the act of 1862, as applied to a Union Pacific railroad bridge. *Union Pac. R. Co. v. U. S.*, 117 U. S. 355; 25 Am. & Eng. R. Cas. 396. See also *MAIL*, vol. 13, p. 1203-4.

Sinking Fund Cases.—The Union Pacific company contracted with the United States government to pay both principal and interest when the principal should fall due, unless the debt were sooner discharged by the application of one-half the compensation for transportation and other services rendered to the government, and the five per cent. of net earnings as specified in the charter (*U. S. v. Union Pac. R. Co.*, 91 U. S. 72). In 1878 Congress passed an act requiring the company to set aside a portion of its current income as a sinking fund to meet this and other mortgage debts when they should mature. It was held that this act was not unconstitutional, that it did not deprive the Union Pacific railway company of property without due process of law or in any way interfere with the company's vested rights. It was held also that the fact that the Secretary of the Treasury was made the sinking fund agent and the Treasury of the United States the depository, or that the investment was to be made in public funds of the United

States, did not make the deposit a payment of the debt due the United States. *Union Pac. R. Co. v. U. S.*, 99 U. S. 700, *U. S. v. Central Pac. R. Co.*, 99 U. S. 449. See also *Gratz v. Pennsylvania R. Co.*, 41 Pa. St. 447. Compare *Tennessee Bond Cases*, 114 U. S. 698.

Within these provisions the "earnings" of the road included all the receipts arising from the company's operations as a railroad company, but not those from the public lands granted, nor fictitious receipts for the transportation of its own property. "Net earnings," within the meaning of the law, are ascertained by deducting from the gross earnings all the ordinary expenses of organization and of operating the road, and expenditures made *bona fide* in improvements, and paid out of earnings, and not by the issue of bonds or stock; but not deducting interest paid on any of the bonded debt of the company. *Union Pac. R. Co. v. U. S.*, 99 U. S. 402; *U. S. v. Kansas Pac. R. Co.*, 99 U. S. 455.

See also in this connection, *U. S. v. Sioux City etc. R. Co.*, 99 U. S. 491; *U. S. v. Denver Pac. R. Co.*, 99 U. S. 460; *Denver etc. R. Co. v. Ailing*, 99 U. S. 463.

Grants of Land.—As to grants of land to railroads, from the Federal government, see *GRANTS*, vol. 9, p. 46-51; *PUBLIC LANDS*.

1. *Passenger Cases*, 7 How. (U. S.) 282; *Barbier v. Connolly*, 113 U. S. 27; *Wilmer v. New Jersey R. etc. Co.* (U. S. Rep.), 16 Law ed. 799; *Chicago etc. R. Co. v. Fuller*, 17 Wall. (U. S.) 560; *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 23 Am. & Eng. R. Cas. 577; *Chicago etc. R. Co. v. Iowa*, 94 U. S. 155.

The charter of the Northern Pacific Railroad Company obtained from the general government, does not exempt its right of way from the operation of the laws of the State of Minnesota, and forbid a railroad company organized under the general law of the State to exercise the right of eminent domain in order to cross its track. *Northern Pac. R. Co. v. St. Paul etc. Co.*, 1 McCrary (U. S.) 302. Compare *Union Pac. R. Co. v. Burlington etc. R. Co.*, 1 McCrary (U. S.) 452.

company is, as has already been seen, a *quasi* public corporation¹ and under peculiar obligations, therefore it cannot make any contract, executed or otherwise, which will disable it from performing its public functions.² For this reason it cannot, in the absence of express authority, lease to another corporation its road, franchises, and equipments,³ or take from another company a lease

1. *Infra*, this title, *Legal Status of Railroads and Railroad Corporations*.

2. *Infra*, this title, *Power to Contract*; Thomas v. West Jersey R. Co., 101 U. S. 71; Washington etc. R. Co. v. Brown, 17 Wall. (U. S.) 450; Central etc. R. Co. v. Morris, 68 Tex. 49; 28 Am. & Eng. R. Cas. 50; International etc. R. Co. v. Moody, 71 Tex. 614; 35 Am. & Eng. R. Cas. 607; Palmer v. Utah etc. R. Co. (Idaho 1888), 36 Am. & Eng. R. Cas. 443, 445, note; Harmon v. Columbia etc. R. Co., 28 S. Car. 401; 36 Am. & Eng. R. Cas. 445, note.

In the case of Harmon v. Columbia etc. R. Co., 28 S. Car. 401, the court by McIver, J., said: "When a railroad company accepts a charter, it assumes the performance of all duties to the public which are imposed upon it by the charter or by the general laws of the State, and it cannot be permitted to escape from the obligations it has imposed upon it by transferring its chartered rights and privileges, either to an individual or to another corporation. A corporation must of necessity always act through individuals; and whether such individuals are called its officers or agents, or its lessees, cannot affect the question of its liability to perform the obligations which it has incurred in consideration of the grant of its chartered rights and privileges. . . . If it were otherwise, a railroad company, by leasing its road to irresponsible persons, might enjoy all the benefits conferred by its charter and practically leave the public generally, as well as individuals, without any of the protection, which the obligation imposed by its charter, as well as the general law of the State, were designed to afford." The same reasoning is used by Redfield, C. J., in Nelson v. Vermont etc. R. Co., 26 Vt. 717.

3. Thomas v. West Jersey R. Co., 101 U. S. 71 (such a lease would be a violation of the corporation's contract with the State); Pennsylvania R. Co. v. St. Louis etc. R. Co., 118 U. S. 293; 24 Am. & Eng. R. Cas. 58; York etc. Line R. Co. v. Winans, 17 How. (U.

S.) 30; Oregon etc. R. Co. v. Oregonian R. Co., 130 U. S. 1; 39 Am. & Eng. R. Cas. 176; Pullan v. Cincinnati etc. R. Co., 4 Biss. (U. S.) 35; Atlantic etc. R. Co. v. Union Pac. R. Co., 1 Fed. Rep. 745; Pittsburgh etc. R. Co. v. Allegheny Co., 63 Pa. St. 126; Stewart's Appeal, 56 Pa. St. 413; Middlesex R. Co. v. Boston etc. R. Co., 115 Mass. 347; Memphis etc. R. Co. v. Grayson, 88 Ala. 572; 43 Am. & Eng. R. Cas. 681; Com. v. Smith, 10 Allen (Mass.) 448; Tippecanoe Co. v. Lafayette etc. R. Co., 50 Ind. 85; Black v. Delaware etc. Canal Co., 24 N. J. Eq. 455; Abbott v. Johnstown etc. Horse R. Co., 80 N. Y. 27; 2 Am. & Eng. R. Cas. 541; Troy etc. R. Co. v. Boston etc. R. Co., 86 N. Y. 107; 7 Am. & Eng. R. Cas. 409; Woodruff v. Erie R. Co., 93 N. Y. 609; 16 Am. & Eng. R. Cas. 501, 512, note; Troy etc. R. Co. v. Kerr, 17 Barb. (N. Y.) 581; International etc. R. Co. v. Underwood, 67 Tex. 589; 34 Am. & Eng. R. Cas. 570; Mills v. Central R. Co., 41 N. J. Eq. 1; 24 Am. & Eng. R. Cas. 47; State v. Atchison etc. R. Co., 24 Neb. 143; 32 Am. & Eng. R. Cas. 388, note; Beeman v. Rufford, 6 Eng. L. & Eq. 106; Great Northern R. Co. v. Eastern Counties R. Co., 12 Eng. L. & Eq. 224. See also Hays v. Ottawa etc. R. Co., 61 Ill. 422. Compare Bards-town etc. R. Co. v. Metcalfe, 4 Metc. (Ky.) 199; Shepley v. Atlantic etc. R. Co., 55 Me. 395.

Where express authority exists there can be, of course, no objection to the validity of such a lease. Vermont etc. R. Co. v. Vermont Cent. R. Co., 34 Vt. 1; Day v. Ogdensburg etc. R. Co., 107 N. Y. 129; 35 Am. & Eng. R. Cas. 102; Central etc. R. Co. v. Macon, 43 Ga. 605; Gratz v. Pennsylvania R. Co., 41 Pa. St. 447; Philadelphia etc. R. Co. v. Catawissa R. Co., 53 Pa. St. 20.

In one case a general authority to purchase lands was construed to authorize the purchase of a railroad. Branch v. Atlantic etc. R. Co., 3 Wood (U. S.) 481.

A Minnesota statute authorizes the leasing of railroads, but it is held that

of the latter's railroad property.¹ Nor can a receiver lease a railroad, which he is operating, without authority.² And even where a State has conferred authority upon a railroad corporation to make a lease of its property the authority is confined to the property within the State.³ The consent of the stockholders is an essential to the validity of a lease.⁴

2. Effect of Lease.—Upon the execution of the lease the lessee becomes bound by all the prohibitions and limitations contained in the charter of the lessor and assumes its rights, franchises, and obligations.⁵ Whether the lessee assumes contractual liabilities,

under it the lease can only be to a company of that State. *Freeman v. Minneapolis etc. R. Co.*, 28 Minn. 413; 7 Am. & Eng. R. Cas. 410. So of a *Georgia* statute. *Upson County R. Co. v. Sharman*, 37 Ga. 644.

1. *Oregon R. etc. Co. v. Oregonian R. Co.*, 130 U. S. 1; 39 Am. & Eng. R. Cas. 176; *Pennsylvania R. Co. v. St. Louis etc. R. Co.*, 118 U. S. 290; 24 Am. & Eng. R. Cas. 58; *Thomas v. West Jersey etc. R. Co.*, 101 U. S. 71.

2. *State v. McMinnville etc. R. Co.*, 6 Lea (Tenn.) 369; 4 Am. & Eng. R. Cas. 95; *Middleton v. New Jersey etc. R. Co.*, 25 N. J. Eq. 306; *Gilbert v. Washington City etc. R. Co.*, 33 Gratt. (Va.) 586; 1 Am. & Eng. R. Cas. 473; RECEIVERS.

3. *Briscoe v. Southern Kan. R. Co.*, 40 Fed. Rep. 273; 40 Am. & Eng. R. Cas. 599.

4. **Consent of Stockholders.**—*Peters v. Lincoln etc. R. Co.*, 12 Fed. Rep. 513; 6 Am. & Eng. R. Cas. 597 (assent must be given at stockholders' meeting); *Peters v. Lincoln etc. R. Co.*, 2 McCrary (U. S.) 275 (same); *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 11 Daly (N. Y.) 373; 14 Abb. N. Cas. (N. Y.) 103; 15 Am. & Eng. R. Cas. 1 (consent of directors and stockholders necessary); *Mills v. Central R. Co.*, 41 N. J. Eq. 1; 24 Am. & Eng. R. Cas. 47 (majority of stockholders cannot lease against will of minority); *Farmers' L. & T. Co. v. St. Joseph etc. R. Co.*, 1 McCrary (U. S.) 247; *Humphreys v. St. Louis etc. R. Co.*, 37 Fed. Rep. 307; *Boston etc. R. Co. v. Salem etc. R. Co.*, 2 Gray (Mass.) 1; *Phillips v. Eastern R. Co.*, 138 Mass. 122; STOCKHOLDERS.

Compare Beveridge v. New York El. R. Co., 112 N. Y. 1; 39 Am. & Eng. R. Cas. 109.

In one case there was a lease of the road, and nineteen years afterward a suit was brought to set it aside, on the

ground that it was made without the consent of the stockholders. It was held that this requirement of consent was a personal privilege which the stockholders had waived by long acquiescence. *St. Louis etc. R. Co. v. Terre Haute etc. R. Co.*, 33 Fed. Rep. 440.

Assent in Writing.—Voting by written ballots upon a written proposition for the lease of a road is not "an assent in writing" within the meaning of a statute authorizing leases only where so assented to. *Humphreys v. St. Louis etc. R. Co.*, 37 Fed. Rep. 307. But if the president signs a certificate that a majority have assented, it is sufficient. *Humphreys v. St. Louis etc. R. Co.*, 37 Fed. Rep. 307.

5. *Pennsylvania R. Co. v. Sly*, 65 Pa. St. 205; *State v. Central Iowa R. Co.*, 71 Iowa 410 (leasing company bound to operate the road along such places as had extended aid to the original company); *In re New York etc. Co.*, 49 N. Y. 414; *South Carolina R. Co. v. Wilmington etc. R. Co.*, 7 S. Car. 410.

See also *Ogdensburg etc. R. Co. v. Vermont etc. R. Co.*, 4 Hun (N. Y.) 712.

Hence it is bound to obey all statutory requirements as to signals, etc. *Linfield v. Old Colony etc. R. Co.*, 10 Cush. (Mass.) 562; 57 Am. Dec. 124.

It must assume all other duties, such, for example, as maintaining fences, cattle guards, etc. *McCall v. Chamberlain*, 13 Wis. 637; *Cook v. Milwaukee etc. R. Co.*, 36 Wis. 45; *Curry v. Chicago etc. R. Co.*, 43 Wis. 665.

Where a corporation in consideration of municipal aid, agreed to and did construct a railroad to a certain city and afterwards leased its road to another corporation which changed the location of the line, it was held that the lessor was not discharged from its corporate obligation to operate the road as agreed on, and this notwithstanding a State statute (*Iowa Code*, § 1300) pro-

and to what extent, must depend upon the language and character of the lease.¹ But it is certain that it does not assume the franchises subject to existing liabilities of the lessor for injuries occurring prior to the lease, unless there is an express provision therefor.²

viding that any corporation operating the railway of another under lease should, in all respects, be as liable as though such railway belonged to it. *Chicago etc. R. Co. v. Crane*, 113 U. S. 424; 20 Am. & Eng. R. Cas. 600.

Where the lease is unlawful and without authority the lessor is released from none of his obligations. *Ottawa etc. R. Co. v. Black*, 79 Ill. 262.

Two Roads United Under a Lease.—

When two railroads are united under a lease specifying the duties and liabilities of each, neither is restricted in any particular not included in their contract with each other; each may obtain new legislative grants, and avail itself of additional powers in any way it may find advantageous to itself, provided these new operations are kept so distinct as not to interfere with the due operation of their agreement with each other.

Such lease between the roads must be construed with reference to the objects proposed by the existing charters of each at the time the lease was made, and its construction or operation cannot be affected by any change of the plans or objects of the corporation beyond the existing scope of their chartered powers at the time of the making of such lease.

Such roads may, as between themselves, vary the terms of their contract with each other, and may consent to a different appropriation of the funds, profits, or dividends, from that provided for in the original contract; but stockholders in either road who have not thus assented, may, in equity, hold both corporations to perform their original contract, and apply their funds and profits in the way originally provided for, so far as relates to themselves. *March v. Eastern R. Co.*, 43 N. H. 515. See also *March v. Eastern R. Co.*, 40 N. H. 548; 77 Am. Dec. 732.

1. A lease which transfers to the lessee all the lessor's contracts does not render the lessor liable for goods delivered to the lessee under a contract between the owner of such goods and the lessor. *Pittsburg etc. R. Co. v. Horbaugh*, 4 Brewst. (Pa.) 115.

See also *Pittsburgh etc. R. Co. v. Keokuk etc. Bridge Co.*, 131 U. S. 371; 39 Am. & Eng. R. Cas. 213, where the lease of a road and a contract by the lessor for the use of a bridge were held to be independent contracts.

Liability of Lessee for Lessor's Debt.

—A railroad company in debt cannot transfer its entire property by lease, so as to prevent the application of it at its full value, to the satisfaction of the debts of the company, and when such transfer is made a court of equity may decree the payment of a judgment debt of the lessor by the lessee. *Chicago etc. R. Co. v. Third Nat. Bank*, 26 Fed. Rep. 820; 134 U. S. 276; *Central R. Co. v. Pettus*, 113 U. S. 116; 43 Am. & Eng. R. Cas. 688.

Rent.—Where one company leases the property of another, agreeing to pay as part of the rent interest on certain mortgage bonds, non-payment of the rent and interest being a cause of forfeiture, receivers of the lessee company, appointed by the court to preserve its system intact for the benefit of the company and its creditors, are liable for the rent and interest accruing during the term of their receivership. *Brown v. Toledo etc. R. Co.*, 35 Fed. Rep. 444.

In an action by a railroad to recover for the use of its tracks, where there was no definite agreement as to the amount to be paid, the amount paid it by other roads, which in fact owned it, does not furnish the measure of damages, and, in the absence of proof that the use was worth more than had been paid, plaintiff cannot recover. *Peoria etc. R. Co. v. Chicago etc. R. Co.*, 127 U. S. 200.

Expense of Receivership.—When a receiver is appointed for a railroad company for the benefit of such company and its creditors, no part of the expenses of the receivership are chargeable against the property of another railroad company leased by the insolvent company—the receivership being for the benefit of the lessor or its creditors. *Brown v. Toledo etc. R. Co.*, 35 Fed. Rep. 444.

2. *Pittsburgh etc. R. Co. v. Kain*, 35 Ind. 291.

The franchise to exercise the right of eminent domain does not, upon the execution of a lease, pass to the lessee, but remains in the lessor as if the lease had never been executed.¹

3. Relative Liability of Lessor and Lessee.—In all cases of negligent or other tortious injury, the lessor and the lessee of a railroad are equally liable, and the injured party may recover from either.² This is true where the injury results from a failure to

1. Mayor etc. of Worcester v. Norwich etc. R. Co., 109 Mass. 103 (lease for 100 years); Chicago etc. R. Co. v. Illinois Cent. R. Co., 113 Ill. 156; Englewood etc. R. Co. v. Chicago etc. R. Co., 117 Ill. 611 (lessor reserved the "general control, management, and supervision of the main line of the track," etc.); Deitrichs v. Lincoln etc. R. Co., 13 Neb. 361 (proceedings by lessee in name of lessor); Gottschalk v. Lincoln etc. R. Co., 14 Neb. 389; 10 Am. & Eng. R. Cas. 118; Kip v. New York etc. R. Co., 67 N. Y. 227.

2. Liability of Lessor and Lessee.—The statement of the text is rather general, but the details of the subject will appear in this note. The law as to the relative liability of the lessor and the lessee is somewhat involved, and there is much conflict of authority, but by searching out the ground upon which this liability rests it seems that proper conclusions may be reached.

Joint Liability.—In several jurisdictions it is provided by statute that the lessor and the lessee shall be liable jointly and severally for all injuries resulting from negligent operation or management of the road. See Cincinnati etc. R. Co. v. Leviston, 97 Ind. 488; 19 Am. & Eng. R. Cas. 633; Stephens v. Davenport etc. R. Co., 36 Iowa 327; Clary v. Iowa Midland R. Co., 37 Iowa 344; Davis v. Providence etc. R. Co., 121 Mass. 134.

And in all the cases holding the lessor liable there is nothing to exclude the idea that the lessee might also be held liable. So of cases where the lessee is held liable. See Davis v. Providence etc. R. Co., 121 Mass. 134; McCluer v. Manchester etc. R. Co., 13 Gray (Mass.) 124; 74 Am. Dec. 624.

A railroad company which allows another corporation to run trains over its road, is jointly liable with such corporation for injuries caused by the negligent management of the trains. Pennsylvania R. Co. v. Ellett, 132 Ill. 654.

Where a railroad company leased its road to another company, but, prior thereto, the lessor had raised its grade wrongfully, and laid additional tracks, and the lessee took possession and continued in the use of the road so constructed, both are jointly liable for a permanent injury to property. Railroad Co. v. Hambleton, 40 Ohio St. 496; 14 Am. & Eng. R. Cas. 126.

Liability of Lessor.—The liability of the lessor for negligence or other tortious injuries rests upon the following grounds:

1. Since a railroad company in the absence of special authority cannot make a lease of its road and franchises, many cases arise in which the lease was unauthorized and unlawful, and in such cases, the lease can clearly have no effect whatever to release the lessor from liability. Ricketts v. Chesapeake etc. R. Co., 33 W. Va. 433; 41 Am. & Eng. R. Cas. 42; Ricketts v. Birmingham St. R. Co., 85 Ala. 600; 37 Am. & Eng. R. Cas. 12; Briscoe v. Southern Kan. R. Co., 40 Fed. Rep. 273; Nugent v. Boston etc. R. Co., 80 Me. 62; 38 Am. & Eng. R. Cas. 52; Lakin v. Willamette Valley etc. R. Co., 13 Oregon 436; 26 Am. & Eng. R. Cas. 611; Ottawa etc. R. Co. v. Black, 79 Ill. 262; Abbott v. Johnstown etc. Horse R. Co., 80 N. Y. 27; 36 Am. Rep. 572.

But in East Line etc. R. Co. v. Culbertson, 72 Tex. 375; 38 Am. & Eng. R. Cas. 225, it is held that the lessor is not liable for the death of a conductor of a train resulting from the incompetency of the engineer or the imperfection of the engine where the road is operated by a lessee.

2. The lessor, in consideration of the grant by its charter of extraordinary rights and privileges, has assumed a *quasi* public character, and becomes subject to unusual obligations towards the public, and public policy requires that it should not be allowed to release itself therefrom by transferring its rights and franchises to a lessee, with-

out express legislative consent. *Wabash etc. R. Co. v. Peyton*, 106 Ill. 534; 18 Am. & Eng. R. Cas. 1; *Lakin v. Willamette Valley etc. R. Co.*, 13 Oregon 436; 26 Am. & Eng. R. Cas. 611; *Central etc. R. Co. v. Morris*, 68 Tex. 49; 28 Am. & Eng. R. Cas. 50; *Norwich etc. R. Co. v. Worcester*, 147 Mass. 518; 36 Am. & Eng. R. Cas. 447; *Ingersoll v. Stockbridge etc. R. Co.*, 8 Allen (Mass.) 438; *Freeman v. Minneapolis etc. R. Co.*, 28 Minn. 443; 7 Am. & Eng. R. Cas. 410; *Brown v. Hannibal etc. R. Co.*, 27 Mo. App. 394; *Singleton v. Southwestern R. Co.*, 70 Ga. 464; 48 Am. Rep. 574; 21 Am. & Eng. R. Cas. 226; *Harmon v. Columbia etc. R. Co.*, 28 S. Car. 401; *Breslin v. Somerville Horse R. Co.*, 145 Mass. 64; 32 Am. & Eng. R. Cas. 406; *Langley v. Boston etc. R. Co.*, 10 Gray (Mass.) 103; *Ohio etc. R. Co. v. Dunbar*, 20 Ill. 623; *Peoria etc. R. Co. v. Lane*, 83 Ill. 448; *St. Louis etc. R. Co. v. Balsley*, 18 Ill. App. 79; *Nelson v. Vermont etc. R. Co.*, 26 Vt. 717; 62 Am. Dec. 631; *Bower v. Burlington etc. R. Co.*, 42 Iowa 546; *St. Louis etc. R. Co. v. Curl*, 28 Kan. 622; 11 Am. & Eng. R. Cas. 458; *Washington etc. R. Co. v. Brown*, 17 Wall. (U. S.) 445; *Great Northern R. Co. v. Eastern etc. R. Co.*, 12 Eng. L. & Eq. 224.

In *Washington etc. R. Co. v. Brown*, 17 Wall. (U. S.) 445, a case which has been cited with approval in numerous cases, the court by Davis, J., said: "It is an accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road to lessees. Redfield's Law of Railways (5th ed.), p. 616. The operation of the road by the lessees does not change the relations of the original company to the public."

In *Pierce on Railroads*, p. 283, similar language is used: "The company cannot, in the absence of special statutory authority and exemption, divest itself of responsibility for the torts of persons operating its road, by transferring its corporate powers or leasing the road to them—it cannot by its own act absolve itself from its public obligations without the consent of the legislature." See also *Wood's Ry. Law*, p. 486, note; *Rorer on Railroads*, pp. 241, 603.

The principle laid down by these authorities just cited is not to be con-

strued to make every lease invalid. There are many cases in which the lease was authorized or was ratified by the legislature, and though valid and binding was held ineffectual to release the lessor from the liability which public policy enforces. *Breslin v. Somerville R. Co.*, 145 Mass. 64; 32 Am. & Eng. R. Cas. 410, note; *Quested v. Newburyport etc. R. Co.*, 127 Mass. 204; *Nugent v. Boston etc. R. Co.*, 80 Me. 62; 38 Am. & Eng. R. Cas. 52; *Central etc. R. Co. v. Morris*, 68 Tex. 49; 28 Am. & Eng. R. Cas. 50; *Chollette v. Omaha etc. R. Co.*, 26 Neb. 159; 37 Am. & Eng. R. Cas. 16; *Balsley v. St. Louis etc. R. Co.*, 119 Ill. 68; 25 Am. & Eng. R. Cas. 497; *Stearns v. Atlantic etc. R. Co.*, 46 Me. 95; *Singleton v. Southwestern R. Co.*, 70 Ga. 464; 48 Am. Rep. 574; 21 Am. & Eng. R. Cas. 226; *Whitney v. Atlantic etc. R. Co.*, 44 Me. 362; *Brown v. Hannibal etc. R. Co.*, 27 Mo. App. 394; *Pittsburgh etc. R. Co. v. Campbell*, 86 Ill. 443.

A corporation owning a railroad can never be released from liability for injuries resulting from the operation of it, except by specific statutory exemption. *Balsley v. St. Louis etc. R. Co.*, 119 Ill. 68; 59 Am. Rep. 784; 25 Am. & Eng. R. Cas. 497; *Wabash etc. R. Co. v. Peyton*, 106 Ill. 534; 18 Am. & Eng. R. Cas. 1.

3. The nature of the lease and the character of the whole transaction place the parties to some extent in the relation of principal and agent, the lessor being the principal. *St. Louis etc. R. Co. v. Balsley*, 18 Ill. App. 79; *Bay City etc. R. Co. v. Austin*, 21 Mich. 390; *Balsley v. St. Louis etc. R. Co.*, 119 Ill. 68; 25 Am. & Eng. R. Cas. 497; *Peoria etc. R. Co. v. Lane*, 83 Ill. 448; *Ottawa etc. R. Co. v. Black*, 79 Ill. 262; *Chicago etc. R. Co. v. Whipple*, 22 Ill. 105 (corporators liable for trespass of the lessees, or of the contractors); *Chicago etc. R. Co. v. McCarthy*, 20 Ill. 385; *Clement v. Canfield*, 28 Vt. 302.

In the case of *Nelson v. Vermont etc. R. Co.*, 26 Vt. 717; 62 Am. Dec. 614, the court by Redfield, C. J., said: "The lessors must at all events be held responsible for just what they expected the lessees to do, and probably for all which they do do as their general agents. For the public can only look to that corporation to whom they have delegated this portion of public service. Certainly they are not bound to look

beyond them, although they doubtless may do so."

Where the lease is unauthorized and therefore of no effect whatever, the lessees can be regarded in no other light than that they are merely the agents of the pretended lessor. *Ottawa etc. R. Co. v. Black*, 79 Ill. 262.

4. In some instances there is a specific statutory provision that the lessor shall not be exempt from liability. *Fort Wayne etc. R. Co. v. Hinebaugh*, 43 Ind. 354; *Quested v. Newburyport etc. R. Co.*, 127 Mass. 204; *Stearns v. Atlantic etc. R. Co.*, 46 Me. 95 (fire communicated from lessee's engine); *Brown v. Hannibal etc. R. Co.*, 27 Mo. App. 394; *Ingersoll v. Stockbridge etc. R. Co.*, 8 Allen (Mass.) 438.

Statutory provisions that lessees shall be held liable afford a cumulative remedy merely, and do not affect the lessor's liability. *Bower v. Burlington etc. R. Co.*, 42 Iowa 546.

Authorities Contra.—In *Pierce on Railroads*, p. 283, it is said: "A lease of a railroad under due authority of law effects a transfer of rights and liabilities in its management so that the corporation owning the road is discharged from responsibility for the lessee's torts; but the corporation will remain liable if it continues, notwithstanding the lease, to operate the railroad, or allows it to be operated in its corporate name, or fails to require other companies using the track to take proper precautions where it has the power to require them." And this has sometimes been cited in support of the proposition that the lessor is not liable for the torts of the lessee. See *Virginia Midland R. Co. v. Washington*, 86 Va. 629; 43 Am. & Eng. R. Cas. 693; *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549; 22 Am. & Eng. R. Cas. 277.

In *Patterson's Ry. Acc. Law*, §§ 130, 131, it is said: "On the other hand, where a railway under due authority of law has leased its line to another railway, the lessor railway is not liable for torts committed by the lessee railway in the operation of the line." But the first statement of Mr. *Pierce* is much modified by his own additions, and that of Mr. *Patterson* is clearly opposed to the great weight of authority as will be seen from the cases cited in the foregoing.

Liability of Lessee.—The grounds upon which the liability of the lessee is to be based are these:

1. In case of personal injury to its passengers or of loss or delay of freight, or of any breach of its general duty as carrier, the lessee is liable to the injured party because of the contractual relation which exists between them. *Mahoney v. Atlantic etc. R. Co.*, 63 Me. 68; *Murch v. Concord R. Co.*, 29 N. H. 9; 61 Am. Dec. 631; *Philadelphia etc. R. Co. v. Anderson*, 94 Pa. St. 351; 6 Am. & Eng. R. Cas. 407; *Patterson v. Wabash etc. R. Co.*, 54 Mich. 91; 18 Am. & Eng. R. Cas. 130; *Wabash etc. R. Co. v. Peyton*, 106 Ill. 534; 18 Am. & Eng. R. Cas. 1; *McCluer v. Manchester etc. R. Co.*, 13 Gray (Mass.) 124; 74 Am. Dec. 624; *Feital v. Middlesex R. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *Burroughs v. Norwich etc. R. Co.*, 100 Mass. 26.

2. In most cases the lessee has the exclusive control of all matters connected with the operation of the road, such, for example, as the management of trains, the selection of all servants and agents, the arrangement of timetables, etc., and it is, or ought to be fully informed of the condition of the track, bridges, engines, cars, etc., and of the competency and faithfulness of its employes; concerning all of which the lessor must necessarily be less informed. *Pierce v. Concord R. Co.*, 51 N. H. 590 (lessee a "proprietor" of the road); *Hall v. Brown*, 54 N. H. 495; *Ditchett v. Spuyten Duyvil etc. R. Co.*, 67 N. Y. 425; *reversing* 5 Hun (N. Y.) 165; *International etc. R. Co. v. Dunham*, 68 Tex. 231; 31 Am. & Eng. R. Cas. 530; *St. Louis etc. R. Co. v. Curl*, 28 Kan. 622; 11 Am. & Eng. R. Cas. 458; *Dickson v. Chicago etc. R. Co.*, 71 Mo. 575; 2 Am. & Eng. R. Cas. 539 (lessee held liable for a nuisance erected by lessor); *Davis v. Providence etc. R. Co.*, 121 Mass. 134; *Sprague v. Smth*, 29 Vt. 421; 70 Am. Dec. 424; *Linfield v. Old Colony R. Co.*, 10 Cush. (Mass.) 562.

In the case of *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424, the court by *Redfield, C. J.*, said: "It is well settled in practice and by repeated decisions that the lessees of railroads are liable to the same extent as the lessors would have been, while they continue to operate the road. Indeed, there can be no question, we think, that a mere intruder into the franchises of a railway corporation, should he continue to use it for his own benefit, would be liable to passengers and to the owners of freight who should employ him, to the

build and maintain proper fences along the track as well as where it results from the negligent management of trains, etc.¹ But in some jurisdictions, this doctrine has been modified and restricted

same extent precisely as the company itself while continuing the same business. Any other view of the liability of such intruder would be to allow him to allege his own wrong in his defense, and that would show no reason why the defendants (the lessees) are not liable to the same extent as the company would have been, and upon similar grounds to those upon which lessees or any others exercising the franchises of the company for the time must be—that is, that they are the ostensible parties who appear to the public to be exercising the franchises of the company."

3. The lessee, having assumed all the rights and privileges belonging to the lessor, must also assume with them its duties and the consequent liability for a breach of them. *Atlanta etc. R. Co. v. Ray*, 70 Ga. 674; 22 Am. & Eng. R. Cas. 281; *McMillan v. Michigan etc. R. Co.*, 16 Mich. 79; *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424; *Cook v. Milwaukee etc. R. Co.*, 36 Wis. 46; *Haff v. Minneapolis etc. R. Co.*, 4 McCrary (U. S.) 622; *Missouri Pac. R. Co. v. Morrow*, 32 Kan. 217; 19 Am. & Eng. R. Cas. 630; *Pierce on Railroads*, p. 284.

In some other States there are statutory provisions that the lessee shall be liable for all injuries caused by its negligence in the operation of the road. *Stewart v. Chicago etc. R. Co.*, 27 Iowa 282; *Stephens v. Davenport etc. R. Co.*, 36 Iowa 327; *Davis v. Providence etc. R. Co.*, 121 Mass. 134.

4. The liability of the lessee rests also upon the general principle that every person must answer for the consequences of his own wrongdoing, regardless of the liability of others for the same acts. *Hall v. Brown*, 54 N. H. 495; *Toledo etc. R. Co. v. Rumbold*, 40 Ill. 143; *NEGLIGENCE*, vol. 16, p. 386.

The lessee's liability is in no wise affected by the fact that the lease was without authority, and therefore unlawful. *McCluer v. Manchester etc. R. Co.*, 13 Gray (Mass.) 124; 74 Am. Dec. 624; *Feital v. Middlesex R. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *Ricketts v. Chesapeake etc. R. Co.*, 33 W. Va. 433; 41 Am. & Eng. R. Cas. 42.

1. Failure to Maintain Fences—Liability of Lessor.—It being a part of the duty of a railroad corporation to fence its track, it is liable for injuries resulting in failure to perform its duty. *Bay City etc. R. Co. v. Austin*, 21 Mich. 390; *St. Louis etc. R. Co. v. Curl*, 28 Kan. 622; 11 Am. & Eng. R. Cas. 458; *East St. Louis etc. R. Co. v. Gerber*, 82 Ill. 632; *Whitney v. Atlantic etc. R. Co.*, 44 Me. 362; *Fontaine etc. R. Co. v. Southern Pac. R. Co.*, 54 Cal. 645; 1 Am. & Eng. R. Cas. 159.

Liability of Lessee.—Either by statute or judicial construction, the lessee is also made liable for injuries resulting from a failure to keep up proper fences. The ground of such liability seems to be that the lessee is guilty of negligence in using a road not properly fenced. *Illinois Cent. R. Co. v. Kanouse*, 39 Ill. 272; *Ditchett v. Spuyten Duyvil etc. R. Co.*, 67 N. Y. 425; reversing 5 Hun (N. Y.) 165; *Tracy v. Troy etc. R. Co.*, 55 Barb. (N. Y.) 529; aff'd 38 N. Y. 433; *Birchfield v. Northern Cent. R. Co.*, 57 Barb. (N. Y.) 589 (liability provided for by statute in *New York*); *Cook v. Milwaukee etc. R. Co.*, 36 Wis. 45; *Missouri Pac. R. Co. v. Morrow*, 32 Kan. 217; 19 Am. & Eng. R. Cas. 630; *Clement v. Canfield*, 28 Vt. 302. See also 2 *Shearm. & Redf. on Neg.* (4th ed.), § 435; *FENCES*, vol. 7, p. 908.

Joint Liability.—Other cases establish the joint and several liability of the lessor and lessee for injuries caused from improper fences. *Toledo etc. R. Co. v. Rumbold*, 40 Ill. 143; *East St. Louis etc. R. Co. v. Gerber*, 82 Ill. 632; *Clary v. Iowa Midland R. Co.*, 37 Iowa 344; *Downing v. Chicago etc. R. Co.*, 43 Iowa 96.

In *Indiana* the rule by statute is that if at the time of stock killed owing to defect in the fences, the road is operated by the lessee in the name of the company by whom it is owned, both lessee and owners are liable; if it is operated in the lessee's own name, the lessee is the responsible party. *Pittsburgh etc. R. Co. v. Bolner*, 57 Ind. 572; *Pittsburgh etc. R. Co. v. Hannon*, 60 Ind. 417; *Cincinnati etc. R. Co. v. Bunnell*, 61 Ind. 183.

in its application to particular cases.¹ And in no case can the lessor be held liable for an injury which is purely the result of a breach by the lessee of his own contractual duty as carrier.²

XIV. RAILROADS AS COMMON CARRIERS.—That railroads are common carriers, possessed of all the rights, and subject to all the duties and obligations of such carriers, is well established.³ What are these rights, duties and obligations has been discussed elsewhere.⁴

1. Rights, Duties and Liabilities as Carriers of Goods.—See **CARRIERS OF GOODS**, vol. 2, p. 771.

2. As Carriers of Passengers.—(See also **CARRIERS OF PASSENGERS**, vol. 2, p. 738)—*a. EXPULSION OF PASSENGERS*—(1) *Right to Expel.*—A railroad company may eject from its accommodations all persons who refuse compliance with its reasonable

1. Thus some courts have sought to hold the lessor responsible for negligence in cases where injury results from a defective construction of the road-bed or equipments, even though in the possession and control of the lessee; and to hold the lessee alone liable for negligence growing out of the mismanagement of trains by its servants. *St. Louis etc. R. Co. v. Curl*, 28 Kan. 622; 11 Am. & Eng. R. Cas. 458.

In *Larkin v. Willamette etc. R. Co.*, 13 Oregon 436; 26 Am. & Eng. R. Cas. 611, it is said that where one railroad company, under authority of law, leases its road to another company, it is not responsible for the faults committed by such other company in the running of its trains or in management of the road. See also *Ditchett v. Spuyten Duyvil etc. R. Co.*, 67 N. Y. 425; *Langley v. Boston etc. R. Co.*, 10 Gray (Mass.) 103.

2. Lessee Liable Alone for Breach of His Own Contractual Duty.—*Mahoney v. Atlantic etc. R. Co.*, 63 Me. 68; *Murch v. Concord R. Co.*, 29 N. H. 35; 61 Am. Dec. 631; *Pierce v. Concord R. Co.*, 51 N. H. 593; *Patterson v. Wabash etc. R. Co.*, 54 Mich. 91; 18 Am. & Eng. R. Cas. 130; *Philadelphia etc. R. Co. v. Anderson*, 94 Pa. St. 351; 6 Am. & Eng. R. Cas. 407; *Singleton v. Southwestern R. Co.*, 70 Ga. 464; 21 Am. & Eng. R. Cas. 226; 48 Am. Rep. 574.

A contrary doctrine is held in *Langley v. Boston etc. R. Co.*, 10 Gray (Mass.) 103, but in that case the lease was wholly unauthorized. The decision is explained in *McClure v. Manchester etc. R. Co.*, 13 Gray (Mass.)

124, where it is distinctly held that while under the decision referred to a lessor under an unauthorized lease is liable for the loss of goods received by the lessee, yet the lessee cannot release himself from liability in such a case by asserting that the lease is void. In this case a portion of one road was leased to another connecting with it.

3. See **CARRIERS OF GOODS**, vol. 2, p. 781-782, 784 and cases cited. See also *Avinger v. South Carolina R. Co.*, 29 S. Car. 265; 35 Am. & Eng. R. Cas. 519; *Johnson v. Pensacola etc. R. Co.*, 16 Fla. 623; 26 Am. Rep. 731; *Schofield v. Lake Shore etc. R. Co.*, 43 Ohio St. 571; 23 Am. & Eng. R. Cas. 612; *Schloss v. Wood*, 11 Colo. 287; 35 Am. & Eng. R. Cas. 492, note; *Ex parte Benson*, 18 S. Car. 42; *Chicago etc. R. Co. v. Thompson*, 19 Ill. 578. This is specifically provided in Const. of *Mississippi* (1890), § 184.

There may, of course, be exceptions in peculiar cases; and whether or not a particular railroad is a carrier in a certain case is a mixed question of law and fact. See *Elkins v. Boston etc. R. Co.*, 23 N. H. 275; *Avinger v. South Carolina R. Co.*, 29 S. Car. 265; 35 Am. & Eng. R. Cas. 519; *Piedmont Mfg. Co. v. Columbia etc. R. Co.*, 19 S. Car. 353; 16 Am. & Eng. R. Cas. 194; **CARRIERS OF GOODS**, vol. 2, p. 784; **QUESTIONS OF LAW AND FACT**.

4. See **CARRIERS OF PASSENGERS**, vol. 2, p. 738; **CARRIERS OF GOODS**, vol. 2, p. 771; **CARRIERS OF STOCK**, vol. 3, p. 1; **FREIGHT**, vol. 8, p. 900; **MAIL**, vol. 13, p. 1201; **INTERSTATE COMMERCE**, vol. 11, p. 539; **STOPPAGE IN TRANSITU**; **SLEEPING-CAR COM-**

regulations or whose presence is attended with danger or great inconvenience to the other passengers.¹ So that it is the right and in many cases the duty of the officers or agents of the company to expel all persons who are drunk² or disorderly³ or who are afflicted with a dangerous disease.⁴

The most frequent cases of expulsion are those arising from a refusal to pay proper fares. Since the company has, within certain limits, the right to prescribe the conditions upon which it will carry passengers, a person who declines to observe such condi-

panies; *BILL OF LADING*, vol. 2, p. 223; *TICKETS AND FARES*.

1. *New Orleans etc. R. Co. v. Burke*, 53 Miss. 201; *Chicago etc. R. Co. v. Flagg*, 43 Ill. 364; *infra*, this title, *Power to Make Reasonable Rules and Regulations*; *Peck v. New York Cent. etc. R. Co.*, 70 N. Y. 587 (refusal to comply with regulations setting apart a separate car for ladies); 1 *Redfield on Ry's* 91, 92.

The right to expel passengers exists, because in the great majority of cases which arise it is the only means of enforcing the regulations the company is authorized to make.

As to expulsion from stations or depot grounds, see *STATIONS*.

2. *Intoxicated Persons*. — *McClelland v. Louisville etc. R. Co.*, 94 Ind. 276; 18 Am. & Eng. R. Cas. 260; *Lemont v. Washington etc. R. Co.*, 1 Mackey (D. C.) 180; 1 Am. & Eng. R. Cas. 263; *Haley v. Chicago etc. R. Co.*, 21 Iowa 15; *Railway Co. v. Valley*, 32 Ohio St. 345; *Vinton v. Middlesex R. Co.*, 11 Allen (Mass.) 304; *Murphey v. Union R. Co.*, 118 Mass. 228; *Baltimore etc. R. Co. v. McDonald*, 68 Ind. 316; *Louisville etc. R. Co. v. Sullivan*, 81 Ky. 624; 16 Am. & Eng. R. Cas. 390.

But slight intoxication, such as does not seriously affect the conduct of the passenger will not justify his expulsion, or even a refusal to carry him. *Pittsburgh etc. R. Co. v. Vandyne*, 57 Ind. 576.

For cases in which a sick passenger has been expelled because the conductor supposed him to be drunk when he was not, see *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57; 37 Am. & Eng. R. Cas. 117; *Lemont v. Washington etc. R. Co.*, 1 Mackey (D. C.) 180; 1 Am. & Eng. R. Cas. 263.

3. *Disorderly Passengers*. — *Murphy v. Western etc. R. Co.*, 23 Fed. Rep. 637; 21 Am. & Eng. R. Cas. 258; *New Orleans etc. R. Co. v. Burke*, 53 Miss. 201; 24 Am. Rep. 689; *Peavey*

v. Georgia R. etc. Co., 81 Ga. 485; 37 Am. & Eng. R. Cas. 114; *Atchison etc. R. Co. v. Gauts*, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290; *Com. v. Kennedy*, 136 Mass. 152; 18 Am. & Eng. R. Cas. 383; *Chicago etc. R. Co. v. Griffin*, 68 Ill. 499 (profane language, etc.); *Philadelphia etc. R. Co. v. Larkin*, 47 Md. 155; *People v. Caryl*, 3 Park. Cr. Rep. (N. Y.) 326.

The general and accepted rule is that a railroad company may refuse to carry those whose ostensible business might tend to injure their line, *e. g.*, one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or committing any crime; or a person infected with contagious diseases, to the danger of other passengers. It is not bound to carry persons who travel for the purpose of gambling. But if its agents have ignorantly sold a ticket to a gambler, the conductor, before expelling him from the train, should tender a return of the fare paid. *Thurston v. Union Pac. R. Co.*, 4 Dill (U. S.) 321.

In *Chicago City R. Co. v. Pelletier* (Ill. 1890), 24 N. E. Rep. 770, it is said that a passenger cannot be ejected from a street car for using vulgar and indecent language unless he uses it in a tone sufficiently loud to annoy and disturb the other passengers.

It is the duty of the company to eject such disorderly passengers, and a failure to do so will render it liable to a passenger injured or insulted by them. *New Orleans etc. R. Co. v. Burke*, 53 Miss. 200; 24 Am. Rep. 689; *King v. Ohio etc. R. Co.*, 22 Fed. Rep. 413; 18 Am. & Eng. R. Cas. 386.

4. *Paddock v. Atchison etc. R. Co.*, 37 Fed. Rep. 841; *Thurston v. Union Pac. R. Co.*, 4 Dill. (U. S.) 321; *Atchison etc. R. Co. v. Weber*, 33 Kan. 443; 21 Am. & Eng. R. Cas. 418; 52 Am. Rep. 543.

tions can claim no right to be carried, and the conductor in charge of the train may expel him if he persists in his refusal.¹ He must be allowed a reasonable opportunity to pay the fares demanded or to produce his ticket,² but after his persistent

1. Expulsion for Non-Payment of Fare—Refusal to Deliver up Tickets, etc.

—Wyman *v.* Northern Pac. R. Co., 34 Minn. 210; 22 Am. & Eng. R. Cas. 402; Swan *v.* Manchester etc. R. Co., 132 Mass. 116; 6 Am. & Eng. R. Cas. 327; Toledo etc. R. Co. *v.* Wright, 68 Ind. 586; 34 Am. Rep. 277; Shelton *v.* Lake Shore etc. R. Co., 29 Ohio St. 214; Crawford *v.* Cincinnati etc. R. Co., 26 Ohio St. 580; Hill *v.* Syracuse etc. R. Co., 63 N. Y. 101; Falkner *v.* Ohio etc. R. Co., 55 Ind. 369; Lillis *v.* St. Louis etc. R. Co., 64 Mo. 464; 27 Am. Rep. 255; Illinois Cent. R. Co. *v.* Nelson, 59 Ill. 110; Elmore *v.* Sands, 54 N. Y. 512; 13 Am. Rep. 617; Atchison etc. R. Co. *v.* Gants, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290; Memphis etc. R. Co. *v.* Benson, 85 Tenn. 627; 31 Am. & Eng. R. Cas. 112.

A person without a ticket who refuses to pay the extra fare may be ejected, as well as one who refuses to pay at all. Swan *v.* Manchester etc. R. Co., 132 Mass. 116; 42 Am. Rep. 432; 6 Am. & Eng. R. Cas. 327; State *v.* Goold, 53 Me. 279.

For the details of the character of such regulations and for the doctrine as to the reasonableness of any regulations concerning fares and tickets, see TICKETS AND FARES where the subject is dealt with.

See also note to Swann *v.* Manchester etc. R. Co., 132 Mass. 116; 6 Am. & Eng. R. Cas. 327, 332.

The case of Pittsburgh etc. R. Co. *v.* Dewin, 86 Ill. 296, was an action by D, a child twenty-seven months old, for being expelled from a railway train in the night. There was evidence that D's father offered the conductor only two tickets for himself, wife, and six children; that the conductor offered to take the older three children at half fare, which was more liberal than the rules allowed, but the parents refused; that the conductor informed them that the children must get off, unless the three half fares were paid; that at the next station the whole family left the train, the conductor making a loud, but not indecent answer to the mother and using no force; that the night was not stormy, and fifteen minutes after the train left,

the family reached a house where they staid over night. It was held that there was no ground for either actual or vindictive damages.

In the case of Philadelphia etc. R. Co. *v.* Hoeflich, 62 Md. 300; 18 Am. & Eng. R. Cas. 373, it appeared that a young woman was seated in a train in the same seat with her sister, a girl of eleven years. Upon the conductor asking the young woman for tickets, she produced two, one for herself and one for her father, who was in another part of the train. She had, however, no ticket for the little girl, and refused to pay any fare for her, although several times requested to do so. She admitted in answer to the conductor's questions that the little girl was with her. At the next station the conductor ejected both the young woman and the girl. It was held that if the jury believed that the conductor could reasonably infer from the circumstances that the plaintiff's younger sister was under her charge, and that therefore she was responsible for her presence in the car and for her fare, he was justified in expelling her as well as her younger sister.

2. Clark *v.* Wilmington etc. R. Co., 91 N. Car. 506; 18 Am. & Eng. R. Cas. 366; International etc. R. Co. *v.* Wilkes, 68 Tex. 617; 34 Am. & Eng. R. Cas. 331; Hayes *v.* New York etc. R. Co. (N.Y. 1884), 18 Am. & Eng. R. Cas. 363; South Carolina R. Co. *v.* Nix, 68 Ga. 572; Maples *v.* New York etc. R. Co., 38 Conn. 557; 9 Am. Rep. 434; Louisville etc. R. Co. *v.* Fleming, 14 Lea (Tenn.) 128; 18 Am. & Eng. R. Cas. 347; Curl *v.* Chicago etc. R. Co., 63 Iowa 417.

There are some cases, however, which hold that upon tender of the proper fare being made the passenger should be allowed to remain on the train, but in these cases the refusal to pay fare was not fractious and they depended, too, upon peculiar circumstances. See O'Brien *v.* New York Cent. R. Co., 80 N. Y. 236; 1 Am. & Eng. R. Cas. 259; Garrett *v.* Louisville etc. R. Co., 8 Lea (Tenn.) 438; 3 Am. & Eng. R. Cas. 416; Nelson *v.* Long Island R. Co., 7 Hun (N. Y.) 140.

refusal he cannot claim the right to be carried by virtue of a tender made while he is being expelled or immediately after.¹

And where a passenger purchases a ticket at the point where he was ejected he may be excluded from the train unless he pays the fare from the station at which he first got on. *Stone v. Chicago etc. R. Co.*, 47 Iowa 82; 29 Am. Rep. 458.

Reasonable Opportunity to Secure Tickets.—In order to justify an expulsion because of the non-payment of the additional fare charged when passenger had no ticket, the company must have afforded reasonable opportunity for the passenger to provide himself with a ticket. *Du Laurans v. St. Paul etc. R. Co.*, 15 Minn. 29; 2 Am. Rep. 102; *Missouri Pac. R. Co. v. McClanahan*, 66 Tex. 530; 27 Am. & Eng. R. Cas. 82; *Southern Kansas R. Co. v. Hinsdale*, 38 Kan. 507; 34 Am. & Eng. R. Cas. 256; *Gulf etc. R. Co. v. Fox* (Tex. 1887), 33 Am. & Eng. R. Cas. 543; *Illinois Cent. R. Co. v. Johnson*, 67 Ill. 312; *Evans v. Memphis etc. R. Co.*, 56 Ala. 246; *St. Louis etc. R. Co. v. Myrtle*, 51 Ind. 566.

What is such reasonable opportunity to purchase tickets must depend upon circumstances. See *Indianapolis etc. R. Co. v. Kennedy*, 77 Ind. 507; 3 Am. & Eng. R. Cas. 467; *Everett v. Chicago etc. R. Co.*, 69 Iowa 15; 27 Am. & Eng. R. Cas. 98; *St. Louis etc. R. Co. v. South*, 43 Ill. 176; *Swan v. Manchester etc. R. Co.*, 132 Mass. 116; 42 Am. Rep. 432; 6 Am. & Eng. R. Cas. 327. In these two last cases it was held that a reasonable time meant up to the time fixed by the published rules of the company and not up to the time of the actual departure of the train.

In *Everett v. Chicago etc. R. Co.*, 69 Iowa 15; 27 Am. & Eng. R. Cas. 98, it was held that it was not essential that the office be kept open until the last moment. But in cases where the statute required that the ticket office should be kept open "at least one hour prior to the departure of each passenger train from such station," the actual departure of the train is meant. *Porter v. New York Cent. R. Co.*, 34 Barb. (N. Y.) 353; *Nellis v. New York etc. R. Co.*, 30 N. Y. 505.

And in *Atchison etc. R. Co. v. Dwelle*, 44 Kan. 394; 44 Am. & Eng. R. Cas. 402, it is said that keeping the office open thirty minutes before the schedule time for departure was not

sufficient; it must be kept open long enough before the actual departure of the train, whether delayed or not, for passengers to get their tickets conveniently.

1. Passenger Expelled Cannot Re-enter Upon Tender of Fare.—*State v. Campbell*, 32 N. J. L. 309; *O'Brien v. Boston etc. R. Co.*, 15 Gray (Mass.) 20; *Swan v. Manchester etc. R. Co.*, 132 Mass. 116; 42 Am. Rep. 432; *Hibbard v. New York etc. R. Co.*, 15 N. Y. 455; *Pease v. Delaware etc. R. Co.*, 101 N. Y. 367; 26 Am. & Eng. R. Cas. 185; *People v. Jillson*, 3 Park. Cr. Rep. (N. Y.) 234; *Louisville etc. R. Co. v. Harris*, 9 Lea (Tenn.) 180; 16 Am. & Eng. R. Cas. 374; *Hoffbauer v. Delhi etc. R. Co.*, 52 Iowa 342; 35 Am. Rep. 278; *Railroad Co. v. Skillman*, 39 Ohio St. 444; 13 Am. & Eng. R. Cas. 31; *Atchison etc. R. Co. v. Dwelle*, 44 Kan. 394; 44 Am. & Eng. R. Cas. 402. In this last case an attempt was made to create an exception to the rule by showing that the passenger refused to pay extra fare not with an intent to annoy the conductor or defraud the company, but solely because he thought he had a right to travel without paying extra fare. But the court held that in such cases the intent is immaterial and that it will afford no ground for a denial of the right to eject. The same view is taken in *Stone v. Chicago etc. R. Co.*, 47 Iowa 82; 29 Am. Rep. 458; *Marshall v. Boston etc. R. Co.*, 145 Mass. 164; 31 Am. & Eng. R. Cas. 18.

In *Louisville etc. R. Co. v. Harris*, 9 Lea (Tenn.) 180; 16 Am. & Eng. R. Cas. 374, the court was of the opinion that the strict rule should be confined to cases of willful violation of contract.

Where a passenger tenders money for his fare to a certain station which is less than that prescribed, saying he will pay no more, and the conductor retains a sum sufficient to carry the passenger to the next station, the passenger has the right on reaching such station to continue his journey upon offering the proper fare, and he cannot rightfully be put off the train. *Chicago etc. R. Co. v. Bryan*, 90 Ill. 126.

Third Person Offering to Pay Fare.—The case of *Garrett v. Louisville etc. R. Co.*, 8 Lea (Tenn.) 438; 3 Am. & Eng. R. Cas. 416, furnishes a very just exception to the general rule. The

(2) *Manner and Place of Expulsion.*—Although the relation of carrier and passenger does not exist in many of the cases arising in this connection, yet the railroad company always owes a certain measure of duty to the ejected person, and is bound to exercise its right to eject in a lawful and proper manner and with due regard to the safety of the ejected.¹ No more force may be used

plaintiff in the case, an old and feeble man, tendered for his fare a tax certificate of greater money value than the usual fare. The conductor declined to receive it and proceeded to eject him; while doing so, a passenger offered to pay his fare; the conductor declined to receive this also, and ejected the plaintiff. It was held that in such a case the ejection was justified by no rule of law or of public policy. See also *Clark v. Wilmington etc. R. Co.*, 91 N. Car. 506; 18 Am. & Eng. R. Cas. 366; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432.

The proper course to be pursued by a passenger in such cases is to accede to the conductor's demand, since his right to recover of the company is as full and complete as if he had been ejected. It is his duty to pay the fare demanded, and if the company fails to make reparation, he has an appropriate remedy. *Chicago etc. R. Co. v. Griffin*, 68 Ill. 499; *Hall v. Memphis etc. R. Co.*, 15 Fed. Rep. 57; 9 Am. & Eng. R. Cas. 348; *Atchison etc. R. Co. v. Gants*, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; 18 Am. & Eng. R. Cas. 339.

Reason of the Rule.—In *O'Brien v. Boston etc. R. Co.*, 15 Gray (Mass.) 23, the court by Bigelow, J., said: "The right to refuse to transport the plaintiff further and to eject him from the train would be an idle and useless exercise of legal authority if the party, who had hitherto refused to perform the contract by paying his fare when duly demanded, could immediately re-enter the cars and claim the fulfillment of the original contract by the defendant."

In *Railroad Co. v. Skillman*, 39 Ohio St. 444; 13 Am. & Eng. R. Cas. 31, the court, by Upson, J., said: "To concede that privilege (*i. e.*, to re-enter the cars) to a person who has willfully violated the obligations of the implied contract under which he was allowed to enter the cars, would enable him to attempt the perpetration of a fraud at the least possible risk of loss or incon-

venience to himself, and the greatest annoyance and inconvenience to the railroad company and the passengers on its trains."

In *Hibbard v. New York etc. R. Co.*, 15 N. Y. 55, the court by Brown, J., said: "If one passenger may, at his pleasure, condemn the regulations of the company and put the conductors at defiance, all may; and such a result would put it out of its power to protect itself from injury and to fulfill its duties to those who committed themselves to its charge."

1. The relation of carrier and passenger does not exist where proper fares have not been paid or a ticket or pass exhibited after demand by the conductor. See *CARRIERS OF PASSENGERS*, vol. 2, p. 744; *Pennsylvania R. Co. v. Price*, 96 Pa. St. 256; 1 Am. & Eng. R. Cas. 234; *Gardner v. New Haven etc. R. Co.*, 51 Conn. 143; 18 Am. & Eng. R. Cas. 170; *Atchison etc. R. Co. v. Gants*, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290. And it seems that the relation, when begun, ceases upon the passenger's so conducting himself as to violate the rules of the company and subject his fellow passengers to inconvenience or to danger, since he has forfeited his right to be carried. *Peavey v. Georgia R. etc. Co.*, 81 Ga. 485; 37 Am. & Eng. R. Cas. 114; *New Orleans etc. R. Co. v. Burke*, 53 Miss. 201; 24 Am. Rep. 689; *Com. v. Kennedy*, 136 Mass. 152; 18 Am. & Eng. R. Cas. 383.

But in all cases the railroad company owes the ejected party a measure of duty. *Columbus etc. R. Co. v. Powell*, 40 Ind. 37; *NEGLIGENCE*, vol. 16, p. 416-417; *Pennsylvania R. Co. v. Toomey*, 91 Pa. St. 256; 1 Am. & Eng. R. Cas. 61.

And a failure to exercise proper care in the expulsion renders it liable for all injuries the proximate consequence of such negligence. *Healey v. City Passenger R. Co.*, 28 Ohio St. 23; *New York etc. R. Co. v. Haring*, 47 N. J. L. 137; 21 Am. & Eng. R. Cas. 436; *Bass v. Chicago etc. R. Co.*, 42 Wis. 654; *Clark v. New York etc. R. Co.*, 40

than is actually necessary;¹ the train must be at a full stop,² and the circumstances of time, place, and the physical condition of the ejected are to be considered.³

In many jurisdictions it is required that the ejection shall take place only at a station or usual stopping place for trains on that road. But this requirement is not universal and is modified and restricted in its application to particular cases.⁴

Hun (N. Y.) 605; Vicksburg etc. R. Co. v. Phillips, 64 Miss. 693; 30 Am. & Eng. R. Cas. 597; Philadelphia etc. R. Co. v. Hoefflich, 62 Md. 300; 18 Am. & Eng. R. Cas. 373; Georgia R. Co. v. Homer, 73 Ga. 251; 27 Am. & Eng. R. Cas. 186.

See also NEGLIGENCE, vol. 16, p. 386.

1. Amount of Force to be Used.—All unnecessary force is negligence or willful tort and recovery may be had for injuries the proximate result thereof. New York etc. R. Co. v. Haring, 47 N. J. L. 137; 21 Am. & Eng. R. Cas. 436; Jardine v. Cornell, 50 N. J. L. 485; 34 Am. & Eng. R. Cas. 437; Sanford v. Eighth Ave. R. Co., 23 N. Y. 343; 80 Am. Dec. 286; State v. Ross, 26 N. J. L. 224; Chicago etc. R. Co. v. Bills, 118 Ind. 221; 37 Am. & Eng. R. Cas. 121, 126, note; Wright v. California Cent. R. Co., 78 Cal. 360; Brown v. Hannibal etc. R. Co., 66 Mo. 588; Thorpe v. New York etc. R. Co., 13 Hun (N. Y.) 70; Johnson v. Concord R. Co., 46 N. H. 213.

Proof that the conductor ordered the plaintiff to get off and accompanied the order with such a show of force sufficient to impress him with the belief that it would be employed, thereby compelling him to jump from the car, is equivalent to proof of the employment of actual force. Kline v. Central Pac. R. Co., 39 Cal. 587.

Resistance by Passenger.—The doctrine of the *New York* cases is that a passenger lawfully upon a train has the right to resist any attempt to remove him therefrom; and if in consequence of his resistance extraordinary force is used to remove him, and he is injured thereby he may recover. He has also the right, even where the conductor is justified in ejecting him, to resist being put off in a dangerous manner. English v. Delaware etc. Co., 66 N. Y. 454; 23 Am. Rep. 69; Sanford v. Eighth Ave. R. Co., 23 N. Y. 343; 80 Am. Dec. 286 (cases of refusal to pay fare).

2. Train Must Be at Full Stop.—

Holmes v. Wakefield, 12 Allen (Mass.) 580; Sanford v. Eighth Ave. R. Co., 23 N. Y. 343; 80 Am. Dec. 286; Kansas City R. Co. v. Kelly, 36 Kan. 655; 34 Am. & Eng. R. Cas. 281; State v. Kinney, 34 Minn. 311.

3. Railway Co. v. Valley, 32 Ohio 345.

Thus in *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57; 37 Am. & Eng. R. Cas. 117, a passenger was stricken with apoplexy while riding on a street car, and the driver thinking he was drunk, removed him and left him lying on the edge of the sidewalk. The passenger was perfectly helpless, and it was a cold rainy day. It was held that, admitting the right of the company to expel such passenger because of the inconvenience he occasioned to the other passengers, yet it must do so with due regard to his safety, and was liable for his death caused by the improper manner of expulsion.

So also in *Louisville etc. R. Co. v. Sullivan*, 81 Ky. 624; 16 Am. & Eng. R. Cas. 390, the same principle was emphasized. And it was held that if the passenger were drunk, he was not to be put off in such place as would on account of his condition endanger his life or his health. See also *Atchison etc. R. Co. v. Weber*, 33 Kan. 543; 21 Am. & Eng. R. Cas. 418.

And the principle of the text is recognized in other cases. See *Paddock v. Atchison etc. R. Co.*, 37 Fed. Rep. 841 (removal of passengers suffering from infectious disease); *Hall v. South Carolina R. Co.*, 28 S. Car. 261; 34 Am. & Eng. R. Cas. 311.

Convenience of Ejected.—In ejecting a trespasser the company is not bound to have any regard to his convenience; that is not to be considered. *Atchison etc. R. Co. v. Gants*, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290.

4. At Usual Stopping Place.—This requirement exists by statute in several States. See *Stephen v. Smith*, 29 Vt. 160; *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438; *Hobbs v. Texas*

The conductor, being the officer or agent charged with the enforcement of the regulations concerning the expulsion of passengers, it follows that in every case in which the right to eject exists, the company is liable for all the wrongful acts of the conductor, malicious or otherwise, in effecting the expulsion.¹

etc. R. Co., 49 Ark. 357; 34 Am. & Eng. R. Cas. 268; *Baldwin v. Grand Trunk R. Co.*, 64 N. H. 596; 37 Am. & Eng. R. Cas. 126.

The *California* Civ. Code, § 487, requires that the expulsion shall take place at a usual stopping place or near a dwelling-house. See *Wright v. California Cent. R. Co.*, 78 Cal. 360.

Distinction Between Trespassers and Others.—Under such statutes a distinction has been made between persons who are properly on the train and those who are mere trespassers, so that while a person rightfully on the train may be ejected only at a regular station or usual stopping place, a trespasser may be ejected anywhere except at a place known to be dangerous. *Hardenbergh v. St. Paul etc. R. Co.*, 39 Minn. 3; 34 Am. & Eng. R. Cas. 359 (refusal to pay constitutes one a trespasser); *Maples v. New York etc. R. Co.*, 38 Conn. 557; 9 Am. Rep. 434 (trespassers may be ejected at any convenient place); *Kent v. Mason*, 1 Ill. App. 466; *Wynan v. Northern Pac. R. Co.*, 34 Minn. 210; 34 Am. & Eng. R. Cas. 405; *Atchison etc. R. Co. v. Gants*, 38 Kan. 608; 34 Am. & Eng. R. Cas. 200; *Hobbs v. Texas etc. R. Co.*, 49 Ark. 357; 34 Am. & Eng. R. Cas. 268; *Southern Kansas R. Co. v. Hinsdale*, 38 Kan. 507; 34 Am. & Eng. R. Cas. 256 (failure to secure ticket for freight train); *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420 (distinction made between refusal to surrender ticket and refusal to pay fare). See also *infra*, this title, *Liability for Injuries to Trespassers*.

The question as to whether one is or is not a trespasser is one for the jury. *Arnold v. Pennsylvania R. Co.*, 115 Pa. St. 135; 28 Am. & Eng. R. Cas. 189.

Where No Statute Exists.—Where no statute exists concerning the place of ejection it seems that it may be at any place not dangerous to the ejected party. *Great Western etc. R. Co. v. Miller*, 19 Mich. 305; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1; *Railroad Co. v. Skillman*, 39 Ohio St. 444; 13 Am. & Eng. R. Cas. 31; *Haley v. Chicago*

etc. R. Co., 21 Iowa 15; *Brown v. Chicago etc. R. Co.*, 51 Iowa 235; *Toledo etc. R. Co. v. Wright*, 68 Ind. 586.

Thus in *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, the court by Frayer, J., said: "The passenger who refuses to pay fare is from that moment an intruder and wrongfully on the train. He has no lawful right to be carried *gratis* to the next station. This is too plain to admit of debate."

In the absence of statutory provision a station is not an improper place to eject a passenger, even though there be no hotel there. *Hall v. Memphis etc. R. Co.*, 15 Fed. Rep. 57; 9 Am. & Eng. R. Cas. 348. But this rule might be otherwise in extreme cases, such, for example, as where a sick passenger is expelled.

Definition of "Regular Station"—Usual Stopping Place.—In *Illinois Cent. R. Co. v. Lattimer*, 128 Ill. 163, it was held that the term "regular station" as used in the statute relating to the expulsion of passengers, means a place where passenger trains usually stop for the purpose of receiving or discharging passengers, and not merely a town or village in which a depot is located.

In *Texas etc. R. Co. v. Casey*, 52 Tex. 112, the term "usual stopping place" was held to mean either a regular station or any other place which a railroad company expressly by public notice or otherwise, or impliedly by user for such purpose, had designated as a proper place for passengers to get on or off its trains. A place at which a train is stopped for wood or water only is not such a place.

1. Company Liable for Wrongful Acts of Its Conductor.—*Great Western R. Co. v. Miller*, 19 Mich. 305; *Kline v. Central Pac. R. Co.*, 37 Cal. 400; *Terre Haute etc. R. Co. v. Fitzgerald*, 47 Ind. 79; *Rounds v. Delaware etc. R. Co.*, 3 Hun (N. Y.) 329; 64 N. Y. 129; *Hamilton v. Third Ave. R. Co.*, 13 Abb. Pr. (N. S. (N. Y.)) 318; 44 How. Pr. (N. Y.) 294; *Holmes v. Wakefield*, 12 Allen (Mass.) 580; *Ramsden v. Boston etc. R. Co.*, 104 Mass. 117; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365 and cases cited; *Seymour v. Green-*

(3) *Damages for Wrongful Expulsion.*—The expulsion may be wrongful in itself, or wrongful in its execution, or both. In the first case, that is where the company has no right to expel the passenger, the elements which may be considered in estimating damages are the humiliation and insult¹ occasioned to the

wood, L. J. 30 Exch. 189, 327; Milwaukee etc. R. Co. v. Finney, 10 Wis. 388 (contract and tort); Healy v. City Passenger R. Co., 28 Ohio St. 23; Columbus etc. R. Co. v. Powell, 40 Ind. 37; Hoffman v. New York Cent. R. Co., 87 N. Y. 25; 41 Am. Rep. 337, 340, note; Higgins v. Watervliet etc. Co., 46 N. Y. 23; 7 Am. Rep. 293; Sanford v. Eighth Ave. R. Co., 23 N. Y. 343; 80 Am. Dec. 282; CARRIERS OF PASSENGERS, vol. 2, p. 753.

This is but one of the many applications of the familiar rule that a principal is liable for all the acts of his agent, acting within the scope of his employment. See AGENCY, vol. 1, p. 419; Evans on Agency (2nd Eng. ed.), p. 567-8; Wharton on Agency, § 474, *et seq.*; McManus v. Cricket, 1 East 106; MASTER AND SERVANT, vol. 14, p. 804, 821, *et seq.*; Howe v. Newmarch, 12 Allen (Mass.) 49; note to Allegheny Valley R. Co. v. McLain, 91 Pa. St. 442; 1 Am. & Eng. R. Cas. 466.

Courts will take cognizance of the duties of conductors as pointed out by statute. Travers v. Kansas Pac. R. Co., 63 Mo. 421.

Even Where the ejection is not authorized and the conductor acted contrary to orders, the company is liable if there was any discretionary power vested in the conductor. Moore v. Fitchburg etc. R. Co., 4 Gray (Mass.) 465; Bayley v. Manchester etc. R. Co., L. R., 7 C. P. 415; 3 Moak's Rep. 308; 8 C. P. 148; 4 Moak's Rep. 384; Chicago etc. R. Co. v. Bryan, 90 Ill. 126 (passenger lawfully on train ejected by conductor; company held liable for assault and battery); Philadelphia etc. R. Co. v. Derby, 14 How. (U. S.) 468; Heenrich v. Pullman Palace Car Co., 20 Fed. Rep. 100; 18 Am. & Eng. R. Cas. 379; MASTER AND SERVANT, vol. 14, p. 821, *et seq.*

Compare Pennsylvania Co. v. Toomey, 91 Pa. St. 256; 1 Am. & Eng. R. Cas. 461.

It is almost invariably the case that a conductor is vested with discretionary power in the management of the train. Thus in a leading case, Great Western R. Co. v. Miller, 19

Mich. 305, the court by Campbell, J., said: "There is *** no authority which would exempt them (*i. e.*, the railroad company) from some amount of responsibility for any wrongful expulsion of a passenger by a conductor. He represents them in the whole management of his train and the power to do any serious mischief is chiefly derived from their vesting him with the control of this large agency. He occupies the same position as the master of a ship and his action . . . must be regarded as done in the line of his employment." See also Southern Kansas R. Co. v. Rice, 38 Kan. 398; 34 Am. Eng. R. Cas. 316.

No matter what the circumstances may have been, the company is liable for the wrong done, if it in any way sanctions or ratifies such wrong. MASTER AND SERVANT, vol. 14, p. 826.

And the fact that the wrongdoer was promoted or retained in the company's service is strong evidence of its ratification and sanction. Perkins v. Missouri etc. R. Co., 55 Mo. 201; Bass v. Chicago etc. R. Co., 42 Wis. 654; 24 Am. Rep. 437; Goddard v. Grand Trunk R. Co., 57 Me. 202; 2 Am. Rep. 39.

Contra, Edelmunn v. St. Louis Tr. Co., 3 Mo. App. 504.

But the retention of a porter after he had been criminally convicted of assault is said not to constitute a ratification in a particular case. Williams v. Pullman Car Co., 40 La. Ann. 87; 33 Am. & Eng. R. Cas. 407.

1. Little Rock etc. R. Co. v. Dean, 43 Ark. 529; 21 Am. & Eng. R. Cas. 279; Chicago etc. R. Co. v. Chisholm, 79 Ill. 584; Murphy v. Western etc. R. Co., 23 Fed. Rep. 637; 21 Am. & Eng. R. Cas. 258 (colored man expelled from car set apart for white people); International etc. R. Co. v. Smith (Tex. 1886), 1 S. W. Rep. 565; 27 Am. & Eng. R. Cas. 148; Lake Erie etc. R. Co. v. Fix, 88 Ind. 381; 11 Am. & Eng. R. Cas. 109; Georgia R. Co. v. Horner, 73 Ga. 251; 27 Am. & Eng. R. Cas. 186 (good or bad faith of conductor may be considered); Carsten v. Northern Pac. R. Co., 44 Minn. 454; 44

passenger, his pecuniary loss,¹ and the inconvenience and bodily harm suffered.²

In the second case, no damages can be recovered except such

Am. & Eng. R. Cas. 392; Chicago etc. R. Co. v. Williams, 55 Ill. 185; 8 Am. Rep. 641; Chicago etc. R. Co. v. Holdridge, 118 Ind. 281; Wilsey v. Louisville etc. R. Co., 83 Ky. 511; 39 Am. & Eng. R. Cas. 513; DAMAGES, vol. 5, p. 42; 3 Sutherland on Dam. 712.

In the case of McKinley v. Chicago etc. R. Co., 44 Iowa 314; 24 Am. Rep. 748, it was said: "A careful examination of the authorities will disclose the fact that the weight of the adjudged cases is in favor of the proposition that mental anguish arising from the nature and character of the assault is an element of compensatory damages."

So also in Taber v. Hutson, 5 Ind. 322, the court, while holding that only compensatory damages were recoverable by the plaintiff, said: "He was not, it is true, confined to the proof of actual pecuniary loss; the jury might have taken into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind—in short, his individual happiness." S. P. in Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142; 23 Am. & Eng. R. Cas. 672.

So that a passenger is entitled to more than nominal damages where he incurred no pecuniary loss, but suffered indignity. Chicago etc. R. Co. v. Chisholm, 79 Ill. 584. In Toledo etc. R. Co. v. McDonough, 53 Ind. 289, the plaintiff suffered no bodily injury, no pecuniary loss and no inconvenience, yet it was held that \$400 was not excessive, the insult and indignity being considered.

But where a passenger's cause of action is not a tort but a breach of the contract to carry, he cannot show that he was ejected with insult or abuse, or that the conductor was intoxicated. Stone v. Chicago etc. R. Co., 47 Iowa 82; 29 Am. Rep. 458.

1. **Pecuniary Loss.**—It has never been doubted that in such cases a person may recover damages sufficient to compensate him for pecuniary loss, the proximate consequence of the expulsion. The term "pecuniary loss" includes expenses incurred, loss of time, etc. Little Rock etc. R. Co. v. Dean, 43 Ark. 529; 21 Am. & Eng. R. Cas. 279; Pennsylvania

R. Co. v. Spicker, 105 Pa. St. 142; 23 Am. & Eng. R. Cas. 672; Atchison etc. R. Co. v. Gants, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290; Southern Kansas R. Co. v. Rice, 38 Kan. 398; 34 Am. & Eng. R. Cas. 316.

But the loss of a job of work occasioned by the plaintiff's delay at the station where he was expelled, and where he remained a week for want of money, has been held too remote to be considered as an element of damage. Carsten v. Northern Pac. R. Co., 44 Minn. 454; 44 Am. & Eng. R. Cas. 392.

2. **Inconvenience and Bodily Harm.**—Inconvenience and annoyance caused by an unlawful expulsion are proper elements of damage. Chicago etc. R. Co. v. Williams, 55 Ill. 185; 8 Am. Rep. 641 (vexation); Carsten v. Northern Pac. R. Co., 44 Minn. 454; 44 Am. & Eng. R. Cas. 392 ("annoyance").

Bodily harm suffered in consequence of the expulsion is to be considered just as in all other cases of personal injury. See DAMAGES, vol. 5, p. 41-42.

The liability for a violent ejection of a passenger is not diminished by the fact that he was at the time suffering from a disease which aggravated the injuries sustained, or rendered them more difficult of cure. Brown v. Hannibal etc. R. Co., 66 Mo. 588.

In the case of International etc. R. Co. v. Smith (Tex. 1886), 1 S. W. Rep. 565; 27 Am. & Eng. R. Cas. 148, a lady passenger, on the wrong train by a mistake of the company's agent, and who refused to pay fare for being carried further after the mistake was discovered, was held to be entitled to recover damages for being ejected. It was held also that a verdict for \$8,000 damages for personal injuries received, and fright and mental anguish suffered by the passenger, who with two infant children was expelled from the train on a dark night at a lonely place, not a regular station, and, being afraid to seek shelter there among negroes, walked back several miles to a station, through swamps and over a high railroad bridge, and was compelled to engage for a guide a negro who insulted her—was not excessive.

as would be recoverable in an ordinary action for negligent injury.¹

Where the expulsion in any case is accompanied with undue violence or abuse, exemplary damages may be awarded.²

b. LIABILITY FOR LOSS OF BAGGAGE—(See also BAGGAGE, vol. 1, pp. 1042, *et seq.*; CARRIERS OF GOODS, vol. 2, pp. 771, *et seq.*; SLEEPING CARS).—Exactly what is to be included within the term "baggage" has already been stated.³

1. That is, where the company has the right to expel a passenger but does so at such a time or place or under such circumstances that he receives bodily injury as a proximate consequence, he is entitled to recover damages just as in other cases of personal injury. *Louisville etc. R. Co. v. Sullivan*, 81 Ky. 624; 16 Am. & Eng. R. Cas. 390; *Atchison etc. R. Co. v. Weber*, 33 Kan. 543; 21 Am. & Eng. R. Cas. 418; *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57; 37 Am. & Eng. R. Cas. 117; *Illinois Cent. R. Co. v. Sutton*, 53 Ill. 397 (ejecting sick passenger); DAMAGES, vol. 5, p. 40, *et seq.*; DEATH, vol. 5, p. 128.

No damages are recoverable if the right to eject exists and it is properly exercised. *Lake Shore etc. R. Co. v. Pierce*, 47 Mich. 277; 3 Am. & Eng. R. Cas. 340.

2. *Exemplary Damages*.—See generally EXEMPLARY DAMAGES, vol. 7, p. 448, *et seq.*

Whatever may be the merits of the view entertained by eminent text writers that exemplary damages should never in any case be allowed, there is certainly a multitude of cases of high authority in which such damages have been permitted. And there is scarcely any question now that if in the expulsion of a passenger willful or malicious violence is used, exemplary damages may be awarded. See *City etc. R. Co. v. Brauss*, 70 Ga. 368; 18 Am. & Eng. R. Cas. 324; *Western etc. R. Co. v. Turner*, 72 Ga. 292; 28 Am. & Eng. R. Cas. 455; *Lake Shore etc. R. Co. v. Rosenzweig*, 113 Pa. St. 519; 26 Am. & Eng. R. Cas. 489; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398; 34 Am. & Eng. R. Cas. 316; *Chicago etc. R. Co. v. Bryan*, 90 Ill. 126; *Hicks v. Hannibal etc. R. Co.*, 68 Mo. 329; *Bass v. Chicago etc. R. Co.*, 42 Wis. 654; 24 Am. Rep. 437; *Chicago etc. R. Co. v. Flagg*, 43 Ill. 364 (ejecting passenger at place not a station); *Texas etc. R. Co. v. Casey*, 52 Tex. 112; *Brown v. Memphis etc. R.*

Co., 7 Fed. Rep. 51 (good faith of company and its agent may go in mitigation of damages); *Wabash etc. R. Co. v. Rector*, 104 Ill. 296.

A railroad company is never liable in exemplary damages for the act of a conductor who unlawfully ejects a passenger from its cars, unless the plaintiff would have been entitled to recover such damages had the action been against the conductor himself. *Townsend v. N. Y. Cent. R. Co.*, 56 N. Y. 295; 15 Am. Rep. 419; *Garrett v. Louisville etc. R. Co.*, 8 Lea (Tenn.) 438; 3 Am. & Eng. R. Cas. 416.

And any liability of a railroad company to exemplary damages for wrongful acts of its agents must be limited to cases where there has been negligence on the part of the company, in selecting or instructing the agent, or where the wrongful act has been ratified. *Hays v. Houston etc. R. Co.*, 46 Tex. 272; *New Orleans etc. R. Co. v. Burke*, 53 Miss. 200; 24 Am. Rep. 689; *Toledo etc. R. Co. v. Patterson*, 63 Ill. 304; *Du Laurus v. St. Paul etc. R. Co.*, 15 Minn. 29.

Excessive Damages.—If the amount of damages is not such as to indicate that the jury were influenced by passion or prejudice a verdict will not be set aside as giving excessive damages. See DAMAGES, vol. 5, p. 54.

3. *Definition of "Baggage"*.—In the article BAGGAGE, vol. 1, p. 1042, numerous instances are given of what the term has been held to include.

See also *Mauritz v. New York etc. R. Co.*, 23 Fed. Rep. 765; 21 Am. & Eng. R. Cas. 286 (where the general rule is stated); *Staub v. Kendrick*, 121 Ind. 226; 40 Am. & Eng. R. Cas. 652 (salesman's illustrated catalogue carried for personal use, held to be baggage); *Metz v. California Southern R. Co.*, 85 Cal. 329; 44 Am. & Eng. R. Cas. 433 (ladies' jewelry in man's trunk—owner not entitled to recovery, carrier being ignorant of such facts); *Pfister v. Central Pac. R. Co.*, 70 Cal. 169; 27

The purchase of a ticket completes the contract of carriage between the carrier and its passenger, a part of which contract is to carry the latter's baggage.¹ And in carrying the baggage of its passenger, a railroad acts in the capacity of a common carrier, and is therefore liable as an insurer.² But this extends only so far as to include such property delivered to the carrier as is

Am. & Eng. R. Cas. 246 (money intended for investment not baggage); Texas etc. R. Co. v. Capps (Tex., 1884), 16 Am. & Eng. R. Cas. 118 (samples as baggage); Kansas City etc. R. Co. v. Morrison, 34 Kan. 502 (mechanics' tools as baggage); Blumenthal v. Maine Cent. R. Co., 79 Me. 550; 34 Am. & Eng. R. Cas. 247 (merchandise not baggage); Carlson v. Oceanic S. Nav. Co., 109 N. Y. 359; 34 Am. & Eng. R. Cas. 215 (jewelry—notice to carrier); New York Cent. etc. R. Co. v. Fraloff, 100 U. S. 24 (275 yards of laces, value \$10,000—held to be baggage); Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671; Thompson on Carriers of Passengers, p. 510 *et seq.*; 2 Rorer, on Railroads, p. 988; 3 Wood's Ry. Law, p. 1512-1516; 2 Redfield on Ry's (6th ed.), p. 58, *et seq.* Whether any particular property is "baggage" is a mixed question of law and fact. Thompson on Carriers of Passengers, p. 510; New York Cent. etc. R. Co. v. Fraloff, 100 U. S. 24. See also QUESTIONS OF LAW AND FACT; Brock v. Gale, 14 Fla. 523.

Property of Other Persons.—Ordinarily a passenger cannot include in his baggage the effects of other persons. If he does so a railroad company will not be responsible for loss or injury. First National Bank v. Marietta etc. R. Co., 20 Ohio St. 260; Weed v. Saratoga etc. R. Co., 19 Wend. (N. Y.) 534; Dexter v. Syracuse etc. R. Co., 42 N. Y. 326; Chicago etc. R. Co. v. Boyce, 73 Ill. 510; Mississippi etc. R. Co. v. Kennedy, 41 Miss. 671; Dunlap v. International Steamboat Co., 98 Mass. 371; Becher v. Great Eastern R. Co., L. R., 5 Q. B. 241.

But members of the same family traveling together may carry each other's effects. Dexter v. Syracuse etc. R. Co., 42 N. Y. 326; Curtis v. Delaware etc. R. Co., 74 N. Y. 116.

"Luggage."—The term luggage is one used in some jurisdictions—its meaning is exactly the same as baggage. Its use obtains in *England* and in *California* and in possibly other jurisdictions. See Pfister v. Central Pac. R.

Co., 70 Cal. 169; 27 Am. & Eng. R. Cas. 246.

1. Isaacson v. New York Cent. R. Co., 94 N. Y. 278; 16 Am. & Eng. R. Cas. 188; Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671; Smith v. Boston etc. R. Co., 44 N. H. 325; Smith v. Boston etc. R. Co., 44 N. H. 330; Chicago etc. R. Co. v. Fahey, 52 Ill. 81; Angell on Carriers, §§ 107, 116; Atchison etc. R. Co. v. Brewer, 20 Kan. 669; Glasco v. New York Cent. R. Co., 36 Barb. (N. Y.) 557.

Compare Wilson v. Grand Trunk R. Co., 56 Me. 60; 57 Me. 138, where baggage forwarded after passenger had passed over the connecting line was charged for as freight. See also Elkins v. Boston etc. R. Co., 23 N. H. 287.

A statute which provides a penalty in case a railroad company refuses to carry baggage does not preclude an injured party from his remedy by an action for damages. Norfolk etc. R. Co. v. Irvine, 84 Va. 553.

The carrier's liability for baggage lost by its negligence is not affected by the mere fact that the owner traveled on a free pass. McGill v. Rowland, 3 Pa. St. 451; 45 Am. Dec. 654; Malone v. Boston etc. R. Co., 12 Gray (Mass.) 588; Rice v. Illinois Cent. R. Co., 22 Ill. App. 643.

2. **Carrier Liable as Insurer of Baggage.**—Camden etc. R. Co. v. Burke, 13 Wend. (N. Y.) 611; 28 Am. Dec. 488; Merrill v. Grinnell, 30 N. Y. 594; Isaacson v. New York etc. R. Co., 94 N. Y. 278; 16 Am. & Eng. R. Cas. 138; Montgomery etc. R. Co. v. Culver, 75 Ala. 587; 22 Am. & Eng. R. Cas. 411; Davis v. Michigan Southern etc. R. Co., 22 Ill. 278; Mobile etc. R. Co. v. Hopkins, 41 Ala. 486; 94 Am. Dec. 607; Illinois Cent. R. Co. v. Troustine, 64 Miss. 834; 31 Am. & Eng. R. Cas. 99; Louisville etc. R. Co. v. Katzenberger, 16 Lea (Tenn.) 380; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Shaw v. Northern Pac. R. Co., 40 Minn. 144 (company held liable as insurer—not warehouseman, where baggage was stored for company's convenience);

actually baggage; the carrier has a right to limit the amount which it will carry as baggage;¹ and if by means of fraud or misrep-

Cohen v. Southeastern R. Co., 2 Exch. Div. 253; 20 Moak's Rep. 524; Thompson on Carriers of Pass., p. 489; 2 Redfield on Ry's (6th ed.), § 171 (where it is said that this is an elementary principle of the law); 2 Rorer on Railroads, 991.

See also *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348, where the distinction is drawn between the liability of carriers of goods and carriers of passengers.

In 2 Kent's Com. (13th ed.) p. 601, it is said, "the custody of baggage is an accessory to the principal contract; and the modern doctrine and the tendency of the modern cases seem to be to place coach proprietors, in respect to baggage, upon the ordinary footing of common carriers." See also *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85; *Brooke v. Pickwick*, 4 Bing. 218; 13 E. C. L. 404.

But a railroad company is not liable for lost baggage, unless it is shown to have been in its possession, or that it has contracted in some way to transport it; and voluntary assistance by the agents of the company in looking for the baggage, or an offer by way of gratuity, to pay on account of it, will not render the company liable. *Michigan etc. R. Co. v. Meyers*, 21 Ill. 627.

The proprietors of a line of stages contracted with a railroad company to convey its passengers from one terminus of the road to various points, upon through tickets issued by the company at the other terminus of the road. It was held that the proprietors of the stage line were the agents of the railroad company, so as to make the latter liable for baggage lost on the stage line. *Wilson v. Chesapeake etc. R. Co.*, 21 Gratt. (Va.) 654.

When Liability Attaches.—The liability of the carrier attaches as soon as baggage is received for transportation, even though the owner has not paid his fare. *Logan v. Pontchartrain R. Co.*, 11 Rob. (La.) 24; 43 Am. Dec. 199; *Woods v. Devin*, 13 Ill. 747; 56 Am. Dec. 483; *Dibble v. Brown*, 12 Ga. 217; 56 Am. Dec. 460; *Illinois Cent. R. Co. v. Tronstine*, 64 Miss. 834; 31 Am. & Eng. R. Cas. 99; *Shaw v. Northern Pac. R. Co.*, 40 Minn. 144.

Tender or Demand.—A tender of lost baggage more than a year after de-

mand was made for it will not relieve the carrier from liability. *Lake Shore etc. R. Co. v. Warren* (Wyoming Ter. 1885), 21 Am. & Eng. R. Cas. 302.

In *Garvey v. Camden etc. R. Co.*, 1 Hilt. (N. Y.) 280, it is said that proof of delivery of trunk to carriers and of loss makes out a *prima facie* case; there need be no demand made for it.

Authority of Baggage-master.—In the absence of special authority to do so, a baggage master has no power to bind his company by a contract to carry baggage beyond its terminus, or by fixing a special or unusual mode of delivery. *Isaacson v. New York Cent. R. Co.*, 94 N. Y. 278; 16 Am. & Eng. R. Cas. 188. See also *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69.

A passenger has a right to regard the man who handles and takes charge of baggage on the arrival of the train at a station, as the authorized agent of the company on whose road he is traveling, and notice to such persons as to the destination of the baggage is notice to the company. *Ouimit v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646. And if such agent checks the baggage over the wrong route and it is injured the company is liable as an insurer. *Estee v. St. Paul etc. R. Co.*, (Supreme Ct.), 7 N. Y. Supp. 863.

1. It is a reasonable regulation that no goods, merchandise, or other similar property will be carried on passenger cars except what is actually baggage. *Norfolk etc. R. Co. v. Irvine*, 85 Va. 217; 37 Am. & Eng. R. Cas. 27; *Doyle v. Kiser*, 6 Ind. 242; *Collins v. Boston etc. R. Co.*, 10 Cush. (Mass.) 506; *Merrill v. Grinnell*, 30 N. Y. 594; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586; 41 Am. Dec. 767; *Blumenthal v. Maine Cent. R. Co.*, 79 Me. 350; 34 Am. & Eng. R. Cas. 247; *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348.

In the case of *Norfolk etc. R. Co. v. Irvine*, 84 Va. 553, it was held that a railroad company may properly require a peddler to make affidavit as to the contents of his trunk, and if he refuses to do so may decline to carry it. The court by Lacy, J., said: "The company cannot be required to transport merchandise or other freight not baggage on its passenger trains which have not been equipped for such use; and the plaintiff having exacted such service of

sensation it is induced to receive more for carriage, it is liable for such excess only as an ordinary bailee for hire.¹ If, however, it receives for transportation as baggage any trunk or similar receptacle with a knowledge of its contents, it is liable for the full value of the property if it is lost.²

As to the right of a carrier to limit its liability, the rule is this: it may legally contract for exemption from the liability imposed by the common law by which it becomes an insurer, but on grounds of public policy it cannot be allowed to contract for its exemption from liability for damages occasioned by the negligence or willful default of itself or of its servants.³ In order for

these trains as a traveling merchant, if he had ceased such employment and business it was a simple and easy act for him to so certify. A carrier of passengers is only required to carry baggage under a certain weight, and may by law, or otherwise, restrict the amount to be carried for one passenger so the limit does not rest below that fixed by the statute, and may also refuse to carry anything as luggage except the passengers' ordinary luggage." *Phelps v. London etc. R. Co.*, 19 C. B., N. S. 321; 115 E. C. L. 321; *Norfolk etc. R. Co. v. Irvine*, 85 Va. 217; 37 Am. & Eng. R. Cas. 227.

In *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671, the court by Peyton, J., said: "The implied undertaking of the proprietors of stage-coaches, railroads, and steamboats to carry in safety the baggage of passengers, is not unlimited, and cannot be extended beyond ordinary baggage, which consists of such articles of necessity or convenience as are usually carried by passengers for their personal use, comfort, and convenience; and not merchandise or other valuables, although carried in trunks of passengers, which are not designed for any such purposes." *Angell on Carriers* 115; *Story on Bailments* § 449.

1. *Cincinnati etc. R. Co. v. Marcus*, 38 Ill. 219; *Michigan Southern etc. R. Co. v. Oehm*, 56 Ill. 293; *Chicago etc. R. Co. v. Shea*, 66 Ill. 471; *Del Valle v. Steamboat Richmond*, 27 La. Ann. 90.

In other cases the carrier is held liable only as a bailee without hire. *Smith v. Boston etc. R. Co.*, 44 N. H. 325; *Stimpson v. Connecticut River R. Co.*, 98 Mass. 83.

The carrier is not bound to inquire as to the contents of a passenger's trunk, but has a right to rely upon the representation arising by implication that it contains nothing more than

baggage. *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348; *Merchants' Despatch Transp. Co. v. Bolles*, 80 Ill. 473.

2. *Central Trust Co. v. Wabash etc. R. Co.*, 32 Fed. Rep. 566; 38 Fed. Rep. 63; 39 Am. & Eng. R. Cas. 592; *Com. v. Connecticut River R. Co.*, 15 Gray (Mass.) 447 (company held liable to penalty for refusal to carry even when its agent who received the baggage for transportation had no authority to do so); *Chicago etc. R. Co. v. Conklin*, 32 Kan. 55; 16 Am. & Eng. R. Cas. 116.

If a carrier has reasonable ground for refusing to receive and carry persons or property applying, he is bound to make the objection at the time the application is made. If, without making objection, he receives the persons or property for transportation, his liability is the same as though no ground for refusal existed. *Hannibal R. Co. v. Swift*, 12 Wall. (U. S.) 262.

Evidence that a passenger delivered to the baggage-master a package of merchandise, and received a check for it on showing his ticket, that the baggage-master knew it was merchandise, and that other passengers had similar packages, will not warrant a finding that the corporation agreed to transport the merchandise, or become liable for it as a common carrier, in the absence of evidence of an agreement that it should be carried as freight, or that the baggage-master had authority to bind the corporation to carry merchandise as personal baggage. *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322. Compare *Minter v. Pacific R. Co.*, 41 Mo. 503, where the company was held liable though its baggage-master had been expressly instructed not to receive such baggage.

3. *Mobile etc. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607; *Camden etc. R. Co. v. Burke*, 13 Wend. (N. Y.)

such a limitation to be of any force, it must be by special and express contract; a general notice is not sufficient.¹

In no case is a railroad company to be held liable where baggage is not intrusted to its keeping, but is retained by the passenger, except where the loss is occasioned by its own negligence.²

611; 28 Am. Dec. 488; *Swindler v. Hilliard*, 2 Rich. (S. Car.) 286; *Sager v. Portsmouth etc. R. Co.*, 31 Me. 228; 50 Am. Dec. 659; *Bingham v. Rogers*, 6 W. & S. (Pa.) 495; 40 Am. Dec. 581.

The status of railroad companies as quasi public institutions and the uniform policy of the law forbid that they should be allowed in any case to exempt themselves from liability for the consequences of their own negligence or wrongdoing. *Mobile etc. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607; *Cincinnati etc. R. Co. v. Pontius*, 19 Ohio St. 221; CARRIERS OF GOODS, vol. 2, p. 811, *et seq.*; *Thompson on Carriers of Pass.* 471-525; *infra*, this title, *Legal Status of Railroads*.

1. *Mauritz v. New York etc. R. Co.*, 23 Fed. Rep. 765; 21 Am. & Eng. R. Cas. 286; *Kansas City etc. R. Co. v. Rodebaugh*, 38 Kan. 45; 34 Am. & Eng. R. Cas. 219; *Baltimore etc. R. Co. v. Campbell*, 36 Ohio St. 647; 3 Am. & Eng. R. Cas. 246; *Malone v. Boston etc. R. Co.*, 12 Gray (Mass.) 388; *Anderson v. Canadian Pac. R. Co.*, 17 Ont. Rep. 747; 40 Am. & Eng. R. Cas. 624; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; 72 Am. Dec. 455. In all of these cases there was printed on the ticket, a stipulation that the railroad company's liability for lost baggage should not exceed a certain amount, and in each of them it was held that the contract did not bind the passenger, unless it was brought to his notice, and that there was no presumption that he had seen or assented to the contract, merely because he had bought the ticket. See also TICKETS AND FARES, where the subject of ticket contracts is examined. *Compare* *Pennsylvania R. Co. v. Schwarzenberger*, 45 Pa. St. 208.

But where a passenger signs a ticket which contains a limitation, a limitation contained therein is valid against him, even though he did not read it. *Bate v. Canadian Pac. R. Co.*, 15 Ont. App. 388; 37 Am. & Eng. R. Cas. 208. There must be a plain and distinct proposal. *Camden etc. R. Co. v. Baldauf*, 16 Pa. St. 67 (where it was held

to be no proposal if purchaser could not understand English); *Cressin v. Philadelphia etc. R. Co.*, 11 Phila. (Pa.) 597; 32 Leg. Int. (Pa.) 363; *Steers v. Liverpool etc. Co.*, 57 N. Y. 1; *Mauritz v. New York etc. R. Co.*, 23 Fed. Rep. 765; 21 Am. & Eng. R. Cas. 286 (purchaser unable to read—held that no contract for limitation arose).

There Must be an Acceptance.—Applying for a pass and actually using it after attention was called to its terms is an assent. *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196.

So also assent is implied from the taking and constant use of a commutation ticket. *Cresson v. Philadelphia etc. R. Co.*, 11 Phila. (Pa.) 597; 32 Leg. Int. 363; *Louisville etc. R. Co. v. Harris*, 9 Lea (Tenn.) 80; 42 Am. Rep. 668; *Bland v. Southern Pac. R. Co.*, 55 Cal. 570; 3 Am. & Eng. R. Cas. 285; 36 Am. Rep. 50; *Hoffbauer v. Delhi etc. R. Co.*, 52 Iowa 342; 35 Am. Rep. 278. *Compare* *Malone v. Boston etc. R. Co.*, 12 Gray (Mass.) 388. See TICKETS AND FARES.

2. Not Liable for Baggage Unless Intrusted to Its Keeping.—*Henderson v. Louisville etc. R. Co.*, 20 Fed. Rep. 430; 16 Am. & Eng. R. Cas. 397; aff'd 123 U. S. 61; *Williams v. Keokuk etc. Packet Co.*, 3 Cent. L. J. 400; *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85; *Kingsley v. Lake Shore etc. R. Co.*, 19 Alb. L. J. 113; *Tower v. Utica etc. R. Co.*, 7 Ill. (N. Y.) 47 (passenger's overcoat left by him on the seat); *Weeks v. New York etc. R. Co.*, 72 N. Y. 50; *Abbott v. Bradstreet*, 55 Me. 530; *Clark v. Burns*, 118 Mass. 275; *Del Valle v. Steamboat Richmond*, 27 La. Ann. 90; *American Steamship Co. v. Bryan*, 83 Pa. St. 446; *Talley v. Great Western R. Co.*, L. R., 6 C. P. 44; *Bergheim v. Great Eastern R. Co.*, L. R., 3 Ch. Div. 221; 30 Moak's Rep. 117; *Sewall v. Allen*, 6 Wend. (N. Y.) 335; *Great Western R. Co. v. Bunch*, L. R., 13 App. Cas. 31; 34 Am. & Eng. R. Cas. 224. In all these cases, the property of the passenger was stolen from him while it was in his custody.

It is the duty of a railroad company, not only to transport baggage, but to store it after its arrival at its destination, and hold it ready for delivery until it is called for by the owner, and its liability as a common carrier continues until the owner has had a reasonable time to call for it; after the lapse of such time it remains liable only as a warehouseman.¹ Where the baggage is stored at

But in order to relieve the company from liability, it must distinctly appear that the passenger had assumed the custody of the article in question. *Le Conte v. London etc. R. Co.*, L. R., 1 Q. B. 54; *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr., N. S. (N. Y.) 229; *Gore v. Norwich etc. Transp. Co.*, 2 Daly (N. Y.) 254.

Traveling Bag Dropped Out of Window.—In the case of *Henderson v. Louisville etc. R. Co.*, 20 Fed. Rep. 430; 16 Am. & Eng. R. Cas. 397, aff'd 123 U. S. 61; 31 Am. & Eng. R. Cas. 95, it was held that a railroad company is not responsible for the loss of a bag containing money and jewelry carried in the hand of a passenger, and accidentally dropped by her through an open window of the car, although upon notice of the loss it refuses to stop the train short of the usual station, in order to enable her to recover it.

1. Duty as Carrier or Warehouseman.—*Curis v. Avon etc. R. Co.*, 49 Barb. (N. Y.) 148; *Roth v. Buffalo etc. R. Co.*, 34 N. Y. 548; *Mattison v. New York etc. R. Co.*, 57 N. Y. 552; *Cary v. Cleveland etc. R. Co.*, 29 Barb. (N. Y.) 35; *Mote v. Chicago etc. R. Co.*, 27 Iowa 22; *Chicago etc. R. Co. v. Fairclough*, 52 Ill. 106; *Quimit v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646; *Ross v. Missouri etc. R. Co.*, 4 Mo. App. 583; *Louisville etc. R. Co. v. Mahan*, 8 Bush (Ky.) 184; *Kansas City etc. R. Co. v. Morrison*, 34 Kan. 502; 23 Am. & Eng. R. Cas. 481 (failure to deliver trunk when called for). *Patscheider v. Great Western R. Co.*, L. R., 3 Exch. Div. 153; 31 Moak's Rep. 165; *Hutchins on Carriers*, § 212.

In the first case, the passenger was unable from lameness to take away his baggage on arriving at his destination, and he made an arrangement with the baggage-master to retain it until he could send for it. The company's liability as a common carrier was held to continue, until the baggage was so sent for. *Curis v. Avon etc. R. Co.*, 49 Barb. (N. Y.) 148.

Compare Vineburg v. Grand Trunk R. Co., 13 Ont. App. 93; 27 Am. &

Eng. R. Cas. 271, where it was held that a company was liable only as a warehouseman where passenger failed to call for his baggage immediately on arriving at his destination, but sent for it next morning. *Compare also Dimming v. New York etc. R. Co.*, 49 N. Y. 546 (delay in removing baggage caused by negligence of company's servants).

In *Illinois* the carrier's liability as insurer does not cease until the baggage is safely stored. *Bartholomew v. St. Louis etc. R. Co.*, 53 Ill. 227; *Chicago etc. R. Co. v. Fairclough*, 52 Ill. 106; *Chicago etc. R. Co. v. Boyce*, 73 Ill. 510.

As to what is the liability of a warehouseman, see WAREHOUSEMEN.

What is Reasonable Time.—What is a reasonable time for the removal of baggage and when it has elapsed are mixed questions of law and fact to be decided by the jury, upon the facts and circumstances of each case. *Mote v. Chicago etc. R. Co.*, 27 Iowa 22; *Louisville etc. R. Co. v. Mahan*, 8 Bush (Ky.) 184.

Reasonable time for the removal of baggage is not necessarily the same as that for the removal of freight, being usually much shorter. *Hutch. on Carr.* § 708; *Roth v. Buffalo etc. R. Co.*, 34 N. Y. 548.

Depending as it does upon the circumstances of each particular case, no fixed rule can be laid down. Instances of what has been held reasonable time may be seen in *Roth v. Buffalo etc. R. Co.*, 34 N. Y. 548; *Jones v. Norwich etc. Transp. Co.*, 50 Barb. (N. Y.) 193; *Chicago etc. R. Co. v. Boyce*, 73 Ill. 510; 24 Am. Rep. 268 (reasonable time not extended by reason of passenger's illness); *Jacobs v. Tutt*, 33 Fed. Rep. 412; *Quimit v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646.

Baggage Delivered with Instructions to Forward.—In the case of *Illinois Cent. R. Co. v. Troustine*, 64 Miss. 834; 31 Am. & Eng. R. Cas. 99, a party delivered baggage at a railroad station with instructions to the baggage-master to ship it to a specified place on the next day unless directed to the contrary. No subsequent directions were given. It was

an intermediate station, to be sent forward on a connecting road, the liability of the company is that of a common carrier, not of a warehouseman.¹

A check which is delivered upon the receipt of baggage by the company is of no importance as constituting a contract between the owner of the baggage and the company; it is mere *prima facie* evidence that the company has the baggage.²

The old rule of evidence that a party whose baggage was lost constituted an exception to the rule disqualifying as witnesses those interested in the suit is no longer of any force, in view of the general removal by statute of the disqualification on the ground of interest.³

In computing the damages the market value of the articles lost is a proper measure of compensation.⁴

held that it was the duty of the company to ship it on not receiving further directions, and that from that time it held the baggage for immediate shipment, and its liability as carrier attached. *Citing 2 Redfield on Rys. 46-49; Hutch. on Carriers, § 63.*

1. *Ouimit v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646.

Baggage Stored for Passenger's Convenience.—But where for the passenger's convenience, his baggage is stored at a station while he stops over, the carrier's liability is that of a warehouseman, and he is not liable for loss by fire not caused by his negligence. *Laffray v. Grummond*, 74 Mich. 186; 37 Am. and Eng. R. Cas. 235; *Rock Island etc. R. Co. v. Fairclough*, 52 Ill. 106; *Holger v. Chicago etc. R. Co.*, 63 Wis. 100; 21 Am. & Eng. R. Cas. 308; *Clark v. Eastern R. Co.*, 139 Mass. 423; 21 Am. & Eng. R. Cas. 307.

So where a passenger, on arriving at his destination, takes his baggage into his own exclusive possession, but afterwards, for his own convenience, hands it to the baggage-master to keep for him, the railroad company is liable only as a gratuitous bailee. *Minor v. Chicago etc. R. Co.*, 19 Wis. 40; *Mulligan v. Northern Pac. R. Co.* (Dakota 1886); 27 Am. & Eng. R. Cas. 33; *Texas etc. R. Co. v. Capps* (Texas, 1884); 16 Am. & Eng. R. Cas. 118.

2. **Effect of Check.**—*Hickox v. Naugatuck R. Co.*, 31 Conn. 281; *Davis v. Michigan Southern R. Co.*, 22 Ill. 278; *Illinois Central R. Co. v. Copeland*, 24 Ill. 332 (and that the check-holder owns the baggage); *Dill v. South Carolina R. Co.*, 7 Rich. (S. Car.) 158 ("it stands in the place of a bill of lading"); *Isaac-*

son v. New York etc. R. Co., 94 N. Y. 278; 16 Am. & Eng. R. Cas. 188; *Davis v. Cayuga etc. R. Co.*, 10 How. Pr. (N. Y.) 330; *Denver etc. R. Co. v. Roberts*, 6 Colo. 333; 18 Am. & Eng. R. Cas. 627; *Atchison etc. R. Co. v. Brewer*, 20 Kan. 669; *Louisville etc. R. Co. v. Weaver*, 9 Lea (Tenn.) 38; 16 Am. & Eng. R. Cas. 218; *Alebeck v. St. Paul etc. R. Co.*, 39 Minn. 424.

See also *Anderson v. Wabash etc. R. Co.*, 65 Iowa 131; 18 Am. & Eng. R. Cas. 377, where a check was issued to two persons jointly, who sued jointly.

3. **Competency of Witnesses.**—See **WITNESSES**; 1 Greenl. Ev. (14th ed.), § 348; *Wharton on Ev.* § 419; *Harlow v. Fitchburgh etc. R. Co.*, 8 Gray (Mass.) 237; *Davis v. Michigan Southern etc. R. Co.*, 22 Ill. 278.

Evidence.—Testimony by a custom-house inspector as to the value of personal baggage usually carried by emigrants is admissible to prove value of certain baggage that was lost. *Carlson v. Oceanic S. Navigation Co.*, 109 N. Y. 359; 34 Am. & Eng. R. Cas. 215.

In an action for the loss of baggage, declarations of the company's servant that he could not find it are admissible in evidence. *Baltimore etc. R. Co. v. Campbell*, 36 Ohio St. 647; 3 Am. & Eng. R. Cas. 246. See also *Illinois Cent. R. Co. v. Troustine*, 64 Miss. 834; 31 Am. & Eng. R. Cas. 99.

4. **Damages.**—*Texas etc. R. Co. v. Ferguson* (Tex. 1882), 9 Am. & Eng. R. Cas. 395; *Lake Shore etc. R. Co. v. Warren* (Wyoming Ter. 1885), 6 Pac. Rep. 724; 21 Am. & Eng. R. Cas. 302; **DAMAGES**, vol. 5, p. 31; **CARRIERS OF GOODS**, vol. 2, p. 905, *et seq.*

In another case it is said that where

Where the passenger has a through ticket for passage over several connecting lines and baggage is checked from the initial station through to his destination, the question of liability for its loss becomes more complicated. There is no doubt that each company is liable if it can be shown that the loss occurred on its own line.¹ It is equally certain that if the several connecting lines are united continuous lines and parts of one system, each is responsible for the loss, since the whole constitute but one line, and are each the agents or partners of the others.² Where the connecting lines are distinct and independent the better rule seems to be that a carrier checking baggage through is not liable for a loss occurring beyond its own line in the absence of an express contract;³ there is only a burden of proof upon him to show

there is no proof as to the value of the contents of the lost trunk, or of what they consisted, the jury may give damages proportioned to the value of the articles which they, in their judgment, think the trunk did and might fairly contain. *Dill v. South Carolina R. Co.*, 7 Rich. (S. Car.) 158; 62 Am. Dec. 497.

Damages cannot be recovered for expense incurred in making search for lost baggage. *Texas etc. R. Co. v. Ferguson* (Texas, 1882), 9 Am. & Eng. R. Cas. 395.

Exemplary damages may be awarded where the passenger's baggage was wrongfully carried beyond the station at which he desired it to be delivered to him, if the injury be committed willfully or with such negligence as indicates a wanton disregard of the rights of others. *Pittsburgh etc. R. Co. v. Lyon*, 123 Pa. St. 140; 37 Am. & Eng. R. Cas. 231.

Delay of Baggage—Measure of Damages.—In a suit against a railroad for damages and expenses incurred by delay of baggage, it is competent to show the damages sustained by reason of being compelled to buy clothes to supply the place of those delayed in their delivery by the company; also in waiting for the arrival of the goods. The difference in the value of the goods when they were delivered, and when they should have been delivered, forms no measure of damages. *International etc. R. Co. v. Phillips*, 63 Tex. 590.

1. *Chicago etc. R. Co. v. Fahey*, 52 Ill. 81; *Atchison etc. R. Co. v. Roach*, 35 Kan. 740; 27 Am. & Eng. R. Cas. 257.

In *McCormick v. Hudson River R. Co.*, 4 E. D. Smith (N. Y.) 181, the last of several connecting lines was held

liable for the loss of baggage, since it was shown that the baggage had been safely delivered to it.

In *Lin v. Terre Haute etc. R. Co.*, 10 Mo. App. 125, it was held that evidence that when delivered by the last carrier baggage was broken open and part of its contents missing is *prima facie* evidence that the loss occurred through the negligence or fraud of the last carrier.

2. Joint Liability.—*Barter v. Wheeler*, 49 N. H. 9; *Texas etc. R. Co. v. Ferguson* (Tex. 1882), 9 Am. & Eng. R. Cas. 395; *Texas etc. R. Co. v. Fort* (Tex. 1882), 9 Am. & Eng. R. Cas. 392; *Hart v. Rensselaer etc. R. Co.*, 8 N. Y. 37; *Peterson v. Chicago etc. R. Co.*, 80 Iowa 92.

2 Redfield on Rys. (6th ed.), § 171, par. 2.

3. Connecting but Independent Lines.—The rule of the text seems to be supported by principle as well as authority. The undertaking on the part of the initial carrier is to transport the passenger and his baggage safely along its line and to deliver the latter to the connecting line in good order. And unless a special contract or undertaking to do more can be proven there can exist no liability on such carrier's part for losses beyond its own line. *Central Trust Co. v. Wabash etc. R. Co.*, 31 Fed. Rep. 247; 31 Am. & Eng. R. Cas. 103; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; 18 Am. & Eng. R. Cas. 339; *Felder v. Columbia etc. R. Co.*, 21 S. Car. 35; 27 Am. & Eng. R. Cas. 264 (sale of through ticket no evidence of a joint liability between the roads); *Isaacson v. New York Cent. R. Co.*, 94 N. Y. 297; 16 Am. & Eng. R. Cas. 188; *Milnor v. New York etc. R. Co.*, 53 N. Y. 363; 5 Am. Ry. Rep. 381;

delivery in good order to its connecting line.¹ This rule, however, is not universally accepted, and, it must be conceded, there is much conflict of authority in the various jurisdictions.²

2 Rorer on Railroads 997; TICKETS AND FARES; CARRIERS OF GOODS, vol. 2, p. 859, *et seq.*

This rule is particularly true when the initial carrier expressly stipulates that it acts only as the agent of connecting roads. *Pennsylvania Cent. R. Co. v. Schwarzenberger*, 45 Pa. St. 208; *Fowles v. Great Western R. Co.*, 7 Exch. 699.

1. *Montgomery etc. R. Co. v. Culver*, 75 Ala. 587; 22 Am. & Eng. R. Cas. 411; *Mobile etc. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607.

Must Deliver to Connecting Carrier.

—In checking baggage through it is a part of the contract that the carrier will deliver the baggage to the connecting line in safe condition; if it deliver it to the right line its responsibility is terminated; if it does not, but there is a misdelivery, it remains liable as an insurer. *Isaacson v. New York Cent. R. Co.*, 94 N. Y. 278; 16 Am. & Eng. R. Cas. 188; *Johnson v. New York Cent. R. Co.*, 33 N. Y. 610; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500.

The proprietors of a railroad, who receive passengers and commence their carriage at the station of another road, are bound to have a servant there to take charge of the baggage, until it is placed in their cars; and if it is the custom of the baggage-master of the station, in the absence of such servant, to receive and take charge of baggage in his stead, the proprietors will be responsible for baggage so delivered to him. *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69.

2. **Kansas.**—In *Atchison etc. R. Co. v. Roach*, 35 Kan. 740; 27 Am. & Eng. R. Cas. 257, the rule previously stated in the text is qualified, and it is said that the sale of a through ticket for a single fare, together with the checking of the baggage through, is evidence of an undertaking by the initial carrier to carry the whole distance, and in the absence of any evidence as to limitation of its liability, it becomes liable for all losses of baggage wherever occurring. Any company, however, on whose line the loss can be shown to have occurred can be held liable.

Tennessee.—The view of the *Kansas* case just cited is also that taken in *Tennessee*. *Louisville etc. R. Co. v.*

Weaver, 9 Lea (Tenn.) 38; 16 Am. & Eng. R. Cas. 48; *Furstenheim v. Memphis etc. R. Co.*, 9 Heisk. (Tenn.) 238; 19 Am. Ry. Rep. 409. In this latter case the plaintiff bought a through ticket from the Pennsylvania railroad at New York, to Memphis, and had his baggage checked through. It was held in a suit against the last connecting line that there was no privity of contract between it and the road selling the ticket and therefore it was not responsible for the loss.

See also *East Tenn. etc. R. Co. v. Montgomery*, 44 Ga. 278.

Ohio.—The courts of *Ohio* take the same view as those of *Kansas* and *Tennessee*, and hold that the collection of fare for the entire route and the checking of the baggage through is evidence of an undertaking to carry the baggage safely throughout the entire route. *Baltimore etc. R. Co. v. Campbell*, 36 Ohio St. 647; 3 Am. & Eng. R. Cas. 246.

Wisconsin.—In *Candee v. Pennsylvania R. Co.*, 21 Wis. 582, the court inclined to the opinion now held by the *Kansas* and *Tennessee* courts, but the point was not adjudicated.

In this case the plaintiff had a through ticket to New York with the option of going via A or P. He had his baggage checked via A, but before reaching A he had it rechecked via P. It was held that the railroad company entered into no new contract by rechecking the trunk, but was merely acting in pursuance of the original agreement.

Georgia.—In *Georgia* the rule is laid down that where the passenger has a through ticket, with a coupon for each road, and his baggage is checked through, he can hold the last line responsible. It is said that this line may reimburse itself from that one of the links of the combination whose fault or negligence lost the baggage. *Wolff v. Central R. Co.*, 68 Ga. 653; 6 Am. & Eng. R. Cas. 441; *Savannah etc. R. Co. v. McIntosh*, 73 Ga. 532; 27 Am. & Eng. R. Cas. 269.

In the case of *Hawley v. Screven*, 62 Ga. 347, it was held that the initial carrier was responsible for the loss of baggage, even though it proved delivery to the next connecting line.

XV. LIABILITY FOR THE CREATION OR MAINTENANCE OF NUISANCES

—1. **Generally.**—Aside from the law relating to nuisances by railroads, as already presented, there is little to be said in this connection.¹ The general principles which determine what constitutes a nuisance, and the remedy applicable, apply here as well as in other cases.²

1. **Cross - References.**—See NUISANCES, vol. 16, p. 922, *et seq.*

Indictment of railroad corporations for erecting or maintaining nuisances is treated in CORPORATIONS, vol. 4, p. 267; *infra*, this title, *Liability to Indictment*.

Nuisances by railroad companies in the occupation or obstruction of highways is treated in HIGHWAYS, vol. 9, p. 408; STREETS.

2. **What Constitutes a Nuisance.**—As sufficient definitions have already been given, it may be enough to present mere instances here. The following have been held to constitute a nuisance:

The keeping of the iron rails of a railroad six or eight inches above the level of a highway at the public crossing. Paducah etc. R. Co. v. Com., 80 Ky. 147.

Workshops causing noise and smoke, thereby injuring church property adjacent. Baltimore etc. R. Co. v. Fifth Baptist Church, 108 U. S. 317; 11 Am. & Eng. R. Cas. 15; First Baptist Church v. Schenectady etc. R. Co., 5 Barb. (N. Y.) 79; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316; 56 Am. Rep. 1.

A bridge causing overflow is a continuing nuisance. Omaha etc. R. Co. v. Standen, 22 Neb. 343; 34 Am. & Eng. R. Cas. 179.

The crossing of a turnpike by trains at a rate of from 15 to 20 miles an hour without warnings or signals. Louisville etc. R. Co. v. Com., 80 Ky. 143; 44 Am. Rep. 468.

Also a bridge over a navigable stream which interferes with navigation. Any party whose boat is stopped by such bridge has a cause of action. Little Rock R. Co. v. Brooks, 39 Ark. 403; 17 Am. & Eng. R. Cas. 152.

A damming or partial damming of a creek in certain cases. Union Trust Co. v. Cuppy, 26 Kan. 574; 11 Am. & Eng. R. Cas. 162.

Engine-house near dwelling, so used as to practically deprive the occupant of the use of his house as a residence. Cogswell v. New York etc. R. Co., 103 N. Y. 10; 56 Am. Rep. 6, note; 27 Am.

& Eng. R. Cas. 376 (injunction granted).

Steam-engine used to work cable for propelling street cars under license from municipality, causing noise, smoke, and jarring of adjacent buildings. Tuebner v. California Street R. Co., 66 Cal. 171; 19 Am. & Eng. R. Cas. 147.

A heap of refuse on land near highway, liable to frighten horses. Brown v. Eastern etc. R. Co., 22 Q. B. Div. 391; 37 Am. & Eng. R. Cas. 558. Or a hand-car left on track, so loaded as to frighten horses. Cincinnati R. Co. v. Com., 80 Ky. 139.

A grade crossing in a particular case. Appeal of New York etc. R. Co., 58 Conn. 532; 45 Am. & Eng. R. Cas. 109.

Allowing cars to remain on the track in a street, whereby ingress and egress of abutting landowner is obstructed. Frankle v. Jackson, 30 Fed. Rep. 398; Angel v. Pennsylvania R. Co., 38 N. J. Eq. 58. Compare Lakkie v. Chicago etc. R. Co., 44 Minn. 438.

A railroad company which habitually runs its trains without giving reasonable and proper signals at crossings is indictable for nuisance, irrespective of whether any express law prescribed the duty of giving signals. The obligation to give reasonable signals is implied by law wherever a person assumes to conduct a highly dangerous operation or business. Louisville etc. R. Co. v. Com., 13 Bush (Ky.) 388; 26 Am. Rep. 205.

And in general, all those impediments and obstructions to the free use of roads and streets which are not absolutely necessary to the making and using of the railroad are nuisances, whether the obstruction be expressly prohibited or not, and whether the company be expressly required to construct another road or not. Tennessee etc. R. Co. v. Adams, 3 Head (Tenn.) 596.

In a suit to enjoin the building of a track across a street, plaintiff showed that he owned improved property on one of the streets where he lived and did business as a retail merchant; that

the street on both sides of the proposed crossing was populous, filled with stores, shops, boarding houses, residences, etc.; that the proposed track would divert travel from it, thereby decreasing the value of his property, and taking away some of his trade. It was held a sufficient showing of special injury to entitle the plaintiff to an injunction. *Glaessner v. Anheuser-Busch Brew. Assoc.*, 100 Mo. 508. Compare *Fogg v. Nevada etc. R. Co.*, 20 Nev. 429.

In Streets and Highways.—The occupation of a street or highway by a railroad without authority of law is a continuing nuisance. *Denver etc. R. Co. v. Denver City R. Co.*, 2 Colo. 673; *Cain v. Chicago etc. R. Co.*, 54 Iowa 255; *Kavanaugh v. Mobile etc. R. Co.*, 78 Ga. 271; 32 Am. & Eng. R. Cas. 267; *Fanning v. Osborne*, 102 N. Y. 441; 25 Am. & Eng. R. Cas. 252; *Uline v. New York Cent. etc. R. Co.*, 101 N. Y. 98; 23 Am. & Eng. R. Cas. 3. And even when authority has been granted to occupy the street, any obstruction beyond what is absolutely necessary, is a nuisance. *Harmon v. Louisville etc. R. Co.*, 87 Tenn. 614; *Pennsylvania etc. R. Co. v. Angel*, 41 N. J. Eq. 316; 26 Am. & Eng. R. Cas. 559; *Tennessee etc. R. Co. v. Adams*, 3 Head (Tenn.) 596.

Where a track is laid in a highway for passenger purposes, the use of it for the operation of freight cars is a public nuisance. *McCartney v. Chicago etc. R. Co.*, 112 Ill. 611; 29 Am. & Eng. R. Cas. 326.

The carrying along the highway of freight cars loaded with offensive matter, constitutes a private nuisance to any who suffer thereby. *Neitzey v. Baltimore etc. R. Co.*, 5 Mackey (D. C.) 34; 26 Am. & Eng. R. Cas. 553.

It is held in several cases that a railroad track in a street is not necessarily a public nuisance *per se*. Nor can it be said as a matter of law that it is an obstruction, but that the fact that it is a nuisance must be proven. *Wabash etc. R. Co. v. People*, 12 Ill. App. 448; *State v. Louisville etc. R. Co.*, 86 Ind. 114; 10 Am. & Eng. R. Cas. 286; *Com. v. Wilkes Barre etc. R. Co.*, 127 Pa. St. 278.

So where a company has acquired the right to run through a city street, the laying of a second track is not necessarily a nuisance; the circumstances of the case and the actual hindrance must be considered. *Davis v. Chicago etc. R. Co.*, 46 Iowa 389.

For non-compliance with the requirement that a railroad company shall make and maintain proper approaches to a bridge made to carry the highway over the tracks an indictment for nuisance will lie. *People v. New York Cent. etc. R. Co.*, 74 N. Y. 302. See also *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63.

Other cases of nuisance may be seen in *Central R. Co. v. English*, 73 Ga. 366; 29 Am. & Eng. R. Cas. 530 (pond of water); *Wayland v. St. Louis etc. R. Co.*, 75 Mo. 548; 11 Am. & Eng. R. Cas. 543; *Drake v. Chicago etc. R. Co.*, 63 Iowa 302; 17 Am. & Eng. R. Cas. 45; *Neitzey v. Baltimore etc. R. Co.*, 5 Mackey (D. C.) 34; 26 Am. & Eng. R. Cas. 553; *Porterfield v. Bond*, 38 Fed. Rep. 391; 39 Am. & Eng. R. Cas. 48 (unlawful rate of speed).

What Are Not Nuisances.—Barb wire fence is not a nuisance, and company is not liable for the death of a colt caused by the animal's running against it. *Hillyard v. Grand Trunk R. Co.*, 8 Ont. Rep. 583; 23 Am. & Eng. R. Cas. 154.

Nor are sheds when built in conformity to ordinance of town. *Laviosa v. Chicago etc. R. Co.* (La. 1881), 4 Am. & Eng. R. Cas. 128.

Where the railroad crosses a highway below grade, the construction of a bridge of less width than the highway is not, *per se*, a nuisance. *People v. New York etc.*, 89 N. Y. 266; 10 Am. & Eng. R. Cas. 230.

Nuisance Created by Company's Servants.—A railroad company is not responsible for the acts of its employes in creating a nuisance by using a culvert under the railroad near the residence of the plaintiff for the purposes of a privy. *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190.

Authority of Municipal Corporations.—As to the authority of a municipal corporation to declare certain acts or structures a nuisance, and to abate the same, see **MUNICIPAL CORPORATIONS**, vol. 15, pp. 1178-1186; *State v. Heidenhain* (La. 1890), 7 So. Rep. 621; 43 Am. & Eng. R. Cas. 287; *Mayor etc. v. Georgia R. Co.*, 72 Ga. 800; 29 Am. & Eng. R. Cas. 477.

Measure of Damages.—The measure of damages is the impairment of the property affected by the nuisance during its continuance. The difference in market value, it is said, cannot be considered. *Harmon v. Louisville etc.*

2. Effect of Legislative Grant as Affecting Liability.—A company authorized by legislative grant to build and operate a railroad, is thereby relieved from liability for many of the consequences attending the construction and operation of the road, which, in the absence of such grant, would be actionable. The railroad is raised to the dignity of a public use, and the advantages secured to the general public are presumed to compensate for the inconveniences suffered.¹ Therefore, so long as it keeps within the scope of the power granted, a railroad company is completely protected from civil or criminal liability for nuisances arising as a natural and necessary result of the construction and operation of its road.² It is often said that the legislature can in no case

R. Co., 87 Tenn. 614. It must be confined to the time during which the nuisance continued. *Quinn v. Chicago etc. R. Co.*, 63 Iowa 510; 17 Am. & Eng. R. Cas. 63. It is a question for the jury. *Tuebner v. California St. R. Co.*, 66 Cal. 171; 19 Am. & Eng. R. Cas. 147. See also *DAMAGES*, vol. 5, p. 38; *NUISANCE*, vol. 16, p. 984, *et seq.*

Where the action is brought for deterioration in the value of real estate, from a nuisance of a permanent character, all damages for past and future injury to the property may be recovered in one suit; and one recovering such damages will be barred as to all future actions for the same cause. Authorities cited: *Chicago etc. R. Co. v. Loeb*, 118 Ill. 203; 27 Am. & Eng. R. Cas. 415.

Where railroad shops near a church are declared a nuisance, damages are not to be confined to the depreciation in the value of the church property, but extend to the inconvenience and discomfort caused to the congregation assembled. *Baltimore etc. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; 11 Am. & Eng. R. Cas. 317.

1. *Uline v. New York Cent. etc. R. Co.*, 101 N. Y. 96; 23 Am. & Eng. R. Cas. 3; *Clark v. Hannibal etc. R. Co.*, 36 Mo. 202; *People v. Law*, 34 Barb. (N. Y.) 494; *Rex v. Pease*, 4 B. & Ad. 30; 24 E. C. L. 17 (Parke, J.); *Rex v. Russell*, 6 B. & C. 566; 13 E. C. L. 254.

See also *BRIDGES*, vol. 2, p. 550; *FIRES BY RAILWAYS*, vol. 8, p. 1; *EMINENT DOMAIN*, vol. 6, p. 547; *WATER AND WATER COURSES*; *NUISANCE*, vol. 16, p. 1000.

"There is nothing unreasonable or inconsistent in supposing that the legislature intended that the part of the public using the highway should sus-

tain some inconvenience for the sake of the greater good to be obtained by another part of the public in the more speedy traveling along the new road." Parke, J., in *Rex v. Pease*, 4 B. & Ad. 30; 24 E. R. L. 17.

But where there is no legislative authority to build or operate the road, it is a continuing actionable nuisance. *Little Rock etc. R. Co. v. McGehee*, 41 Ark. 202; 20 Am. & Eng. R. Cas. 82; *Denver etc. R. Co. v. Denver City R. Co.*, 2 Colo. 673.

2. *State v. Louisville etc. R. Co.*, 86 Ind. 114; 10 Am. & Eng. R. Cas. 286; *Hatch v. Vermont Cent. R. Co.*, 28 Vt. 142; *Randall v. Jacksonville etc. R. Co.*, 19 Fla. 409; 17 Am. & Eng. R. Cas. 184; *Laviosa v. Chicago etc. R. Co.* (La. 1881), 4 Am. & Eng. R. Cas. 128; *Chope v. Detroit etc. R. Co.*, 37 Mich. 195; 26 Am. Rep. 512; *London etc. R. Co. v. Truman, L. R.*, 11 App. Cas. 45; 25 Am. & Eng. R. Cas. 116 (maintaining cattle yards not enjoined when on land acquired by statute for that purpose); *Randall v. Pacific R. Co.*, 65 Mo. 325; *State v. Louisville etc. R. Co.*, 86 Ind. 114; 10 Am. & Eng. R. Cas. 286; *Rogers v. Kennebec etc. R. Co.*, 35 Me. 319; *Uline v. New York Cent. etc. R. Co.*, 101 N. Y. 98; 23 Am. & Eng. R. Cas. 3 (leading case); *Billinger v. New York Cent. R. Co.*, 23 N. Y. 43; *Conklin v. New York etc. R. Co.*, 102 N. Y. 107; *People v. Law*, 34 Barb. (N. Y.) 94; *Eaton v. Boston etc. R. Co.*, 51 N. H. 504; 12 Am. Rep. 147; *Com. v. Erie etc. R. Co.*, 27 Pa. St. 339; *Tennessee etc. R. Co. v. Adams*, 3 Head (Tenn.) 596; *FIRES BY RAILWAYS*, vol. 8, p. 1; *NUISANCE*, vol. 16, p. 1000.

Compare First Baptist Church v. Schenectady etc. R. Co., 5 Barb. (N. Y.) 79.

authorize a private nuisance; but this principle, even if correct, cannot be held to deny the right of the legislature to relieve a company from liability for what would otherwise be a public nuisance.¹

A work authorized by law cannot be a nuisance; the term "public nuisance" applies only to something occasioned by acts done in violation of law. *Danville etc. R. Co. v. Com.*, 73 Pa. St. 29; *Hinchman v. Patterson Horse R. Co.*, 17 N. J. Eq. 75; 82 Am. Dec. 252.

Thus where the use of steam engines to draw cars over a street railroad is expressly authorized by an act of the legislature, and by the ordinances of the city council, such use cannot be abated as a public nuisance, even though it tends to the immediate annoyance of the citizens in general. *Vason v. South Carolina R. Co.*, 42 Ga. 631; *Hill v. Chicago etc. R. Co.*, 38 La. Ann. 599.

A railroad track laid upon a street of a city by authority of law, properly constructed and operated in a skillful and careful manner, is not in law a nuisance. *Chicago etc. R. Co. v. Loeb*, 118 Ill. 203; 27 Am. & Eng. R. Cas. 415. See also *HIGHWAYS*, vol. 9, p. 408, *et seq.*

If a railroad is not built or operated negligently, and the charter authorizes the laying of tracks on a street, the soot, obstructions, jarring, danger, etc., do not constitute a nuisance. The burden of proof of such negligence is upon the party complaining. *Randle v. Pacific R. Co.*, 65 Mo. 325; *Parrot v. Cincinnati etc. R. Co.*, 10 Ohio St. 624.

A railroad company, having the right to use streets in a town, cannot be charged with maintaining a public nuisance, where the obstruction caused by their tracks, switches, cars, etc., is no greater than is required by a reasonable use. *State v. Louisville etc. R. Co.*, 86 Ind. 114.

But where a railroad company is authorized to construct its road across any stream of water in such a way as not to impair its usefulness, it is liable for damages caused by the overflow of the stream, owing to the peculiar construction of the bridge. *Brown v. Cayuga etc. R. Co.*, 12 N. Y. 486; *Lawrence v. Great Northern River Co.*, 16 Ad. & El. 643; 71 E. C. L. 643; 20 L. J., Q. B. 293; 6 Ry. Cas. 656.

And the maintenance of a street or

other railway by an individual or association of individuals, without legislative authority, is a public nuisance, subjecting the persons to indictment, and also to a private action in favor of any person sustaining special injury. *Fanning v. Osborne*, 102 N. Y. 441; 25 Am. & Eng. R. Cas. 252; *Little Rock etc. R. Co. v. McGehee*, 41 Ark. 202; 20 Am. & Eng. R. Cas. 82.

Reason of the Rule.—Private persons have in many cases no action for annoyances attending the construction and operation of a railroad, for the reason that they suffer no special injury, but only one in common with the rest of the public. See *Winterbottom v. Lord Derby*, L. R., 2 Eq. 316; *Cleveland etc. R. Co. v. Speer*, 56 Pa. St. 325; *NEGLIGENCE*, vol. 16, p. 425; *Philadelphia etc. R. Co. v. Philadelphia*, 11 Phila. (Pa.) 358; *NUISANCE*, vol. 16, p. 971. To those persons who suffer by reason of the railroad passing through their land, compensation for such inconveniences is supposed to have been made when the land was first taken, and therefore they have no right of further recovery. *Clark v. Hannibal etc. R. Co.*, 36 Mo. 202; *EMINENT DOMAIN*, vol. 6, p. 547; *Porterfield v. Bond*, 38 Fed. Rep. 391; 39 Am. & Eng. R. Cas. 48 (does not include, however, damages arising from unlawful use). There can be no indictment against the railroad in the cases under consideration, for the State certainly cannot punish one criminally for doing an act which it has itself authorized. *Stoughton v. State*, 5 Wis. 291; *Danville etc. R. Co. v. Com.*, 73 Pa. St. 29.

Therefore the only case in which an action for nuisance could lie is where a private individual has suffered special damage; and even in such a case it seems that the weight of authority is against his right to recover, where the railroad is built by authority of law, and the inconvenience is one necessarily attending its operation. See the cases cited in the first part of this note. See also *NUISANCE*, vol. 16, p. 1003.

1. That a legislature can in no case license or legalize a private nuisance or deprive the injured person of his right

This rule as to relief from liability, conferring powers so plainly in derogation of common right, is to be strictly construed, and cannot be allowed to extend so far as to exempt companies from liability for unnecessary or unauthorized nuisances.¹ Every annoyance arising from the existence of the road which would otherwise be a nuisance is actionable as such unless it be an absolutely necessary accompaniment to the proper operation of the road.²

to recover is asserted in *Lexington etc. R. Co. v. Applegate*, 8 Dana (Ky.) 301; 33 Am. Dec. 507.

But admitting this to be true within a certain limit, it is too well settled to be successfully controverted that an act done under authority of law if done in a proper manner and within the scope of the authority granted, will not subject the actor to liability for the consequences, unless damages are specially provided for as compensation; the only ground of liability in such cases is a failure to use proper care and skill in the execution of what is authorized. *Selden v. Delaware etc. Canal Co.*, 29 N. Y. 642; *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42; *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195; 53 Am. Dec. 357; *Lawrence v. Great Northern R. Co.*, 16 Ad. & El. N. S. 643; 71 E. C. L. 643; *Conklin v. New York etc. R. Co.*, 102 N. Y. 112; *Danville etc. R. Co. v. Com.*, 73 Pa. St. 29; *Chicago etc. R. Co. v. Loeb*, 119 Ill. 203; 23 Am. & Eng. R. Cas. 415.

See also Wood on Nuisances, §§ 753, *et seq.*; 1 Wood's Ry. Law, § 212.

1. *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283; *Reg. v. Bradford Nav. Co.*, 6 B. & S. 631; 118 E. C. L. 628; *Biscoe v. Great Eastern R. Co.*, L. R., 16 Eq. Cas. 640; *Harmon v. Louisville etc. R. Co.*, 87 Tenn. 614; *NUISANCE*, vol. 16, p. 1001.

Thus where a railroad authorized by its charter to be made at one place is made at another, it is a mere nuisance on every highway it touches in its illegal course. *Com. v. Erie etc. R. Co.*, 27 Pa. St. 339.

The statutory sanction which will justify an injury to private property must be express or must be given by clear and unmistakable implication from the powers expressly conferred, so that it can be fairly said that the legislature contemplated the doing of the very act which occasioned the injury.

Cogswell v. New York etc. R. Co., 103 N. Y. 10; 27 Am. & Eng. R. Cas. 376; 57 Am. Rep. 701.

In the case of *Baltimore etc. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; 11 Am. & Eng. R. Cas. 15, an act of Congress had authorized a railroad company to bring its tracks within the limits of the city of Washington and to construct such works as were necessary and expedient for the completion and maintenance of its road. It was held that whatever might be the extent of the authority conferred, it was accompanied by the implied qualification that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. And therefore when the company under such act had constructed workshops immediately adjoining a church building, and in the necessary use of these shops, created much noise, smoke, soot, etc., whereby the worshippers in the church were greatly discommoded and the usefulness of the church greatly impaired, the authority granted constituted no defense, and the company was liable for the injuries resulting even from a proper conduct of such workshops. See also *First Baptist Church v. Schenectady etc. R. Co.*, 5 Barb. (N. Y.) 79. Compare *First Baptist Church v. Utica etc. R. Co.*, 6 Barb. (N. Y.) 313.

General authority to run the road through a street does not give the right to use such street as a terminal point. *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316; 56 Am. Rep. 1 (as a freight yard). *Neitzey v. Baltimore etc. R. Co.*, 5 Mackey (D. C.) 34; 26 Am. & Eng. R. Cas. 553.

2. Thus while the ringing of bells and blowing of whistles is necessary to some extent and therefore authorized, the authority will not justify constant ringing and blowing, which is more than what is necessary for public safety, and is greatly to the annoyance of peo-

XVI. LIABILITY TO INDICTMENT—(See also CORPORATIONS, vol. 4, pp. 267-272).—The most frequent instances of the indictment of railroad companies are for maintaining a public nuisance, or under a statute providing for liability in cases where persons are injured or killed owing to the negligence of the company. The form and accuracy of the indictment does not differ from that required in ordinary criminal cases.¹

ple dwelling near the road. *First Baptist Church v. Schenectady etc. R. Co.*, 5 Barb. (N. Y.) 79.

Noise, smoke, etc., are unavoidable accompaniments to the operation of a railroad, but the duty lies upon the railroad company to make use of all devices practicable in order to lessen the annoyance as much as possible. *Mumford v. Oxford etc. R. Co.*, 1 H. & N. 34; *Burton v. Philadelphia etc. R. Co.*, 4 Harr. (Del.) 252; 1 Wood's Ry. Law, § 213.

So also the company must provide the best machinery and devices known to prevent the escape of fire from their engines. *Bedford v. Hannibal etc. R. Co.*, 46 Mo. 456; *Gandy v. Chicago etc. R. Co.*, 30 Iowa 420; *FIRES BY RAILWAYS*, vol. 8, p. 1, *et seq.*

In the case of *Louisville etc. R. Co. v. State*, 3 Head (Tenn.) 524, it is said: "Undoubtedly, so long as the company keeps within its charter, it is not liable for a nuisance permissible under that charter. The work must be constructed without inconvenience to the public; but if it cannot be done without some inconvenience, it must be done with the least possible inconvenience."

1. **Form of Indictment.**—Indictment must state facts constituting the offense; it cannot be aided by intendment. *State v. Chicago etc. R. Co.*, 63 Iowa 508; 17 Am. & Eng. R. Cas. 170; *Palatka etc. R. Co. v. State*, 23 Fla. 546; 32 Am. & Eng. R. Cas. 191 (crossing highway outside authorized route); *INDICTMENT*, vol. 10, p. 666.

In *Savannah etc. R. Co. v. State*, 23 Fla. 579; 32 Am. & Eng. R. Cas. 182, it is said that an allegation that the highway was "unnecessarily and unreasonably obstructed," omitting to say "willfully" was insufficient. But in another case it is held that an averment that "the same was willfully and knowingly" done was surplusage and entirely unnecessary. *State v. Chesapeake etc. R. Co.*, 24 W. Va. 809; 10 Am. & Eng. R. Cas. 429. In the first case, however, it was provided by stat-

ute that the common law usage be altered.

See generally *Com. v. Boston etc. R. Co.*, 133 Mass. 383; 8 Am. & Eng. R. Cas. 297; *Texas etc. R. Co. v. State*, 41 Ark. 488; 20 Am. & Eng. R. Cas. 626.

For Negligently Causing Death.—Statutes exist in several of the States providing for the indictment of a railroad company for the death of a person caused by its negligence. Thus, in *Maine*, there is a statute providing that any railroad company by whose negligence or that of its servants the life of any person, exercising due care and diligence, is lost shall forfeit not less than \$500 nor more than \$5,000, to be recovered by indictment found within one year.

These statutes are designed to create a civil and not a criminal liability; they are intended as a substitute for Lord Campbell's act, and therefore the same rules of evidence and the same principles of law are to be applied in the trial under the indictment as in analogous civil actions for damages. *State v. Grand Trunk R. Co.*, 58 Me. 176; *State v. Maine Cent. R. Co.*, 77 Me. 490; 21 Am. & Eng. R. Cas. 216 (prosecution cannot be permitted to enter a *nolle prosequi* during the trial); *State v. Manchester etc. R. Co.*, 52 N. H. 528.

Therefore the burden of proof is upon the party prosecuting to show that the deceased person was free from all contributory negligence; the amount of the forfeiture between the minimum and maximum sums is to be assessed by the jury. *State v. Maine Cent. R. Co.*, 76 Me. 357; 19 Am. & Eng. R. Cas. 312. It must be against the corporation and not the individuals composing it; in one case it was said that it should also show that there is a surviving relative of the deceased entitled to the fine. *State v. Gilmore*, 24 N. H. 461; *Boston etc. R. Co. v. State*, 32 N. H. 215; *Com. v. Eastern R. Co.*, 5 Gray (Mass.) 473.

The remedy by indictment is said to

The subject of the indictment of railroad and other corporations for maintaining nuisances has already received attention in another article. In the note will be found a presentation of later authorities.¹

be limited to cases where the injured person dies immediately, and is never applicable to employes of the road. *State v. Maine Cent. R. Co.*, 60 Me. 290.

The form of the indictment, however, is to be governed by principles of the criminal law. *State v. Manchester etc. R. Co.*, 52 N. H. 528; *State v. Wentworth*, 37 N. H. 196.

It need not set out the names of the servants or agents of the corporation who are guilty of the negligence, nor the manner of such negligence. *Com. v. Boston etc. R. Co.*, 11 Cush. (Mass.) 512. Nor need it negative the existence of circumstances which under a proviso in the statute would exonerate the defendant from liability. *Com. v. Fitchburg R. Co.*, 10 Allen (Mass.) 189.

A memorandum indorsed on a season ticket relieving the company from liability is no defense to an indictment. *Com. v. Vermont etc. Co.*, 108 Mass. 7.

In the case of *Com. v. Boston etc. R. Co.*, 129 Mass. 500; 37 Am. Rep. 382; 1 Am. & Eng. R. Cas. 457, it was held that the person had ceased to be a passenger by leaving the train while in motion, and therefore no indictment could be sustained against the company for his death.

The *Massachusetts* statute has been changed several times. See for various decisions, *Com. v. Fitchburg*, 120 Mass. 372; *Com. v. Boston etc. R. Co.*, 133 Mass. 383; 8 Am. & Eng. R. Cas. 297; *Com. v. Boston etc. R. Co.*, 11 Cush. (Mass.) 512; *Com. v. Boston etc. R. Co.*, 126 Mass. 61; *Com. v. Brockton St. R. Co.*, 143 Mass. 501.

Later statutes have provided an additional remedy in the form of an action against the company by the deceased's next of kin as in other States. A special remedy is also provided where a servant of the company is killed. See *Massachusetts* Pub. Sts. ch. 112, § 212; *Massachusetts* Stats. 1883, ch. 243; *Daley v. Boston etc. R. Co.*, 147 Mass. 101; 33 Am. & Eng. R. Cas. 298.

In Other Cases.—*Missouri* Rev. Stat. § 197 amended by Laws 1881, p. 77, require all railroad companies to erect depots where their roads cross other

railroads, and provides a penalty for failure to do so. Under this the indictment must allege that both the connecting roads were carriers of passengers. *State v. Wabash etc. R. Co.*, 83 Mo. 144; 25 Am. & Eng. R. Cas. 133.

An indictment of a railroad company under *New Hampshire* Gen. Laws, ch. 163, § 2, for not affording reasonable transportation facilities, need not allege that the acts were unlawful, nor that the merchandise was the property of the person trying to transport it. *State v. Concord R. Co.*, 59 N. H. 85.

Under U. S. Rev. St., § 4386, *et seq.*, fixing a penalty for the offense of confining animals in transit in cars for more than twenty-eight consecutive hours without unloading them for five hours for rest, water and food, a railroad company, one of several companies owning connecting lines, is liable only for a default occurring upon its own line, except that the time for which the animals had been confined when delivered to the company which it is sought to charge with the penalty must be counted against such company as part of the twenty-eight consecutive hours. *U. S. v. Louisville etc. R. Co.*, 18 Fed. Rep. 480.

As to indictments for a violation of Sunday laws, see *SUNDAY*; *Com. v. Louisville etc. R. Co.*, 80 Ky. 291; 6 Am. & Eng. R. Cas. 216; *State v. Baltimore etc. R. Co.*, 15 W. Va. 362; 36 Am. Rep. 803.

1. See *CORPORATIONS*, vol. 4, p. 269-272. Indictment lies against a railroad company for establishing and maintaining a nuisance. *Northern Cent. R. Co. v. Com.*, 90 Pa. St. 300; 5 Am. & Eng. R. Cas. 318.

An instruction that if a bridge obstructed or hindered enjoyment of the public in the highway it was a nuisance was held error in *People v. New York etc. R. Co.*, 89 N. Y. 266; 10 Am. & Eng. R. Cas. 230. See also *Palatka etc. R. Co. v. State*, 23 Fla. 546; 32 Am. & Eng. R. Cas. 191.

The indictment must aver that the acts of obstruction were not committed in the course of the construction of the road, or that they were so committed and not afterward repaired. *State v.*

XVII. CRIMES AGAINST RAILROADS.—There are various statutes intended to prevent the commission of criminal offenses against railroad companies, whereby the lives of passengers and employes would be threatened; such are statutes against the wrecking of trains, the using of railroad signals in order to deceive those in charge of the train, etc.¹

Chicago etc. R. Co., 63 Iowa 508; 17 Am. & Eng. R. Cas. 170.

On the trial of an indictment for obstructing the highway the defendant may show that the railroad is in possession of and run by another company. *State v. Chesapeake etc. R. Co.*, 24 W. Va. 809; 10 Am. & Eng. R. Cas. 429. Statutes providing for an indictment for obstructing a "highway, tramway or street" do not apply to the obstruction of a private way. *Com. v. Boston etc. R. Co.* 135 Mass. 550.

A railroad company is liable to indictment for a failure to keep a crossing or a bridge in repair. *Paducah etc. R. Co. v. Com.*, 80 Ky. 147; 10 Am. & Eng. R. Cas. 318; *Reg. v. Birmingham etc. R. Co.*, 9 C. & P. 469; 38 E. C. L. 187; *New York etc. R. Co. v. State*, 50 N. J. L. 303; 32 Am. & Eng. R. Cas. 186.

Or for any nonfeasance misdemeanor. *Texas etc. R. Co. v. State*, 41 Ark. 483; 20 Am. & Eng. R. Cas. 626.

If a railway company lays its track upon the highway, it becomes bound to the public that the highway shall be put in as good repair as it was before; and for a failure to do this it may be indicted. *Gear v. Chicago etc. R. Co.*, 43 Iowa 83.

It is no defense to an indictment for occupying a highway with cars more than five minutes, that the employes were specially instructed not to permit such occupation; that reasonable care was used in the selection of the employes; that the occupation was without intent to obstruct and could not be avoided, and that reasonable diligence was used to remove the obstruction. *Com. v. New York etc. R. Co.*, 112 Mass. 412.

1. Wrecking Trains—Placing Obstructions on Track.—Independently of the criminal liability at common law for endangering life by obstructing the railway track in order to wreck a train, it is made a crime by statute in most of the States to wreck or attempt to wreck a train in any way. For the character of these statutes in the va-

rious States, the codes must be consulted.

If a party willfully and maliciously places an obstruction on the track so that life is endangered, it is no defense that he intended other mischief (*i. e.*, to stop the train and claim a reward), and that he did not intend to endanger life. *State v. Beckman*, 57 N. H. 174; *Crawford v. State*, 15 Lea (Tenn.) 343; 54 Am. Rep. 423. No specific intent to endanger need be shown. *Clifton v. State*, 73 Ala. 473; *People v. Adams*, 16 Hun (N. Y.) 549. In this last case the party got upon an engine on a side track, ran it off ten miles, and then back westward on a track used only for trains going eastward.

Nor an intent to injure any particular person. *Com. v. Bakeman*, 105 Mass. 53.

So also one who willfully puts an obstruction on the track endangering the safety of passengers is guilty, even though no engine or train be stopped or impeded. *State v. Kilty*, 28 Minn. 421; 9 Am. & Eng. R. Cas. 153.

To warrant a conviction under the *Texas* statute, the evidence must show that the obstruction might have endangered human life. *Bullion v. State*, 7 Tex. App. 462.

Where, for the purpose of securing evidence against the accused, a detective employed by the railroad company places an obstruction on its track, not intending to cause any damage to trains, the defendant is not guilty, even though he is present and advises and encourages the act, believing that it is done with a criminal intent. *State v. Douglass* (Kan. 1891), 26 Pac. Rep. 476.

Under 3 & 4 Vict., ch. 97, § 15, it is a crime to place an obstruction upon a railway track, even though the road has not yet been opened up for traffic. *Reg. v. Bradford*, 8 Cox C. C. 309.

In *Reg. v. Upton*, 5 Cox C. C. 298, it is held that the mischievous placing of an obstruction on a track by boys was sufficient to justify the finding that it was done maliciously.

In another case the defendants, two boys, went upon the premises of a railway company and played with a heavy cart, which was near the railway. It ran down an embankment by its own impetus and obstructed the railway. The boys made no attempt to remove it. It was held that the first act being a trespass, and therefore unlawful, the boys might properly be convicted of obstructing a railway. *Reg. v. Monaghan*, 11 Cox C. C. 608. See also *Roberts v. Preston*, 9 C. B., N. S. 206; 99 E. C. L. 208 (placing rubbish on track).

Under the *Indiana* statute, it is said that it is not necessary that the indictment allege that the obstruction was such as would endanger the passage of trains or throw the engines or cars from the track. *Riley v. State*, 95 Ind. 446. See also *Coghill v. State*, 37 Ind. 117.

Under the *Texas* statute (Penal Code of *Texas*, art. 678), an indictment following the language of the statute and charging that the defendant did willfully place an obstruction upon the track of a railroad, "whereby the lives of persons were endangered," is sufficient without specifying the persons whose lives were endangered. *Barton v. State*, 28 Tex. App. 482; *Com. v. Hicks*, 7 Allen (Mass.) 573. See also, as to form of indictment, *State v. Wentworth*, 37 N. H. 196; *Com. v. Bakeman*, 105 Mass. 53.

In the same case, testimony was admitted to show that the defendant placed another obstruction on the track three-fourths of a mile from the one charged in the indictment, and very soon after the first. It was held that though they were separate and distinct offenses, yet being contemporaneous, the commission of the second was admissible to show the motive and intent of the first, and also as a part of the *res gestæ*. *Barton v. State*, 28 Tex. App. 483.

The *Georgia* act (October 12, 1885), making it a criminal offense to wreck railroad trains, applies to all railroads, whether duly chartered as such or not, and therefore includes street railways. *Hodge v. State*, 82 Ga. 643; 38 Am. & Eng. R. Cas. 520; *Price v. State*, 74 Ga. 378.

The *Tennessee* criminal statute relating to obstructions whereby cars, etc., are thrown off the track, does not mention hand-cars. It therefore does not apply to the placing of an obstruc-

tion on a track which throws off a hand-car. *Harris v. State*, 14 Lea (Tenn.) 485. See also *Crawford v. State*, 15 Lea (Tenn.) 343; 54 Am. Rep. 423.

A breach of the contract by which the railroad company secured the right of way over certain lands does not justify the land-owner in placing obstructions on the track where it crosses his land. *State v. Hessenkamp*, 17 Iowa 25.

Removing Rails, Sleepers, etc.—Section 476 of the *Minnesota* Penal Code provides that "a person who displaces, removes, injures, or destroys a rail, sleeper, switch, bridge, viaduct, culvert, embankment, or structure, or any part thereof, attached or appertaining to, or connected with a railway, whether operated by steam or by horses . . . is punishable, etc." It was held that this did not apply to such a structure as a fence, it not constituting any part of the railroad proper. *State v. Walsh*, 43 Minn. 444; 42 Am. & Eng. R. Cas. 623.

Selling Tickets.—In *State v. Fry*, 81 Ind. 7; 6 Am. & Eng. R. Cas. 340, it was held that a person could not be indicted for selling half fare or excursion tickets without license, under 1 Rev. Stat. (*Indiana*) 1876, p. 259, regulating the issuing of tickets.

Shooting or Throwing at Cars.—A *North Carolina* statute provides a penalty by fine or imprisonment for throwing or shooting at or into any railroad car, locomotive, or train, etc. In *State v. Boyd*, 86 N. Car. 634; 9 Am. & Eng. R. Cas. 155, an indictment under this statute was held insufficient, because it failed to charge that the offense was committed while the train was in motion or stopped for a temporary purpose. See also *State v. Hinson*, 82 N. Car. 597.

Making Use of Signals Without Authority.—Where a person improperly went upon a railway, and stood up, signaling the train to stop by holding up his hands, it was held that this was an obstruction of a railway engine within the meaning of 24 & 25 Vict., ch 97; *Reg. v. Hardy*, 11 Cox C. C. 656.

Alterations of the signals by a drunken man, so as to cause a train to stop, is also an obstruction. *Reg. v. Hadfield*, 11 Cox C. C. 574, L. R., 1 Cr. Cas. Res. 253.

Generally.—*Alabama* Code (1876), § 4239, provides a punishment in the case of "any person who wantonly or ma-

XVIII. LIABILITY FOR TORTS.¹—Almost every matter which should belong under this heading has received treatment in other articles.

1. **For Negligent Injury Generally.**—See NEGLIGENCE, vol. 16 p. 386, *et seq.*; CARRIERS OF PASSENGERS, vol. 2, p. 738; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15; COMPARATIVE NEGLIGENCE, vol. 3, p. 367.

2. **Liability for Injuries to Servants and Employees.**—See FELLOW SERVANTS, vol. 7, pp. 821, *et seq.*; MASTER AND SERVANT, vol. 14, pp. 842, *et seq.*

3. **Liability for Fires Caused by Operation of Road.**²—See FIRES BY OPERATION OF RAILWAYS, vol. 8, p. 1, *et seq.*

4. **Liability for Injuries Caused from Failure to Fence Track.**—See FENCES, vol. 7, p. 906, *et seq.*

liciously injures any railroad in this State . . . or places any obstruction or impediment thereon, or salts stock thereon." It is held that this creates three distinct offenses. *Clifton v. State*, 73 Ala. 473.

Michigan Gen. Ry. Acts (1873), art. 4, § 12, provides against willful acts endangering the lives of railway employes or travelers. It is held that the offense of shooting at a brakeman is cognizable under the general criminal law and not under this act. *People v. Dunkel*, 39 Mich. 255.

1. In case of injuries to passengers the liability of the company is not a contractual one only. The contract of carriage creates the relation of passenger and carrier and the high and special duties accompanying that relation. For an injury received resulting from a failure to carry safely, the passenger may sue in tort for a breach of the carrier's duty though that duty was created by contract. See NEGLIGENCE, vol. 16, p. 424; *Baltimore etc. R. Co. v. Kemp*, 61 Md. 619; 48 Am. Rep. 134; 18 Am. & Eng. R. Cas. 220, note; *Ansell v. Waterhouse*, 6 M. & S. 385; *Angell on Carriers*, § 422; *Heim v. McCaughan*, 32 Miss. 17; *Frink v. Potter*, 17 Ill. 406; *Green v. Morris etc. R. Co.*, 24 N. J. L. 486.

The character of the action as to whether *ex contractu* or *ex delicto* must be determined by the nature of the grievance rather than the form of the declaration; and in suits against common carriers for a breach of their public duty to put passengers off at the proper station, the courts are inclined to consider the action as founded in

tort unless it clearly appear otherwise. *New Orleans etc. R. Co. v. Hearst*, 36 Miss. 660; 74 Am. Dec. 785; *Cregin v. Brooklyn etc. R. Co.*, 75 N. Y. 192.

Conflict of Laws.—Where a statute declares that persons shall be liable for negligence notwithstanding the death of the injured person, and a subsequent provision confers the right of action only upon the personal representatives of the deceased, the right to bring the action is not merely part of the remedy and governed by the *lex fori*, but is part of the right conferred by the statute and is governed by the law of the State in which the statute has been enacted. *Usher v. West Jersey R. Co.*, 126 Pa. St. 206; 41 Am. & Eng. R. Cas. 508.

See generally as to questions of conflict of laws in actions against railroad companies for torts committed by them, CONFLICT OF LAWS, vol. 3, p. 521; *DEATH*, vol. 5, p. 127; *New Orleans etc. R. Co. v. Wallace*, 50 Miss. 250; *O'Reilly v. New York etc. R. Co.*, 16 R. I. 388; 42 Am. & Eng. R. Cas. 50; *Laird v. Connecticut etc. R. Co.*, 62 N. H. 254; 43 Am. & Eng. R. Cas. 63; *Usher v. West Jersey R. Co.*, 126 Pa. St. 206; 41 Am. & Eng. R. Cas. 508, 514, note 7, where the subject is examined in length.

2. In this connection two or three exceptional cases may be noticed. In the case of *Metallic Compression Co. v. Fitchburg R. Co.*, 109 Mass. 277, a fire company, in order to obtain the only available supply of water to throw upon a building, which was on fire, laid its hose across a railroad track. It appeared that the application of the water diminished the fire, and would probably

5. **Liability for Injuries at Crossings.**—See CROSSINGS, vol. 4, p. 906, *et seq.*

6. **Liability for Wrongful Acts or Defaults of Its Servants.**—See MASTER AND SERVANT, vol. 17, pp. 805-815.

7. **Liability Where One Company Uses the Track of Another.**—The liability in such cases must depend upon the peculiar circumstances of each separate case.¹ A company which allows another railway company to use its tracks must be liable for all injuries occurring from its own negligence in the care of its road-bed and tracks, and for injuries to its own passengers, even when the result of the negligence of the other company.² And a company run-

have extinguished it had not the servants of the railroad company run a train over the hose and severed it, thereby cutting off the supply of water. Those in charge of the train had abundant notice that the hose was on the track, and might have stopped the train; evidence showed that the railroad company were negligent in other respects also. It was held that the severing of the hose was the proximate cause of the destruction of the building, and the railroad company, having been negligent, was liable for the damage caused; and that the firemen in laying the hose across the track were merely in the exercise of a common law right, which permits a temporary appropriation of private property for public exigencies. See also *Hyde Park v. Gay*, 120 Mass. 589; *Atchison v. New Castle etc. R. Co.*, L. R., 6 Ex. 404; *Pierce on Railroads*, p. 267.

But in another case, *Mott v. Hudson River R. Co.*, 1 Robt. (N. Y.) 585; 8 Bosw. (N. Y.) 345, on a somewhat similar state of facts, the company was held not liable, the court maintaining that the damages caused by the spreading of a fire in consequence of the company's negligently injuring a hose actually in use in extinguishing it, whereby the only available supply of water for this purpose was cut off, were too remote to sustain an action.

1. A *Tennessee* case states the doctrine that if a train of cars of one railroad company, running on the road of another company, be under the exclusive control of the servants of the latter, the latter is liable for all damages occurring through negligence. But if the servants of both parties jointly control the train, both companies are liable. *Nashville etc. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347.

A similar view is taken in *Harper v. Newport News etc. R. Co.* (Ky. 1890), 14 S. W. Rep. 346.

2. *Illinois Cent. R. Co. v. Barrow*, 5 Wall. (U. S.) 90 (injury to one of its own passengers); *Delaware etc. R. Co. v. Salmon*, 39 N. J. L. 299; 23 Am. Rep. 214; *Mason etc. R. Co. v. Mayes*, 49 Ga. 355; 15 Am. Rep. 678; *Fort Wayne etc. R. Co. v. Hinebaugh*, 43 Ind. 354 (stock-killing case); *Ricketts v. Chesapeake etc. R. Co.*, 33 W. Va. 433; 41 Am. & Eng. R. Cas. 42; *Stetler v. Chicago etc. R. Co.*, 49 Wis. 609; *Lakin v. Willamette Valley etc. R. Co.*, 13 Oregon 436; 26 Am. & Eng. R. Cas. 611; *Peoria etc. R. Co. v. Lane*, 83 Ill. 448; *Parker v. Rensselaer etc. R. Co.*, 16 Barb. (N. Y.) 315 (owner of road alone liable for defect in roadway).

Compare *Harper v. Newport News etc. R. Co.* (Ky. 1890), 14 S. W. Rep. 396; *Murch v. Concord R. Co.*, 29 N. H. 35; 61 Am. Dec. 631.

A company is liable for an injury to a passenger upon its line caused by the careless management of a switch, under the control of another company, whereby the two roads are connected. *McElroy v. Nashua etc. R. Co.*, 4 Cush. (Mass.) 400.

Injuries to Servants.—A company leasing its road pursuant to a statutory authority, which does not contain any provision releasing it from the performance of its duties to the public, is liable for personal injuries sustained by the brakeman of the third company, rightfully upon the road, caused by defects in the construction of a station. *Nugent v. Boston etc. R. Co.*, 80 Me. 62; 38 Am. & Eng. R. Cas. 52.

But in another case, it is held that an engineer receiving an injury while in the discharge of his duties by col-

ning its trains over the track of another is liable certainly for all the injuries occasioned by its own negligence.¹

8. Where Road Is Operated by Trustees or Receiver.—Trustees operating a road for the benefit of bondholders are personally liable to owners of freight and to passengers to the same extent as if they were the owners of the road.² And they are equally liable for all other injuries resulting from the negligent management and operation of the road.³

lision with a train of another company using that part of the road under a lease from his employer, caused by the negligence of the employes of the lessee company in running a train in violation of the rules of the lessor, cannot recover of his employer if he had knowledge of the agreement with the lessee, such an accident being one of the ordinary perils of the service, and not attributable to the employer's negligence. *Clark v. Chicago etc. R. Co.*, 92 Ill. 43. *Compare East Line etc. R. Co. v. Culberson*, 72 Tex. 375; 38 Am. & Eng. R. Cas. 225.

1. No company can claim release from liability for injuries clearly the proximate result of its own negligence merely because it was at the time using the track of another. *Fletcher v. Boston etc. R. Co.*, 1 Allen (Mass.) 9; 79 Am. Dec. 695; *Murch v. Concord R. Co.*, 29 N. H. 9; 61 Am. Dec. 631 (leading case); *Illinois Cent. R. Co. v. Kanouse*, 39 Ill. 272; 89 Am. Dec. 307; *Mills v. Orange etc. R. Co.*, 1 McArthur (D. C.) 285; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *Webb v. Portland etc. R. Co.*, 37 Me. 117; *Mulherrin v. Delaware etc. R. Co.*, 81 Pa. St. 366; *Burchfield v. Northern Cent. R. Co.*, 57 Barb. (N. Y.) 589; *Eaton v. Boston etc. R. Co.*, 11 Allen (Mass.) 500.

A railroad company running its trains over the track of another must observe the same precautions for the safety of the public at a crossing as are required of the company running the road. *Webb v. Portland etc. R. Co.*, 37 Me. 117.

If an injury occurs owing to a defect in a car the company using it at the time cannot escape liability by alleging that it belonged to another company. *Jetter v. New York etc. R. Co.*, 2 Abb. App. Dec. (N. Y.) 458; *Fletcher v. Boston etc. R. Co.*, 1 Allen (Mass.) 9; 79 Am. Dec. 695.

But a railroad company running its trains over the track of another road, and selling to passengers tickets over

both roads, is not liable to such passengers for injuries happening to them while on such other road, through the negligence of the managers of such road or their servants, and without any neglect on the part of itself or its agents. *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424.

This rule is laid down in Redf. on Railways, p. 303, as follows: "The rule of law in regard to passenger carriers who run over other roads than their own seems now to be pretty well established that the first company is responsible for the entire route, and must take the risk of the negligence of the employes of other companies." Approved in *Stettler v. Chicago etc. R. Co.*, 46 Wis. 497, where a company was held liable for an injury resulting from a defect in a track which did not belong to it.

In *Stephens v. Davenport etc. R. Co.*, 36 Iowa 327, the rule is said to be that where two railroad companies operate trains on the same line, each is liable for the stock injured or killed by its trains by reason of the road being unfenced, and not for that injured by the trains of the other.

A carrier of passengers in his own cars over connecting lines is liable to its passengers as a carrier over the whole route. *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424.

2. *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424; *Barter v. Wheeler*, 49 N. H. 9; *Rogers v. Wheeler*, 2 Lans. (N. Y.) 486; 43 N. Y. 598; 52 N. Y. 262; *Lamphear v. Buckingham*, 33 Conn. 237.

3. *Daniels v. Hart*, 118 Mass. 543 (fire communicated from engine); *Bal-lou v. Farnum*, 9 Allen (Mass.) 47 (injury to servant); *Farrell v. Union Trust Co.*, 77 Mo. 475; 13 Am. & Eng. R. Cas. 552 (by statute); *Stratton v. European etc. R. Co.*, 76 Me. 269; 17 Am. & Eng. R. Cas. 269 (trustee liable to extent of funds received by him); *Union Trust Co. v. Cuppy*, 26 Kan.

A receiver is regarded as a *quasi* public officer, and is not personally liable for injuries occurring during his official management of the road,¹ though it is usual to allow him to be sued by leave of court and the damages to be paid out of the funds of the company in his hands.²

The surrender of its control over its road in such cases being involuntary and compulsory, the company ceases to be liable after the management has passed out of its hands,³ unless it allows the road to be operated in its own name or retains partial control of it.⁴

9. Liability for Injuries to Trespassers—*a. WHO ARE TRESPASSERS.*—In this connection, every person who enters upon the property of a railroad company, either its track, or its cars or engines, without due license or authority, is, so long as he remains there, to be regarded as a trespasser.⁵ License to enter

754; 11 Am. & Eng. R. Cas. 562 (trustee liable only as agent—company liable as principal); *Grand Tower Mfg. etc. Co. v. Ullman*, 89 Ill. 244 (same); *Jones v. Seligman*, 81 N. Y. 191; 3 Am. & Eng. R. Cas. 236.

See also *Smith v. Eastern R. Co.*, 124 Mass. 154.

1. *Barton v. Barbour*, 104 U. S. 126; 4 Am. & Eng. R. Cas. 1; *Melendy v. Barbour*, 78 Va. 544; 25 Am. & Eng. R. Cas. 622; *Ryan v. Hays*, 62 Tex. 42; 23 Am. & Eng. R. Cas. 501; **RECEIVERS**, where the whole subject is treated.

Compare Blumenthal v. Brainerd, 38 Vt. 402; *Newell v. Smith*, 49 Vt. 255.

Assignee in Bankruptcy.—An assignee appointed in bankruptcy proceedings is not an agent of the railroad company and is not personally liable for injuries committed in the operation of the road. *Metz v. Buffalo etc. R. Co.*, 58 N. Y. 61; 17 Am. Rep. 201; *Cardot v. Barney*, 63 N. Y. 281.

2. *Pierce on Railroads*, p. 285; *Klein v. Jewett*, 26 N. J. Eq. 474; *Murphy v. Holbrook*, 20 Ohio St. 137; **RECEIVERS**.

3. *Central etc. R. Co. v. Morris*, 68 Tex. 49; 28 Am. & Eng. R. Cas. 50; *State v. Consolidated etc. R. Co.*, 67 Me. 479.

In two cases, however, it is said that trustees are merely agents of the company, and it is liable therefore as principal for injuries committed in the operation of the road. *Grand Tower Mfg. etc. Co. v. Ullman*, 89 Ill. 244; *Union Trust Co. v. Cuppy*, 26 Kan. 754; 11 Am. & Eng. R. Cas. 562.

But a railroad company cannot shift

its responsibilities or relieve itself from liability for its wrongdoing by a voluntary surrender of the possession and control of its road by a trust deed. *Nagler v. Alexandria etc. R. Co.*, 83 Va. 707; 32 Am. & Eng. R. Cas. 401; *Acker v. Alexandria etc. R. Co.*, 84 Va. 648.

Railroad Property Subject to Public Trust.—A railroad company, having appropriated private property and constructed its road, its capital stock, franchises and other property, stands charged primarily with a public trust. *Gates v. Boston etc. R. Co.*, 53 Conn. 333; 24 Am. & Eng. R. Cas. 143. See also *Taylor v. South etc. Ala. R. Co.*, 13 Fed. Rep. 152; 6 Am. & Eng. R. Cas. 602.

4. *Washington etc. R. Co. v. Brown*, 17 Wall. (U. S.) 445.

Liability of Consolidated Company.—Where two or more railroad companies are consolidated so as to form one corporation, this new corporation assumes all liabilities for the wrongful acts of the old companies. *Chicago etc. R. Co. v. Moffit*, 75 Ill. 524; *Coggin v. Central R. Co.*, 62 Ga. 685; *CORPORATIONS*, vol. 4, p. 272, n.

5. *Baltimore etc. R. Co. v. Schmidding*, 101 Pa. St. 258; 8 Am. & Eng. R. Cas. 548 (loiterer at station platform there for his own amusement); *Leary v. Cleveland etc. R. Co.*, 78 Ind. 323; 3 Am. & Eng. R. Cas. 498 (person seeking shelter from a storm in one of the company's buildings); *Biddle v. Hesstonville etc. R. Co.*, 112 Pa. St. 551; 26 Am. & Eng. R. Cas. 208 (child riding on platform of street car without paying fare); *Mitchel v. Philadelphia etc.*

upon the premises of a railroad may be express or implied, and is implied in frequent cases; as, for example, where there is an express or implied invitation;¹ where a railroad crosses a high-

R. Co., 132 Pa. St. 226; Pittsburgh etc. R. Co. v. Bingham, 29 Ohio St. 364 (loiterer at station); Pennsylvania etc. R. Co. v. McMullen, 132 Pa. St. 107; 41 Am. & Eng. R. Cas. 505 (boy of ten years of age a trespasser so that he could not recover even though incapable of contributory negligence); Louisville etc. R. Co. v. Hurt (Ky. 1890), 13 S. W. Rep. 275.

A former employé of the company is charged with notice of its regulation forbidding riding in the engine, and if he rides there even at the engineer's invitation he is a trespasser. Virginia etc. R. Co. v. Roach, 83 Va. 375; 34 Am. & Eng. R. Cas. 271.

Persons on a train who have paid either no fare or insufficient fare, are trespassers. Atchison etc. R. Co. v. Gants, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290. See also *infra*, this title, *Expulsion of Passengers*.

But a passenger has a right to refuse to surrender his ticket or to pay his fare until he has been given a seat, and he does not become a trespasser by non-payment of fare in such a case. Hardenburgh v. St. Paul etc. R. Co., 39 Minn. 3; 34 Am. & Eng. R. Cas. 359. And one is not a trespasser who is on the wrong train, owing to a mistake by the company's agent, and who refuses to pay fare for being carried further when mistake is discovered. International etc. R. Co. v. Smith (Tex. 1886), 1 S. W. Rep. 565; 27 Am. & Eng. R. Cas. 148.

A person getting on the wrong train in willful violation of the rules of the company is a mere trespasser. Lake Shore etc. R. Co. v. Rosenzweig, 113 Pa. St. 519; 26 Am. & Eng. R. Cas. 489.

One accepting and using a free pass in violation of law does not thereby become a trespasser. Buffalo etc. R. Co. v. O'Hara (Pa. 1882), 9 Am. & Eng. R. Cas. 317.

A child of such tender years as to be incapable of negligence is not to be considered a trespasser. Battisill v. Humphrey, 64 Mich. 494; 28 Am. & Eng. R. Cas. 597. *Contra*, Pennsylvania R. Co. v. McMullen, 132 Pa. St. 107; 41 Am. & Eng. R. Cas. 505.

Persons on a train with consent of company's agent in charge thereof are

not trespassers. Rosenbaum v. St. Paul etc. R. Co., 38 Minn. 173; 34 Am. & Eng. R. Cas. 275; Gradin v. St. Paul etc. R. Co., 30 Minn. 217; 11 Am. & Eng. R. Cas. 644.

If, however, the agent granting the permission has no authority to do so, such permission does not remove the party from his status as a trespasser. Reary v. Louisville etc. R. Co., 40 La. Ann. 32; 34 Am. & Eng. R. Cas. 277; Virginia etc. R. Co. v. Roach, 83 Va. 375; 34 Am. & Eng. R. Cas. 231.

The conductor of an accommodation train, at the request of a brakeman, permitted a lad of fifteen to ride free daily on the train to sell newspapers. Under the company's rules this was beyond the scope of the conductor's authority. After this practice had continued five or six months, the boy was killed in an accident to the train, caused by the alleged negligence of the company. In an action by the boy's mother to recover damages, it was held that under the evidence the boy was neither a passenger nor an employé, but was a mere trespasser, to whom the company owed no duty, and the plaintiff could not recover. Duff v. Allegheny Valley R. Co., 91 Pa. St. 458; 2 Am. & Eng. R. Cas. 1.

Exception.—There may be an exception to the general rule in some cases. Thus a child going upon the track in order to save younger children is not a trespasser. Spooner v. Delaware etc. R. Co., 115 N. Y. 22; 39 Am. & Eng. R. Cas. 599.

1. Persons who come upon the station premises to take passage on the train, or to meet a friend expected to arrive on one of the trains, or to see him depart, are there by the implied invitation of the company and are not trespassers. McKone v. Michigan Cent. R. Co., 51 Mich. 601; 47 Am. Rep. 596; 13 Am. & Eng. R. Cas. 29; Texas etc. R. Co. v. Best, 66 Tex. 116; Hamilton v. Texas etc. R. Co., 64 Tex. 251; 53 Am. Rep. 756; 21 Am. & Eng. R. Cas. 336; Illinois etc. R. Co. v. Hammer, 72 Ill. 347. See also NEGLIGENCE, vol. 16, p. 412-414; STATIONS.

A person in the caboose of a freight train, treating for passage is, as to injuries committed against him by conductor, not a trespasser, and his case

way¹ or a private way;² or where for many years the company has acquiesced in a certain use of a portion of its track.³

b. DUTY OWING TO THEM.—Properly speaking there is no positive duty owing from a railroad company to a trespasser on its track; it is not a part of its duty in exercising ordinary care in the operation of its road to provide against the possibility that trespassers may be on its track, and the extent of its duty is to

stands within the reason of authorities in reference to like injuries done to passengers. *Western etc. R. Co. v. Turner*, 72 Ga. 292; 28 Am. & Eng. R. Cas. 455.

One who accompanies a car-load of live stock, under contract with the company, though not strictly a passenger, is not a trespasser. *Lawson v. Chicago etc. R. Co.*, 64 Wis. 447; 21 Am. & Eng. R. Cas. 249.

If a company permits passengers to take trains at a place which is not a station, a person taking the train at such place is not a trespasser; and when he has reached in safety the inside of one of the passenger coaches he is then, if he was not before, a passenger. *Dewire v. Boston etc. R. Co.*, 148 Mass. 343; 37 Am. & Eng. R. Cas. 57.

1. See *CROSSINGS*, vol. 4, p. 909; *infra*, this title, *Highway Crossings*; *Ohio etc. R. Co. v. Walker*, 113 Ind. 196; 32 Am. & Eng. R. Cas. 121; *Philadelphia etc. R. Co. v. Troutman* (Pa.), 11 W. N. Cas. 453; 6 Am. & Eng. R. Cas. 117.

See also *Stewart v. Pennsylvania R. Co.* (Ind. 1883), 14 Am. & Eng. R. Cas. 679; *Kilby v. Southern Minnesota R. Co.*, 28 Minn. 98; 6 Am. & Eng. R. Cas. 264; *Berry v. Northeastern R. Co.*, 72 Ga. 137; 28 Am. & Eng. R. Cas. 575.

Party walking in a street where track is laid is not necessarily a trespasser, and if his foot is caught in the track and he is run over he is entitled to recover, upon proof of the company's failure to use due care. *Louisville etc. R. Co. v. Phillips*, 112 Ind. 59; 31 Am. & Eng. R. Cas. 432.

2. *Murphy v. Boston etc. R. Co.*, 133 Mass. 121; 14 Am. & Eng. R. Cas. 675; *Canada Southern R. Co. v. Cluise*, 13 Sup. Ct. Can. 139; 35 Am. & Eng. R. Cas. 296; *Kansas City etc. R. Co. v. Kregels*, 32 Kan. 608; 20 Am. & Eng. R. Cas. 241; *Philadelphia etc. R. Co. v. Troutman* (Pa.), 11 W. N. Cas. 453; 6 Am. & Eng. R. Cas. 117.

Compare Cedar Rapids etc. R. Co. v. Raymond, 37 Minn. 204; 30 Am. & Eng. R. Cas. 345.

3. *License Implied from Acquiescence.*—*Philadelphia etc. R. Co. v. Troutman*, 11 W. N. C. (Pa.) 453; 6 Am. & Eng. R. Cas. 117; *Virginia Midland R. Co. v. White*, 84 Va. 498; 34 Am. & Eng. R. Cas. 22; *Davis v. Chicago etc. R. Co.*, 58 Wis. 646; 15 Am. & Eng. R. Cas. 424 (use for twenty years); *Hooker v. Chicago etc. R. Co.*, 76 Wis. 542; 41 Am. & Eng. R. Cas. 498; *Troy v. Cape Fear R. Co.*, 99 N. Car. 298; 34 Am. & Eng. R. Cas. 13 (use of trestle by public).

But in order to constitute an implied license in such cases, the use must be a reasonable one, and must be long continued. The mere fact that persons have frequently trespassed upon the track, and that the company took no steps to stop them, does not amount to a license. *Central R. Co. v. Brinsan*, 70 Ga. 207; 19 Am. & Eng. R. Cas. 42; *Palmer v. Chicago etc. R. Co.*, 112 Ind. 250; 31 Am. & Eng. R. Cas. 364; *McLaren v. Indianapolis etc. R. Co.*, 83 Ind. 319; 8 Am. & Eng. R. Cas. 217; *Baltimore etc. R. Co. v. State*, 62 Md. 479; 19 Am. & Eng. R. Cas. 83; *Carrington v. Louisville etc. R. Co.*, 88 Ala. 472; 41 Am. & Eng. R. Cas. 546; *Memphis etc. R. Co. v. Womack*, 84 Ala. 149; 37 Am. & Eng. R. Cas. 308 (custom to cross track by foot-path one hundred yards from place of accident not admissible to prove license).

Where a railroad company has for years without objection permitted the public to cross its tracks at a certain point not in itself a public crossing, those crossing there are not trespassers, and it is bound to exercise due care to prevent injury to them from the operation of its trains. *Taylor v. Delaware etc. Canal Co.*, 113 Pa. St. 162; 28 Am. & Eng. R. Cas. 656; *Western etc. R. Co. v. Meigs*, 74 Ga. 857; *Byrne v. New York Cent. R. Co.*, 104 N. Y. 362; 58 Am. Rep. 512; *Kelly v.*

refrain from willful or deliberate injury.¹ Except at crossings it has the right to an exclusive use of its track and premises, and is

Southern Minnesota R. Co., 28 Minn. 98.

1. This is the doctrine which seems to be supported by the great weight of authority. *Johnson v. Boston etc. R. Co.*, 125 Mass. 75; *Morrissey v. Eastern R. Co.*, 126 Mass. 377; *Wright v. Boston etc. R. Co.*, 142 Mass. 296; 28 Am. & Eng. R. Cas. 652; *Terre Haute etc. R. Co. v. Graham*, 95 Ind. 286; 12 Am. & Eng. R. Cas. 77; *Chicago etc. R. Co. v. Hedges*, 105 Ind. 398; 25 Am. & Eng. R. Cas. 550; *Palmer v. Chicago etc. R. Co.*, 112 Ind. 250; 31 Am. & Eng. R. Cas. 364; *Henry v. St. Louis etc. R. Co.*, 76 Mo. 288; 12 Am. & Eng. R. Cas. 136; *Dahlstrom v. St. Louis etc. R. Co.*, 96 Mo. 99; 35 Am. & Eng. R. Cas. 387; *Barker v. Hannibal etc. R. Co.*, 98 Mo. 50; 37 Am. & Eng. R. Cas. 292; *Cauley v. Pittsburgh etc. R. Co.*, 95 Pa. St. 398; 2 Am. & Eng. R. Cas. 4; *Central R. Co. v. Brinson*, 70 Ga. 207; 19 Am. & Eng. R. Cas. 42; *Baltimore etc. R. Co. v. State*, 62 Md. 479; 19 Am. & Eng. R. Cas. 83; *Spicer v. Chesapeake etc. R. Co. (W. Va.)*, 12 S. E. Rep. 553; 45 Am. & Eng. R. Cas. 28 (no recovery by trespasser except where negligence of company is "wanton" or "gross"); *Louisville etc. R. Co. v. Howard*, 82 Ky. 212; 19 Am. & Eng. R. Cas. 98.

In some jurisdictions the English rule is adopted, *i. e.*, that the company is not liable to trespassers, except where the injury was willful, or where, after becoming aware of the party's danger, reasonable care was not exercised to prevent injury. *Central R. Co. v. Brinson*, 70 Ga. 207; 19 Am. & Eng. R. Cas. 42; *St. Louis etc. R. Co. v. Monday*, 49 Ark. 257; 31 Am. & Eng. R. Cas. 424; *St. Louis etc. R. Co. v. Freeman*, 36 Ark. 41; 4 Am. & Eng. R. Cas. 608; *Burnett v. Burlington etc. R. Co.*, 16 Neb. 332; 19 Am. & Eng. R. Cas. 25; *McAllister v. Burlington etc. R. Co.*, 64 Iowa 395; 19 Am. & Eng. R. Cas. 103; *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531; 37 Am. & Eng. R. Cas. 320 (child of nine years discovered on the track—duty of company); *Shackleford v. Louisville etc. R. Co.*, 84 Ky. 433; 28 Am. & Eng. R. Cas. 591; *Louisville etc. R. Co. v. Black*, 89 Ala. 313; 45 Am. & Eng. R. Cas. 38 (duty of company begins when trespasser is first discovered and it is

known that he is ignorant of the approaching danger).

But in other jurisdictions the doctrine stated in the text is disapproved, and it is held no error to refuse to charge that the company is under no obligations to take precautions against possible injuries to trespassers, and that a man who walks upon a railroad track, except at a crossing, does so at his peril. *Carter v. Columbia etc. R. Co.*, 19 S. Car. 20; 15 Am. & Eng. R. Cas. 414; *Houston etc. R. Co. v. Simpkins*, 54 Tex. 615; 6 Am. & Eng. R. Cas. 11; *East Tennessee etc. R. Co. v. Humphreys*, 12 Lea (Tenn.) 200; 15 Am. & Eng. R. Cas. 472; *East Tennessee etc. R. Co. v. Fain*, 12 Lea (Tenn.) 35; 19 Am. & Eng. R. Cas. 102.

The injury must be willful in order to render the company liable, and proof of mere "recklessness," "wantonness," or "gross negligence" cannot be substituted so as to render the company liable, if the conduct of the company's agents is not shown by the evidence to have amounted to a willful wrong. *Chicago etc. R. Co. v. Hedges*, 105 Ind. 398; 25 Am. & Eng. R. Cas. 550; *Terre Haute etc. R. Co. v. Graham*, 95 Ind. 286; 12 Am. & Eng. R. Cas. 82. In the latter case this immediate subject is discussed at length in the opinion of Zollars, J.

Compare Kansas Pac. R. Co. v. Whipple, 39 Kan. 537; 37 Am. & Eng. R. Cas. 328.

This whole subject is but an application of the law of contributory negligence, and the denial of the right of recovery to one who trespasses upon the track is based upon his contributory negligence. Therefore, except in those States in which the doctrine of comparative negligence prevails, the trespasser's contributory negligence in being on the track will bar his recovery in the absence of proof that the injury was willful. See CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15, *et seq.*

Applying this rule, the contributory negligence of a party in going upon a track in front of an approaching train will bar his recovery, even though at the time the train is running at an unlawful rate of speed. *Mobile etc. R. Co. v. Stroud*, 64 Miss. 784; 31 Am. & Eng. R. Cas. 443; *Bell v. Hannibal etc. R. Co.*, 72 Mo. 50; 4 Am. & Eng. R. Cas. 580; *Central R. etc. Co. v.*

entitled to assume that they are clear;¹ it is not bound to anticipate that persons will be on them, or to make provision for the safety of such persons.²

Where persons have long been accustomed to use the track at certain places the company is charged with notice of such usage and owes the duty to keep a careful lookout at such places, even though the parties so using the track do so without authority and are really trespassers.³

Smith, 78 Ga. 694; 34 Am. & Eng. R. Cas. 1.

In the case of *Bergman v. St. Louis etc. R. Co.*, 88 Mo. 678; 28 Am. & Eng. R. Cas. 588, a party, though guilty of negligence in going upon the track, was allowed to recover; but his right was based upon the rule already noticed, that the servants of the company, after having become aware of his danger, failed to exercise ordinary care to prevent the injury.

In *Snyder v. Natchez etc. R. Co.*, 42 La. Ann. 302; 44 Am. & Eng. R. Cas. 278, the rule is laid down that the duty of a carrier to provide against injuries to strangers, while not requiring the same care and diligence as in the case of passengers, is governed by the general principle of law, that every one is obliged upon considerations of humanity and justice to conform his conduct to the rights of others, and in the prosecution of his lawful business, to use every reasonable precaution to avoid their injury. And in no case has the company a right to inflict wanton injury upon a naked trespasser on its property.

1. Right to Exclusive Use of Track.—*Omaha etc. R. Co. v. Martin*, 14 Neb. 295; 19 Am. & Eng. R. Cas. 236; *St. Louis etc. R. Co. v. Monday*, 49 Ark. 257; 31 Am. & Eng. R. Cas. 324; *Isabel v. Hannibal etc. T. Co.*, 60 Mo. 475; *Yarnell v. St. Louis etc. T. Co.*, 75 Mo. 575; 10 Am. & Eng. R. Cas. 726; *Cauley v. Pittsburgh etc. R. Co.*, 95 Pa. St. 398; 2 Am. & Eng. R. Cas. 4 (the company has a right of way and it is exclusive at all times and for all purposes); *Mason v. Missouri Pac. R. Co.*, 27 Kan. 83; 6 Am. & Eng. R. Cas. 1; *Jackson v. Rutland etc. R. Co.*, 25 Vt. 150; *Jersey City etc. R. Co. v. Jersey City etc. R. Co.*, 20 N. J. Eq. 61 (right as against other companies).

2. Duty to Keep a Lookout.—A railroad company is not bound to keep a lookout for trespassers. *Terre Haute etc. R. Co. v. Graham*, 95 Ind. 286; 12

Am. & Eng. R. Cas. 77; *McAllister v. Burlington etc. R. Co.*, 64 Iowa 395; 19 Am. & Eng. R. Cas. 108; *Mobile etc. R. Co. v. Stroud*, 64 Miss. 784; 31 Am. & Eng. R. Cas. 443; *Yarnell v. St. Louis etc. R. Co.*, 75 Mo. 575; 10 Am. & Eng. R. Cas. 726; *Cauley v. Pittsburgh etc. R. Co.*, 95 Pa. St. 398; 2 Am. & Eng. R. Cas. 4; *Louisville etc. R. Co. v. Greene* (Ky. 1884), 19 Am. & Eng. R. Cas. 95.

Compare Houston etc. R. Co. v. Symkins, 54 Tex. 615; 6 Am. & Eng. R. Cas. 11.

In some States, however, it is required by statute that a lookout shall be kept. *Louisville etc. R. Co. v. Robertson*, 9 Heisk. (Tenn.) 276; *East Tennessee etc. R. Co. v. White*, 5 Lea (Tenn.) 540; 8 Am. & Eng. R. Cas. 65; *Moran v. Nashville etc. R. Co.*, 58 Tenn. 879.

Engineer is not bound to expect that helpless infants will be on the track, without sufficient knowledge or ability to escape when warned of danger. *Chrystal v. Troy etc. R. Co.*, 105 N. Y. 164; 31 Am. & Eng. R. Cas. 411.

3. Tomeley v. Chicago etc. R. Co., 53 Wis. 626; 4 Am. & Eng. R. Cas. 562; *Whalen v. Chicago etc. R. Co.*, 75 Wis. 654; 41 Am. & Eng. R. Cas. 558; *Johnson v. Chicago etc. R. Co.*, 49 Wis. 529; 1 Am. & Eng. R. Cas. 155; *Davis v. Chicago etc. R. Co.*, 58 Wis. 646; 15 Am. & Eng. R. Cas. 524; *Needham v. San Francisco etc. R. Co.*, 37 Cal. 409; *Conley v. Cincinnati etc. Co. (Ky.)*, 12 S. W. Rep. 764; 41 Am. & Eng. R. Cas. 537; *Frick v. St. Louis etc. R. Co.*, 5 Mo. App. 435 (train running through city streets); *Cheney v. New York Cent. R. Co.*, 16 Hun (N. Y.) 415; *Palmer v. Chicago etc. R. Co.*, 112 Ind. 250; 31 Am. & Eng. R. Cas. 250; *St. Louis etc. R. Co. v. Crosnoc*, 72 Tex. 79; 37 Am. & Eng. R. Cas. 313; *Western etc. R. Co. v. Meigs*, 74 Ga. 857; *Southerland v. Wilmington etc. R. Co.*, 106 N. Car. 101. See also *Taylor v. Delaware etc. R. Co.*, 113 Pa. St. 162; 28 Am. &

10. Stock-killing Cases.—A railroad company is not, in the absence of a statutory requirement, bound to fence its roadway,¹ and in those jurisdictions where no such requirement exists, the liability of a company for injuries to stock must be determined by the general rules of the law of negligence.² In many States, how-

Eng. R. Cas. 656; Western etc. R. Co. v. Meigs, 74 Ga. 857; Byrne v. New York Cent. R. Co., 104 N. Y. 362; 58 Am. Rep. 512.

Compare Mason v. Missouri etc. R. Co., 27 Kan. 83; 6 Am. & Eng. R. Cas. 1 (custom to use trestle bridge); Connyers v. Sioux City etc. R. Co., 78 Iowa 410.

In a *New York* case it is said that although a company, by permitting people repeatedly to cross its tracks at a point where there is no public right of passage, has given an implied license so to do, it owes no duty of active vigilance to those crossing to guard them from accident. The company is not restricted by the license in the use of its track; nor will a departure in some degree or particular by its employes from the ordinary course of procedure make it liable for an injury resulting therefrom, unless the doing of an act is shown which might reasonably be expected to cause injury to a person lawfully on the track under the license; the licensees acting under it take the risks incident to the business. *Sutton v. New York etc. R. Co.*, 66 N. Y. 243.

Presumption that Trespasser Will Leave Track When Warned.—Employes operating a train may not commit a willful injury, but they have a right to assume that a person on the track will exercise the common instinct of self-preservation, and leave the track in time to avoid danger. *Mobile etc. R. Co. v. Stroud*, 64 Miss. 784; 31 Am. & Eng. R. Cas. 443; *Bell v. Hannibal etc. R. Co.*, 72 Mo. 50; 4 Am. & Eng. R. Cas. 580; *Louisville etc. R. Co. v. Black*, 89 Ala. 313; 45 Am. & Eng. R. Cas. 38; *Nichols v. Louisville etc. R. Co.* (Ky. 1888), 6 S. W. Rep. 339; 34 Am. & Eng. R. Cas. 37; *Ohio etc. R. Co. v. Walker*, 113 Ind. 196; 32 Am. & Eng. R. Cas. 121; *International etc. R. Co. v. Smith*, 62 Tex. 252; 19 Am. & Eng. R. Cas. 21; *St. Louis etc. R. Co. v. Monday*, 49 Ark. 257; 31 Am. & Eng. R. Cas. 424.

They are not charged with knowledge of the trespasser's infirmity, such as deafness, unless it can be shown that it had been previously brought to their

notice. *Nichols v. Louisville etc. R. Co.* (Ky. 1888), 6 S. W. Rep. 339; 34 Am. & Eng. R. Cas. 37; *Louisville etc. R. Co. v. Cooper* (Ky. 1882), 6 Am. & Eng. R. Cas. 5; *Frazer v. South etc. R. Co.*, 81 Ala. 185; 28 Am. & Eng. R. Cas. 565; *Louisville etc. R. Co. v. Black*, 89 Ala. 313; 45 Am. & Eng. R. Cas. 38; *International etc. R. Co. v. Smith*, 62 Tex. 252; 19 Am. & Eng. R. Cas. 21; *Artusy v. Missouri Pac. R. Co.*, 73 Tex. 191; 37 Am. & Eng. R. Cas. 288; *Kennedy v. Denver etc. R. Co.*, 10 Colo. 493; 34 Am. & Eng. R. Cas. 40.

The same presumption does not apply in the case of cattle, horses, or similar animals. *Carlton v. Wilmington etc. R. Co.*, 104 N. Car. 365; 40 Am. & Eng. R. Cas. 178; *Snowden v. Norfolk etc. R. Co.*, 95 N. Car. 93; *Dennis v. Louisville etc. R. Co.*, 116 Ind. 42; 35 Am. & Eng. R. Cas. 141.

Ringin Bell, Blowing Whistle, etc.—The duty to sound signals at crossings and whenever persons or cattle are on the track ahead is generally provided by statute. A failure to perform this duty is evidence of negligence, though not conclusive. This is but a case for the application of the doctrine of negligence, for which see NEGLIGENCE, vol. 16, p. 386, *et seq.*; CROSSINGS, vol. 4, p. 921, *et seq.*

1. *St. Louis etc. R. Co. v. Walbrink*, 47 Ark. 330; 26 Am. & Eng. R. Cas. 604; *Ward v. Paducah etc. R. Co.*, 4 Fed. Rep. 862; 1 Am. & Eng. R. Cas. 620 (ordinary fence laws do not apply to railroad companies); *Boston etc. R. Co. v. Briggs*, 132 Mass. 24; 7 Am. & Eng. R. Cas. 541; *Clark v. Ohio River R. Co.* (W. Va. 1890), 12 S. E. Rep. 505; 45 Am. & Eng. R. Cas. 475; *Williams v. New Albany etc. R. Co.*, 5 Ind. 111; FENCES, vol. 7, p. 906.

2. The plaintiff must show that the company owed the duty to exercise ordinary care to prevent the injury, and that it failed to exercise such care which failure was the proximate cause of the injury complained of. See NEGLIGENCE, vol. 16, p. 387, *et seq.* See also CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15, *et seq.*; *Lafayette etc. R. Co. v.*

Shriner, 6 Ind. 141; Kuch v. Baltimore etc. R. Co., 17 Ind. 32.

Liability Where Owner Is Required to Keep His Stock Inclosed.—In those jurisdictions in which the common law obligation of owners to keep their stock within inclosures survives, the owner is guilty of contributory negligence which will bar his recovery, if he allows them to stray upon the railroad track where they are injured. *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Clark v. Syracuse etc. R. Co.*, 11 Barb. (N. Y.) 112; *Halloran v. New York etc. R. Co.*, 2 E. D. Smith (N. Y.) 257; *New York etc. R. Co. v. Skinner*, 19 Pa. St. 298; *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 101; reversing 5 Phila. (Pa.) 450; *Vandegrift v. Rediker*, 22 N. J. L. 185; *Price v. New Jersey R. Co.*, 32 N. J. L. 19; *Tower v. Providence etc. R. Co.*, 2 R. I. 404; *Maynard v. Boston etc. R. Co.*, 115 Mass. 458; *Darling v. Boston etc. R. Co.*, 121 Mass. 118; *Moses v. Southern Pac. R. Co.*, 18 Oregon 385; 42 Am. & Eng. R. Cas. 555 (the rule is laid down in this case, though it does not apply in *Oregon*); *Louisville etc. R. Co. v. Ballard*, 2 Metc. (Ky.) 177; *Pierce on Railroads* 402 and authorities cited; *Baltimore etc. R. Co. v. Lambson*, 12 Md. 257; *Jackson v. Rutland etc. R. Co.*, 25 Vt. 150; *Woolson v. Northern R. Co.*, 19 N. H. 267; *FENCES*, vol. 7, p. 890, 922, *et seq.*; note in 40 Am. & Eng. R. Cas. 173, 178.

So that the company is liable only for willful injuries. *Pierce on Railroads*, p. 402; *Great Western R. Co. v. Thomson*, 17 Ill. 131; *Chicago etc. R. Co. v. Patchin*, 16 Ill. 198; *Logansport etc. R. Co. v. Caldwell*, 38 Ill. 280; *Williams v. New Albany etc. R. Co.*, 5 Ind. 111; *Lafayette etc. R. Co. v. Shriner*, 6 Ind. 141; *Louisville etc. R. Co. v. Ballard*, 2 Metc. (Ky.) 177; *Louisville etc. R. Co. v. Milton*, 14 B. Mon. (Ky.) 81; *Obannon v. Louisville etc. R. Co.*, 8 Bush (Ky.) 351; *Price v. New Jersey etc. R. Co.*, 31 N. J. L. 229; *Drake v. Philadelphia etc. R. Co.*, 51 Pa. St. 240; *Baltimore etc. R. Co. v. Lamburn*, 12 Md. 257; *McDonnell v. Pittsfield etc. R. Co.*, 115 Mass. 564; *Missouri Pac. R. Co. v. Dunham*, 68 Tex. 231; 31 Am. & Eng. R. Cas. 530; *International etc. R. Co. v. Locke*, 64 Tex. 151; 23 Am. & Eng. R. Cas. 226 (liable only for gross negligence where stock law exists).

Compare *Kentucky Cent. R. Co. v. Lebus*, 14 Bush (Ky.) 518.

But there are some cases which hold that the existence of a stock law requiring owners to keep their stock inclosed has no effect upon the rule that the company is liable if it failed to use ordinary care to discover the stock when on the track and to prevent injury. *Jayner v. South Carolina R. Co.*, 26 S. Car. 49; 29 Am. & Eng. R. Cas. 258; *Jones v. Columbia etc. R. Co.*, 20 S. Car. 249; 19 Am. & Eng. R. Cas. 459; *Roberts v. Richmond etc. R. Co.*, 88 N. Car. 560; 20 Am. & Eng. R. Cas. 473; *Farmer v. Wilmington etc. R. Co.*, 88 N. Car. 564; 30 Am. & Eng. R. Cas. 481. See also *Alabama etc. R. Co. v. McAlpine*, 71 Ala. 545; 15 Am. & Eng. R. Cas. 544.

Liability Where No Such Requirement Exists.—But in a number of States the common-law rule as to inclosure of stock does not exist, and in such cases the owner is not guilty of any negligence in allowing his cattle to stray, and the railroad company is bound to exercise ordinary care in order to prevent injury to them when they come upon the track. *Little Rock etc. R. Co. v. Finley*, 37 Ark. 562; 11 Am. & Eng. R. Cas. 469; *Waters v. Moss*, 12 Cal. 535; *Laws v. North Carolina R. Co.*, 7 Jones (N. Car.) 468; *Washington v. Baltimore etc. R. Co.*, 17 W. Va. 190; 10 Am. & Eng. R. Cas. 749; *Watier v. Chicago etc. R. Co.*, 31 Minn. 91; 13 Am. & Eng. R. Cas. 582; *Alger v. Mississippi etc. R. Co.*, 10 Iowa 268; *Atchison etc. R. Co. v. Shaft*, 33 Kan. 521; 19 Am. & Eng. R. Cas. 529; *Alabama etc. R. Co. v. McAlpine*, 71 Ala. 545; 15 Am. & Eng. R. Cas. 544; *Chicago etc. R. Co. v. Jones*, 59 Miss. 565; 11 Am. & Eng. R. Cas. 450; *Donovan v. Hannibal etc. R. Co.*, 89 Mo. 147; 26 Am. & Eng. R. Cas. 588; *Savannah etc. R. Co. v. Geiger*, 21 Fla. 669; 29 Am. & Eng. R. Cas. 274; *Williams v. Northern Pac. R. Co.*, 3 Dak. 168; 11 Am. & Eng. R. Cas. 421; *Central R. Co. v. Hamilton*, 71 Ga. 461; 23 Am. & Eng. R. Cas. 207; *Western Maryland R. Co. v. Carter*, 59 Md. 306; 13 Am. & Eng. R. Cas. 573; *Jones v. Columbia etc. R. Co.*, 20 S. Car. 249; 19 Am. & Eng. R. Cas. 459; *Simkins v. Columbia etc. R. Co.*, 20 S. Car. 258; 19 Am. & Eng. R. Cas. 467; *FENCES*, vol. 7, p. 890, 922, *et seq.*; note in 40 Am. & Eng. R. Cas. 173-178.

In these States the company is therefore liable for all injuries to stock caused by the operation of its trains

which by the exercise of ordinary care it might have prevented. The right to the exclusive use of its track does not avail to exempt it from liability for negligence. *Vicksburg etc. R. Co. v. Patton*, 31 Miss. 156; *Mississippi etc. R. Co. v. Miller*, 41 Miss. 45 (test of ordinary care in such cases); *Raiford v. Mississippi etc. R. Co.*, 43 Miss. 233 (burden upon owner to prove negligence of the company); *New Orleans etc. R. Co. v. Field*, 46 Miss. 573; *Mobile etc. R. Co. v. Hudson*, 50 Miss. 572; *Natchez etc. R. Co. v. McNeil*, 61 Miss. 434; 19 Am. & Eng. R. Cas. 518; *Nashville etc. R. Co. v. Conans*, 45 Ala. 437; *Mobile etc. R. Co. v. Malone*, 46 Ala. 391; *South etc. Ala. R. Co. v. Hagood*, 53 Ala. 647; *South etc. Ala. R. Co. v. Brown*, 53 Ala. 651 (presentment of claims to special agent, under *Alabama Rev. Code* § 1402); *McAlpine v. Alabama etc. R. Co.*, 75 Ala. 113; 22 Am. & Eng. R. Cas. 602; *Murray v. South Carolina R. Co.* 10 Rich. (S. Car.) 227; *Danner v. South Carolina R. Co.*, 4 Rich. (S. Car.) 329 (burden upon owner to show negligence; if killing was willful on part of engineer, or accidental without negligence, no action will lie); *Zeigler v. North Eastern R. Co.*, 7 S. Car. 402 (omission to slacken speed at highway negligence, *per se*); *Brothers v. Railroad Co.*, 5 S. Car. 55; *Molair v. Port Royal etc. R. Co.*, 31 S. Car. 510; 38 Am. & Eng. R. Cas. 110; *Clark v. Western etc. R. Co.*, 1 Wins. (N. Car.) No 1, 109; *Montgomery v. Wilmington etc. R. Co.* 6 Jones (N. Car.) 464; *Aycock v. Railroad Co.*, 6 Jones (N. Car.) 231; *Garris v. Portsmouth etc. R. Co.*, 2 Ired. (N. Car.) 324; *Pippin v. Wilmington etc. R. Co.*, 75 N. Car. 54; *Winston v. Raleigh etc. R. Co.*, 90 N. Car. 66; 19 Am. & Eng. R. Cas. 566; *Houston etc. R. Co. v. Terry*, 42 Tex. 451; *Betlegi v. Houston etc. R. Co.*, 26 Tex. 604; *Kuch v. Baltimore etc. R. Co.*, 17 Md. 32; *Baltimore etc. R. Co. v. Mulligan*, 45 Md. 486; *Little Rock etc. R. Co. v. Finley*, 37 Ark. 502; 11 Am. & Eng. R. Cas. 469; *Little Rock etc. R. Co. v. Holland*, 40 Ark. 336; 19 Am. & Eng. R. Cas. 479 (ordinary care defined); *Little Rock etc. R. Co. v. Henson*, 39 Ark. 413; 19 Am. & Eng. R. Cas. 440; *Savannah etc. R. Co. v. Geiger*, 21 Fla. 669; 29 Am. & Eng. R. Cas. 274.

See also *Williams v. Michigan etc. R. Co.*, 2 Mich. 259; *Richmond v. Sacramento etc. R. Co.*, 18 Cal. 351; *Knight v. New Orleans etc. R. Co.*, 15

La. Ann. 105 (peculiar liability of New Orleans etc. R. Co.); *Isbell v. New York etc. R. Co.*, 27 Conn. 393; *Chicago etc. R. Co. v. Cuffman*, 28 Ill. 513.

Duty to Keep a Lookout.—In some jurisdictions it is the rule by statute or otherwise that the duty of the engineer is not limited to exercising due care after he perceives animals ahead, but he is bound also to keep a lookout so as to see them in time to avoid injury. *Alabama etc. R. Co. v. Powers*, 73 Ala. 244; 19 Am. & Eng. R. Cas. 502; *Mobile etc. R. Co. v. Caldwell*, 83 Ala. 196 (a watchful lookout must be steadily maintained); *Missouri Pac. R. Co. v. Gedney*, 44 Kan. 329; 45 Am. & Eng. R. Cas. 492; *Carlton v. Wilmington etc. R. Co.*, 104 N. Car. 365; 40 Am. & Eng. R. Cas. 178; *Louisville etc. R. Co. v. Robertson*, 9 Heisk. (Tenn.) 276 (*Tennessee Code*, § 1166); *Washington v. Baltimore etc. C. Co.*, 17 W. Va. 190; 10 Am. & Eng. R. Cas. 149; *Denver etc. R. Co. v. Henderson*, 10 Colo. 1; 31 Am. & Eng. R. Cas. 559; *Vicksburg etc. R. Co. v. Hart*, 61 Miss. 468; 19 Am. & Eng. R. Cas. 521.

This duty to keep a lookout is met if the engineer bestows on the service that watchfulness which his other duties would allow a prudent person to give it. *Alabama etc. R. Co. v. Powers*, 73 Ala. 244; 19 Am. & Eng. R. Cas. 502; *East Tennessee etc. R. Co. v. Bayliss*, 75 Ala. 466; 22 Am. & Eng. R. Cas. 596.

The requirement of § 1166 of Code of *Tennessee* that "every railroad company shall keep the engineer, fireman, or some other person upon the locomotive always upon the lookout ahead," etc., makes it the duty of all engaged in running the train, in whatever department employed, to give the entire energies of their bodies and minds to bring into requisition all of the means at their command to stop the train and prevent the accident. *Louisville etc. R. Co. v. Conner*, 9 Heisk. (Tenn.) 19; *Memphis etc. R. Co. v. Smith*, 9 Heisk. (Tenn.) 860.

A different rule prevails in *Arkansas*, and it is held that there is no duty on the part of the company to keep a lookout from the engine. *Kansas City etc. R. Co. v. Kirksey*, 48 Ark. 366; *Memphis etc. R. Co. v. Kerr*, 52 Ark. 162; 40 Am. & Eng. R. Cas. 172. In the latter case, the case of *Memphis etc. R. Co. v. Sanders*, 43 Ark. 225; 19 Am. & Eng. R. Cas. 497, in so far as it intimates, a different doctrine is disap-

proved. See also *Locke v. First Div. St. Paul etc. R. Co.*, 15 Minn. 350.

Duty to Stop Train.—The duty to stop the train exists only when the engineer either discovers, or ought to have discovered, the animal in dangerous proximity to the track and under circumstances indicating that either it would move on the track or else be injured if it remained stationary. *Western R. Co. v. Listruck*, 85 Ala. 352; *Western R. Co. v. Layams*, 80 Ala. 453; 40 Am. & Eng. R. Cas. 177, note; *Hannibal etc. R. Co. v. Young*, 79 Mo. 336; 19 Am. & Eng. R. Cas. 512; *Louisville etc. R. Co. v. Ganote* (Ky. 1883), 13 Am. & Eng. R. Cas. 519; *Louisville etc. R. Co. v. Mariott* (Ky. 1884), 19 Am. & Eng. R. Cas. 509 (safety of passengers a paramount consideration); *Little Rock etc. R. Co. v. Holland*, 40 Ark. 336; 19 Am. & Eng. R. Cas. 479; *Louisville etc. R. Co. v. Reidmond*, 11 Lea (Tenn.) 205; 13 Am. & Eng. R. Cas. 675; *Wilson v. Norfolk etc. R. Co.*, 90 N. Car. 69; 19 Am. & Eng. R. Cas. 453.

Injuries Not Caused by Actual Collision.—There is no liability on the part of a railroad company for injuries to animals not caused by actual collision. *Schertz v. Indianapolis etc. R. Co.*, 107 Ill. 577; 15 Am. & Eng. R. Cas. 523; *Pennsylvania Co. v. Dunlap*, 112 Ind. 93; 31 Am. & Eng. R. Cas. 512; *Croy v. Louisville etc. R. Co.*, 97 Ind. 126; 19 Am. & Eng. R. Cas. 608; *Holder v. Chicago etc. R. Co.*, 11 Lea (Tenn.) 176; 13 Am. & Eng. R. Cas. 567, 570, note. Thus, where a colt escaped on the track and fell through a bridge the company is not liable for the injury. *Knight v. New York etc. R. Co.*, 99 N. Y. 25; 23 Am. & Eng. R. Cas. 188, 190, note; *Burlington etc. R. Co. v. Shumaker*, 18 Neb. 369; 22 Am. & Eng. R. Cas. 565. So where an animal was frightened by a train and ran on the track and was injured on the trestle without being touched by the train, the company is not liable. *International etc. R. Co. v. Hughes*, 68 Tex. 290; 31 Am. & Eng. R. Cas. 569; *Seibert v. Missouri etc. R. Co.*, 72 Mo. 565; 6 Am. & Eng. R. Cas. 583 (animal killed in attempt to extricate it from the trestle). But where the company has failed to comply with the statutory requirement to fence, the fact that the train did not strike a horse which was injured by running in front of the train on to the bridge, does not relieve the company from liability. *Liston v.*

Central Iowa R. Co., 70 Iowa 714; 26 Am. & Eng. R. Cas. 593.

Presumption Arising from Fact of Injury.—In some States a presumption of negligence on the part of the railroad company arises from the mere fact of injury. *Danner's Case*, 4 Rich. (S. Car.) 329; *Jones v. Columbia etc. R. Co.*, 20 S. Car. 249; 19 Am. & Eng. R. Cas. 459; *White v. Concord etc. R. Co.*, 30 N. H. 207; *Smith v. Eastern R. Co.*, 35 N. H. 357.

In other States it is provided by statute that such presumption shall exist. *Wilson v. Norfolk etc. R. Co.*, 90 N. Car. 69; 19 Am. & Eng. R. Cas. 453; *Chicago etc. R. Co. v. Trotter*, 60 Miss. 442; *Columbus etc. R. Co. v. Kennedy*, 78 Ga. 646; 31 Am. & Eng. R. Cas. 92; NEGLIGENCE, vol. 16, p. 451; *Huber v. Chicago etc. R. Co. (Dak.)*, 43 N. W. Rep. 819; 40 Am. & Eng. R. Cas. 108; *Randall v. Richmond etc. R. Co. (N. Car. 1890)*, 12 S. E. Rep. 605; 45 Am. & Eng. R. Cas. 507; *Louisville etc. R. Co. v. Kelsey*, 89 Ala. 287; 42 Am. & Eng. R. Cas. 284.

But properly there is no such presumption, and the burden of proof is upon the plaintiff to show a wrongful killing. See NEGLIGENCE, vol. 16, p. 448; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 91; CROSSINGS, vol. 4, p. 540; *Cleveland etc. R. Co. v. Crawford*, 24 Ohio St. 631; 15 Am. Rep. 633; *Atchison etc. R. Co. v. Betts*, 10 Colo. 431; 31 Am. & Eng. R. Cas. 563; *Lyndsay v. Connecticut R. Co.*, 27 Vt. 643; *Burlington etc. R. Co. v. Wendt*, 12 Neb. 76; 6 Am. & Eng. R. Cas. 584; *Savannah etc. R. Co. v. Geiger*, 71 Fla. 669; 29 Am. & Eng. R. Cas. 274; *McKissock v. St. Louis etc. R. Co.*, 73 Mo. 456; 7 Am. & Eng. R. Cas. 590; *Schneir v. Chicago etc. R. Co.*, 40 Iowa 337.

In *St. Louis etc. R. Co. v. Hagan*, 42 Ark. 122; 19 Am. & Eng. R. Cas. 446, it is said that no presumption arises when cattle are found wounded near the track; but if it be proved that the wounding was done by a train, a presumption of negligence arises.

Dogs.—The case of *Jemison v. South Western R. Co.*, 75 Ga. 444, was an action to recover damages for the death of a dog run over by a train. It was held that a dog was not property, either at common law or under the statutes of the State, except in a qualified sense, and that no action could be maintained for its death unless the killing was wanton and malicious.

ever, statutes exist which require that all railroad tracks shall be fenced, and in these States the common-law rule is substituted in a great measure by the provisions of these statutes, making the maintenance of lawful fences the criterion by which to determine whether or not the railroad company is liable.¹

11. Measure of Damages.—General rules as to the measure of damages, in case of injury resulting from the negligence of a railroad company have already been set forth. Nothing more than a modification of one of these rules where the injury results in death need be mentioned here.²

XIX. MORTGAGES, BONDS, AND DEBENTURES.—See RAILROAD SECURITIES.

XX. MUNICIPAL SUBSCRIPTIONS.—See MUNICIPAL SECURITIES, vol. 18, pp. 1204, *et seq.*

XXI. RECEIVERS.—See RECEIVERS.

XXII. INJUNCTION AGAINST RAILROADS.—See INJUNCTIONS, vol. 10, p. 969.

XXIII. MANDAMUS.—See MANDAMUS, vol. 14, p. 158.

XXIV. TAXATION OF RAILROADS.—See TAXATION.

XXV. STATIONS.—See STATIONS.

XXVI. TICKETS AND FARES.—See TICKETS AND FARES.

In *Jones v. Bard*, 40 Fed. Rep. 281; 40 Am. & Eng. R. Cas. 191, recovery was denied in a similar case, but on the ground that there was no negligence, though the court maintained that more was to be expected of a dog in getting out of the way of danger than of ordinary cattle.

In *St. Louis etc. R. Co. v. Hanks*, 78 Tex. 300; 45 Am. & Eng. R. Cas. 521, it is held that the failure of an engineer to use ordinary care to prevent injury after he has seen the dog will render the company liable.

Value of Cases.—Many of the cases cited in this section are no longer of value in the State in which they were rendered because of later statutory provisions. They are still valuable, however, as showing the common-law rule on the subject.

1. See FENCES, vol. 7, p. 917, where the whole subject is discussed. See also *Pierce on Railroads*, p. 401, *et seq.*; 3 Wood's Ry. Law, p. 1543, *et seq.*; *Rorer on Railroads*, p. 614, *et seq.*; *NEGLIGENCE*, vol. 16, p. 420.

A clause giving to a railroad company the fee simple in their track, with the sub-use and occupation of the same, also providing that no person or body corporate or politic shall interfere therewith, etc., or do anything "to detract from or affect the profits of said

corporation," will not exempt the company from the operation of statutes, rendering railroad corporations liable for cattle killed by them, owing to a failure to fence, even though such statutes were passed subsequent to the act of incorporation. *Indianapolis etc. R. Co. v. Kercheval*, 16 Ind. 84.

2. The rule as to the measure of damages is stated in *DAMAGES*, vol. 5, p. 40; *DEATH*, vol. 5, p. 128, 129; *NEGLIGENCE*, vol. 16, p. 476. See also 3 *Suth. on Dam.*, p. 282; *Sedgewick on Dam.* (8th ed.), § 573.

One of the rules there stated is that where injury results in death, the measure of damages is compensation for the pecuniary loss to the survivors from the death of the deceased; and numerous cases are cited in support of the statement. But all the cases were under statutes which provided specifically that the jury should consider only the pecuniary loss.

In some jurisdictions, however, it is provided that such damages shall be recovered, not to exceed a certain sum, as the jury may deem "fair and just," no limitation to pecuniary loss being made. Under such statutes, it is uniformly held that the jury is not to be confined to a consideration of the pecuniary loss caused by the death of the deceased person. Thus, where a

plaintiff's child was killed, it was held that the jury might consider as an element of damage, the loss of society and the comfort which the parents might have taken in rearing their child. *Hyde v. Union Pac. R. Co.* (Utah, 1891), 26 Pac. Rep. 979. See also *Watly v. Mobile etc. R. Co.* (now, 1891, pending in Supreme Court of *Mississippi*).

So also it is held that in an action by a wife for damages for the death of her husband, the jury may take into consideration the relation existing between the plaintiff and deceased at the time of death, and the injury sustained by her in the loss of his society. *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20; *Nehrbas v. Central Pac. R. Co.*, 62 Cal. 336; *Munro v. Pacific Coast Dred. Co.*, 84 Cal. 515; 18 Am. St. Rep. 248; *Howard Co. v. Legg*, 93 Ind. 530.

It is also held that under such a statute, punitive or exemplary damages may be recovered. *Matthews v. Warner*, 29 Gratt. (Va.) 570; 26 Am. Rep. 396. In this case, after quoting the English statute and those of several of the States, the court by Christian, J., said: "We are bound to presume that the legislature which enacted this law was familiar with the English statute, and those of the other States of the Union, and of the American and English decisions under them. And it is a most significant fact that with the English and American statutes before them, and familiar with the decisions under them, the legislature, after following the English statute and the New York statute up to the point where the measure of damages in the one case is declared to be 'proportioned to the injury,' and in the other, 'with reference to the pecuniary injuries resulting from such death,' at that point discarded these terms, and in lieu thereof adopted the language, 'such damages as to the jury may seem fair and just.' It is impossible to conceive that the omission of such language, and the adoption of other terms meaning the very reverse could have been accidental. We must conclude that it was done with a design, and that design plainly, by all the recognized rules of construction, was to declare that in an action for the death of a party caused by the wrongful act, neglect, or default of any person or corporation, such damages may be recovered 'as to the jury may seem fair and just.'"

"I think it manifest that the legislature intended, as in *Kentucky*, *Iowa*, *Connecticut* and *California* (which States are exceptions to the English statute) to allow the jury in such cases to award remunerative and exemplary damages."

As to *Connecticut* rule, see *Murphy v. New Haven etc. R. Co.*, 29 Conn. 499.

In *Iowa*, however, the rule is that the jury must be confined to a consideration of the pecuniary damages. *Donaldson v. Mississippi etc. R. Co.*, 18 Iowa 290; 87 Am. Dec. 391; *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246. Whether the decision was made in pursuance of a special statutory provision does not appear in the case. In *Sherman v. Western Stage Co.*, 34 Iowa 515, the question as to whether exemplary damages could be allowed in an action for death was left *quære*.

But in no case can damages be allowed for mental pain and suffering. *Webb v. Denver etc. R. Co.* (Utah, 1890), 24 Pac. Rep. 616; 44 Am. & Eng. R. Cas. 683; *Blake v. Midland R. Co.*, 18 Q. B. 83, 83 E. C. L. 93; *Howard Co. v. Legg*, 93 Ind. 532; *Munro v. Pacific Coast Dred. etc. Co.*, 84 Cal. 515; 18 Am. St. Rep. 248.

And the right to recover punitive damages in any case ceases with the death of the wrongdoer. *Hewlett v. George*, 68 Miss. 703; *Sheik v. Hobson*, 64 Iowa 146.

In *Missouri*, under § 2123 of the Rev. St., providing that damages may be recovered not exceeding \$5,000 as the jury "may deem fair and just with reference to the necessary injury resulting from such death to the surviving parties, who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default," it is held that exemplary damages are recoverable. *Gray v. McDonald* (Mo. 1891), 16 S. W. Rep. 398; *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286; *Nichols v. Winfrey*, 79 Mo. 544; *Smith v. Wabash etc. R. Co.*, 92 Mo. 360. The case of *Porter v. Hannibal etc. R. Co.*, 71 Mo. 66, in so far as it asserted a different doctrine, was disapproved. But under this statute, in an action by a father for the death of a son no damages can be allowed, either as a *solatium* to the father for his mental agony and distress, or for the loss of his son's society. *Parsons v. Missouri Pac. R. Co.*, 94 Mo.

300; *Schaub v. Hannibal etc. R. Co.*, (Mo. 1891), 16 S. W. Rep. 924 (action by widow for husband's death).

Rev. Stat. of *Missouri*, §§ 4426-27, make a similar provision to that above cited, where an employé sues. As to proper instructions in such a case, see *McGowan v. St. Louis Ore etc. Co.* (Mo. 1891), 16 S. W. Rep. 236; *Fugler v. Pophe*, 43 Mo. App. 44.

In *Texas* exemplary damages are recoverable when the death was occasioned by the "willful act or gross negligence" of the company or its officers. *International etc. R. Co. v. McDonald*, 75 Tex. 41; 42 Am. & Eng. R. Cas. 211; *Houston etc. R. Co. v. Baker*, 57 Tex. 419; 11 Am. & Eng. Cas. 667. In this latter case it is held that under the statute a father cannot recover exemplary damages for the death of his son, he not being an "heir of the body."

So in *Kentucky*, when death results from the "willful neglect" of the company, exemplary damages are recoverable. *Louisville etc. R. Co. v. Brooks*, 83 Ky. 137.

Cons. Sts. of *Canada*, ch. 7, § 3 provide that "the judge or jury may give such damages as they think proportioned to the injury resulting from such death." It is held that although on the death of a wife, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife is a substantial loss for which damages may be recovered, as so also is the loss to the children of the care and moral training of their mother. *St. Lawrence etc. R. Co. v. Lett*, 11 Sup. Ct. (Can.), 422; 26 Am. & Eng. R. Cas. 454; affirming 11 Ont. App. 1; 21 Am. & Eng. R. Cas. 165. The doctrine of *Tilley v. Hudson River R. Co.*, 24 N. Y. 474, was quoted and approved.

"**Pecuniary**" to be **Liberally Construed**.—In *West Virginia* where the statute limits the amount to be recovered to "pecuniary loss" it is held proper to instruct the jury, where the action is for a father's death, that "in estimating the pecuniary injury they may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the children would have received from their father." *Searle v. Kanawha etc. R. Co.*, 32 W. Va. 370; 37 Am. & Eng. R. Cas. 184; *Stoher v. St. Louis etc. R. Co.*, 91 Mo. 509; 31 Am. & Eng. R. Cas. 229.

Other cases sustain the same view.

Tilley v. Hudson River R. Co., 29 N. Y. 285; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471; *Dwinney v. Wheeling etc. R. Co.*, 27 W. Va. 57.

Compare Chicago etc. R. Co. v. Pounds, 11 Lea (Tenn.) 127; 15 Am. & Eng. R. Cas. 510; *Nashville etc. R. Co. v. Smith*, 9 Lea (Tenn.) 475; 15 Am. & Eng. R. Cas. 469.

The word "pecuniary" in relation to the subject under consideration is to receive a liberal construction. *Vicksburg v. McLain*, 67 Miss. 4. See also *Watty v. Mobile etc. R. Co.* (Miss. 1891—now pending) and the cases just cited.

Plaintiff's Inheritance as Affecting Damages.—In estimating damages the jury cannot take into consideration the fact that the plaintiff, by the death of deceased, has come into the possession of large property. *Terry v. Jewett*, 78 N. Y. 346, affirming 17 Hun (N. Y.) 395.

Consult in this connection *Bevens v. Chicago etc. R. Co.*, 58 Iowa 150; 10 Am. & Eng. R. Cas. 658, where evidence as to the amount of property owned by the deceased was admitted. "The real question," it was said, "in this case, is what was the value of the deceased's life to his estate?"

See also remarks of *Bramwell, B.*, in *Bradburn v. Great Western R. Co.*, L. R., 10 Exch., 1; 11 Moak's Rep. 330.

Insurance as Affecting Damages.—The liability of the railroad company and the measure of damages entitled to be recovered where a party suffers injury from the negligence of such company are not affected in any way by the payment of any sum on account of the injury, by a life or accident insurance company, and evidence as to such insurance is therefore inadmissible. *Pittsburgh etc. R. Co. v. Thompson*, 56 Ill. 138; *Kellogg v. New York Cent. R. Co.*, 79 N. Y. 72; *North Pennsylvania R. Co. v. Kirk*, 90 Pa. St. 20; *Clark v. Inhabitants etc.*, 2 B. & C. 254; 92 E. C. L. 118; *Bradburn v. Great Western R. Co.*, L. R., 10 Exch. 1; 11 Moak's Rep. 330; *Mason v. Sainsbury*, 3 Doug. 61; 26 E. C. L. 36; *Harding v. Townshend*, 43 Vt. 534; 5 Am. Rep. 304; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239; 26 Am. & Eng. R. Cas. 268. A contract of life insurance is a mere contract to pay a certain sum of money upon the death of a person in consideration of the due payment of certain annual premiums during his life. It is not a contract of indemnity. *Dalby v. India etc. L. Assur. Co.*, 15 C. B. 365; 8 E. C. L. 364. It is a

RAIN-WATER.—See SURFACE-WATER.

RAINY DAYS.—See LAY DAYS, vol. 12, p. 974, n.

RAISE.—See note 1. (See also INTENT, vol. 11, p. 370.)

RANK.—Rank is often used to express something different from office. It then becomes a designation or title of honor, dignity, or distinction conferred upon an officer in order to fix his relative position with reference to other officers in matters of

"*quid pro quo*, larger if he gets it, on the chance that he will never get it at all." Bradburn v. Great Western R. Co., L. R., 10 Exch. 1; 11 Moak's Rep. 231.

See also Yates v. Whyte, 4 Bing. N. C. 272; Monticello v. Mollison, 17 How. (U. S.) 152; Hayward v. Cain, 105 Mass. 213; Clark v. Wilson, 103 Mass. 219; 4 Am. Rep. 532; Althorf v. Wolfe, 22 N. Y. 355; Drinkwater v. Dinsmore, 80 N. Y. 390; 36 Am. Rep. 624, reversing 16 Hun (N. Y.) 250.

The only case in which the doctrine here laid down has ever been denied is that of Hicks v. Newport etc. R. Co., 116 E. C. L. 401, note, in which Lord Campbell instructed the jury that if there was an insurance by some company on the life of the injured person and the parties suing were entitled to receive the amount of the policy, there ought to be a deduction from the aggregate amount of damages of the sum so received from the insurance company. See this case commented upon in Harding v. Towshend, 43 Vt. 541.

As to the right of an insurance company to maintain an action for damages against a railroad company whose negligence caused the death of one of its policy holders, see NEGLIGENCE, vol. 16, p. 470; Mobile L. Ins. Co. v. Brame, 95 U. S. 754; Randall v. Cochran, 1 Ves. Sr. 198.

Authorities on Railroads—Acknowledgment.—For much valuable assistance in the preparation of this article acknowledgment is made to Pierce on Railroads (edition of 1881); Wood's Railway Law; Rorer on Railroads; Redfield on Railways; Beach on Railways; Digest of Am. & Eng. R. Cas., vol. 1 (1890), vol. 2 (1891).

Special acknowledgment is due to the very valuable notes in the American and English Railroad Cases.

General reference may be made to other works treating the various branches of Railroad Law; for ex-

ample, Thompson on Carriers; Wheeler on Carriers; Shearman and Redfield on Negligence; Patterson's Railway Accident Law; Lacey's Railway Digest (2 vols.); Digest of Am. & Eng. R. Cas. (2 vols.); Beach's Railway Digest (Annual).

Annotated reported cases may be found in Am. & Eng. R. Cas. (Northport, N. Y.); Am. & Eng. R. & Corp. Rep. (Chicago); American Railway Reports (New York).

1. **Raise Equivalent to Collect.**—See INTENT, vol. 11, p. 370.

In an Act Granting a Lottery.—The act was as follows: "A lottery is hereby granted, etc., to raise the sum of," etc. It was held that the word as here used, meant to "create or produce a fund," and the word "raised" as used in the same act was held to mean "actually produced and realized in cash" ready to be paid into the treasury of the State, and not a sum of money ineffectually attempted to be raised. Opinion of the Justices, 7 Me. 502.

Authority to Raise Money.—An authority given to a municipal corporation to "raise" money for prosecuting and defending suits only authorizes the raising of money by taxation, and not by borrowing. Wells v. Salina, 119 N. Y. 280, 29 Am. & Eng. Corp. Cas. 101.

Raise a Child.—A testator devised the control, benefit, and proceeds of his real estate to his widow "to help her raise and school all" his children. It was held that when the children attained the age of twenty-one years they had been "raised" within the meaning of the will. Shoemaker v. Stobaugh, 59 Ind. 598.

Raise Revenue.—To bring revenue together; to collect revenue, not necessarily to increase the amount. This is the meaning in the declaration that a bill "to raise revenue" shall originate in the popular house. Anderson's L. Dict., citing Perry Co. v. Selma etc. R. Co., 58 Ala. 546.

privilege, precedence, and sometimes of command, or by which to determine his pay and emoluments.¹

RANSOM.—A ransom is only a redemption for money or other consideration of that which is taken in war.²

RAPE.

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| <p>I. Definition, 946.</p> <p>II. Person Who May Commit the Crime, 947.</p> <p>III. Principals and Accessories, 948.</p> <p>IV. Person on Whom the Crime May be Committed, 948.</p> <p>1. <i>In General</i>, 948.</p> <p>2. <i>Carnal Abuse of Children</i>, 948.</p> <p>V. The Carnal Knowledge Necessary, 949.</p> <p>VI. The Force Used, 950.</p> <p>VII. Resistance and Consent, 951.</p> <p>VIII. Indictment, 953.</p> <p>1. <i>Joinder of Parties</i>, 953.</p> <p>2. <i>Joinder of Counts</i>, 954.</p> <p>3. <i>Descriptive Allegations</i>, 955.</p> <p>4. <i>Charging the Offense</i>, 956.</p> | <p>5. <i>Conclusion</i>, 958.</p> <p>IX. Evidence, 958.</p> <p>1. <i>Prosecutrix</i>, 958.</p> <p>(a) <i>As a Witness</i>, 958.</p> <p>(b) <i>When an Infant</i>, 958.</p> <p>(c) <i>Her Complaint at the Time</i>, 959.</p> <p>(d) <i>Her Cross-Examination</i>, 961.</p> <p>(e) <i>Her Character</i>, 961.</p> <p>2. <i>Previous Conduct of the Accused</i>, 963.</p> <p>3. <i>Various Matters of Evidence</i>, 963.</p> <p>X. Instructions, 967.</p> <p>XI. Verdict, 968.</p> <p>XII. Assault with Intent to Commit Rape, 968.</p> <p>XIII. The Civil Action, 969.</p> |
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I. DEFINITION.—Rape is the carnal knowledge of a woman by a man, forcibly and unlawfully against her will;³ or, more accurately, “where she does not consent,” instead of “against her will,” following the words of the statute of West-

Raised Checks.—See CHECKS, vol. 3, p. 225.

1. *Wood v. U. S.*, 15 Ct. of Cl. 159.
2. *Havelock v. Rockwood*, 8 T. R. 277.

A ransom is not, strictly speaking, a re-purchase of the captured property. It is rather the re-purchase of the actual right of the captors at the time, be it what it may; or, more properly, it is a relinquishment of all the interest and benefit which the captors might acquire or consummate in the property by the regular adjudication of a prize tribunal, whether it be an interest *in rem*, or mere title to expenses. *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325.

A **Ransom Bill** is a contract for payment of ransom of a captured vessel, with stipulations of safe conduct, if she pursue a certain course and arrive at a certain time. If found out of time and course the safe conduct is void. *Bouvier's L. Dict.*, citing *Wheaton's Int. Law* 107.

The cognizance of ransom bills belongs exclusively to admiralty, but an action on a bill of exchange given as collateral security for the payment of a ransom bill may be maintained in a court of common law. *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325. The payment of a ransom bill cannot be enforced in *England* during the war by an action on the contract, but can in this country. *Bouvier's L. Dict.*, citing 1 *Kent's Com.* 104, 105; *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325.

An ally is bound by the ransom bill of a co-belligerent. *Miller v. Ship Resolution*, 2 Dall. (U. S.) 15.

3. *Croghan v. State*, 22 Wis. 445; *People v. Lynch*, 29 Mich. 284; *Don Moran v. People*, 25 Mich. 359; 12 Am. Rep. 283; *Charles v. State*, 11 Ark. 409; *Cato v. State*, 9 Fla. 182; *State v. Pickett*, 11 Nev. 257; 21 Am. Rep. 754; *Bouv. L. Dict.*, 1 East P. C. 434; 1 Hawk. P. C. (Curw. ed.) 122, § 2; 1 Russ. Crimes (3d Eng. ed.), p. 675.

Rape is the carnal knowledge of

minster 2, defining the offense. The crime may be committed when, strictly speaking, the woman exhibits no will at all, as when drugged or *non compos mentis*; and it may be committed where the act is not strictly against her will but is effected without a conscious and proper consent, as by fear or fraud.¹

II. THE PERSON WHO MAY COMMIT THE CRIME.—Rape may be committed only where there is a physical capacity in the direct perpetrator.²

It is said that infants under the age of fourteen years cannot commit the crime of rape; and that no evidence is admissible to the contrary, if he be under that age, even though it could be shown as matter of fact that he had the requisite capacity. Such is the English doctrine.³

In the United States, however, some courts have held that the presumption of incapacity is not conclusive but rebuttable.⁴ Nor can a boy under the age of fourteen be convicted of an assault with intent to commit rape.⁵

any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will. 1 Hale P. C. 628.

1. See 2 Bish. Crim. Law, § 1115. The two definitions may be reconciled by holding that "against her will" is equivalent to "without her consent," as was done in *Com. v. Burke*, 105 Mass. 376; 7 Am. Rep. 531. The later English authorities sustain the position that it is the ravishment of a woman without her consent, which constitutes the crime rather than that it was against her will. *Reg. v. Fletcher*, 8 Cox C. C. 131; *Reg. v. Camplin*, 1 Cox C. C. 220; *Reg. v. Ryan*, 2 M. C. C. 15.

2. *Nugent v. State*, 18 Ala. 521. This definition has been adopted in *Bishop Cr. Law*, § 1116. And see *Hiltabiddle v. State*, 35 Ohio St. 52; 35 Am. Rep. 592.

But impotence is no defense in a prosecution for assault for intent to commit rape where there is no proof that defendant knew that he was impotent. *Territory v. Keyes*, 5 Dak. 244.

3. *State v. Sam*, 1 Wins. No. 1 (N. Car.) 300; *Reg. v. Phillips*, 8 C. & P. 736; 34 E. C. L. 610; *Reg. v. Jordan*, 9 C. & P. 118; 38 E. C. L. 63; *Reg. v. Brimilow*, 9 C. & P. 336; 38 E. C. L. 158; *Rex v. Groombridge*, 7 C. & P. 782; 32 E. C. L. 641; *Williams v. State*, 20 Fla. 777.

4. The common-law presumption

that a boy under fourteen is incapable of committing rape is liable to be overcome by clear proof of maturity. But the question of capacity is not to be left to the jury on very slight evidence tending to show maturity. *People v. Randolph*, 2 Park. Cr. (N. Y.) 174.

Williams v. State, 14 Ohio 222; 45 Am. Rep. 536; *Wagoner v. State*, 5 Lea (Tenn.) 352; *Heilman v. Com.*, 84 Ky. 457.

A jury may be instructed to draw inferences as to the age of the prisoner from his personal appearance. *State v. McNair*, 93 N. Car. 628.

The common-law presumption does not obtain in *Louisiana*. *State v. Jones*, 39 La. Ann. 935.

5. *State v. Sam*, 1 Wins. No. 1 (N. Car.) 300; *Rex v. Eldershaw*, 3. C. & P. 396; 14 E. C. L. 367; *Reg. v. Phillips*, 8 C. & P. 736; 34 E. C. L. 610; *Williams v. State*, 14 Ohio 222; 45 Am. Dec. 536; *State v. Handy*, 4 Har. (Del.) 566.

In *Com. v. Green*, 2 Pick. (Mass.) 380, it was held otherwise on the ground that the rules established were *in favorem vitæ* and should not be extended to assaults. In this case, however, Parker, C. J., dissented, and the decision is opposed to the weight of authority.

In *People v. Randolph*, 2 Park. Cr. (N. Y.) 174, it was held that he cannot be convicted of an assault to commit rape unless the common law presumption as to physical incapacity is overcome by evidence.

III. PRINCIPALS AND ACCESSORIES.—One not technically capable of rape may become guilty by aiding and abetting another who is. All persons who are present, aiding and assisting in the commission of the crime, are principals in the second degree, whether men or women, and may be indicted and punished to the same extent as the principal perpetrator of the crime.¹

IV. THE PERSON ON WHOM THE CRIME MAY BE COMMITTED—1. **In General.**—The crime may be committed upon any female, of whatever character, mental capacity, or age, if without her consent.²

2. **Carnal Abuse of Children.**—But a child under ten years of age is conclusively presumed incapable of giving her consent,³ and carnal knowledge of such a child is felony. Carnal knowledge of

1. *Kessler v. Com.* 12 Bush (Ky.) 18; *Reg. v. Crisham*, C. & M. 187; 41 E. C. L. 106; *Rex v. Folkes*, 1 Mov. C. C. 354; *Rex v. Gray*, 7 Car. & P. 164; 32 E. C. L. 480.

Defendant and three others forcibly separated prosecutrix from her escort, with whom she was walking, and the others ravished her. Defendant admitted that he put his hand on the escort's shoulder, and suggested that he take his girl and go home, and that he knew the intention of the others, but denied taking any further part in the separation, and alleged that he then left. *Held*, that as defendant was present aiding and assisting, his conviction was warranted, though he did not have intercourse with prosecutrix. *People v. Batterson*, 50 Hun (N. Y.) 44.

A, who wanted a divorce from his wife, offered B money to be caught in the act of adultery with her. A and his brother concealed themselves while B made the effort. The woman would not consent, whereupon B, A and his brother looking on, committed rape upon her. *Held*, that A was guilty of rape. *People v. Chapman*, 62 Mich. 280.

2. *Wright v. State*, 4 Humph. (Tenn.) 193. That she was a lewd woman or a common prostitute makes no difference. One may be guilty of rape on a woman who offered to permit the intercourse for ten cents. *State v. Long*, 93 N. Car. 542.

The fact that the female was not a virgin was said in *Higgins v. People*, 1 Hun (N. Y.) 307, not to lessen nor mitigate the offense.

3. *Coates v. State*, 50 Ark. 330; *Williams v. State*, 47 Miss. 609; *Dawson v. State*, 29 Ark. 116; *Fizell v. State*, 25 Wis. 364; *State v. Dancy*, 83 N. Car.

608; *People v. McDonald*, 9 Mich. 150; *Mayo v. State*, 7 Tex. App. 342.

Under the *Louisiana Code*, intercourse with a female under twelve is rape. *State v. Tiltman*, 30 La. Ann. 1249; 31 Am. Rep. 236.

Act *Nebraska* 1887, fixes the age of consent for a female child at fifteen years, and in effect declares that she is incapable of consenting to sexual intercourse; and that such intercourse with her, when under that age, by a person over eighteen years of age, even with her consent, will constitute rape. *State v. Wright*, 25 Neb. 38.

Two *Ohio* cases, however, hold that evidence is admissible to show that the child understood the nature of the act, or had such knowledge as females at the age of ten usually have, and a bare preponderance only is required. *O'Meara v. State*, 17 Ohio St. 515; *Moore v. State*, 17 Ohio St. 521.

On the other hand, a female who is over ten years of age, but is a child yet in physical and mental development, may properly, according to a decision under the *Texas Code* be presumed incapable of consent. *Anschilds v. State*, 6 Tex. App. 524. See also *Joiner v. State*, 62 Ga. 560.

A child under ten years of age cannot legally consent to a rape upon her, but she may consent to the attempt to commit it; and such an attempt, with her consent, would not be an assault. *Reg. v. Cockburn*, 3 Cox C. C. 543.

But on an indictment for attempting to have carnal knowledge of a girl under ten years, being a misdemeanor, consent by the girl is no defense and is immaterial. *Reg. v. Beale*, 14 W. R. 57; 10 Cox C. C. 157.

In a trial for rape on a child between thirteen and fourteen years of age,

a child between the ages of ten and twelve with her consent is a misdemeanor by statute in *England* and in most of the States.¹ It is not essential to a conviction that the accused should have known that the girl was under age, and even though she consents, at the same time saying she is over age, the accused may be guilty of the crime.²

V. THE CARNAL KNOWLEDGE NECESSARY.—Actual carnal knowledge must be shown either by direct or indirect evidence.³ Neither in *England* nor in the *United States* is it essential, at the present day, to prove emission.⁴ If the fact of penetration is proved, it

where the evidence shows that defendants did have intercourse with her, and compelled her to submit to their embraces, though she was shown to be a depraved girl, a refusal to instruct the jury after the testimony of the State had closed, to find defendants not guilty, is not error. *Pugh v. Com.* (Ky. 1888), 7 S. W. Rep. 541.

1. Attempting to carnally know and abuse a girl between the ages of ten and twelve is not an assault, if the girl consents to all that is done, but is a misdemeanor. The person making such attempt with the consent of the girl is not indictable for an assault, but is indictable for the misdemeanor of attempting to commit the misdemeanor of carnally knowing and abusing her. *Reg. v. Martin*, 9 C. & P. 213; 38 E. C. L. 85.

An indecent assault committed upon a girl between the ages of ten and twelve, with her consent, is not indictable. *Reg. v. Johnson*, L. & C. 632; 10 Cox C. C. 114.

On an indictment for the carnal knowledge of a girl above ten years of age and under twelve, and also for an assault, *held*, on the latter count, that although consent would be a defense, consent extorted by terror, or induced by the influence of a person in whose power she feels herself, is not really such consent as will have that effect. *Reg. v. Woodhurst*, 12 Cox C. C. 443; and in *Reg. v. Day*, 9 C. & P. 722, 38 E. C. L. 306, it was held that although consent on the part of the girl would put an end to the charge of assault, yet that there was a great difference between consent and submission, and that, although in the case of an adult, submitting quietly to an outrage of this kind would go far to show consent, yet that, in the case of a child, the jury should consider whether the submission of the child was voluntary on her part, or was the result of fear

under the circumstances in which she was placed.

If on a trial for misdemeanor in carnally abusing a girl between the ages of ten and twelve, it appears that, in addition, the elements of rape were present, the prisoner will not be acquitted of the lighter offense. *Reg. v. Neale*, 1 C. & R. 591; 47 E. C. L. 590.

The statutory provision of *Connecticut* for the punishment of carnal knowledge of children under ten does not do away with the common-law crime of rape committed on a child under ten. *State v. Worden*, 46 Conn. 349; 33 Am. Rep. 27.

Subsequent Acts.—On an indictment for rape on a child under ten, evidence was admitted of subsequent perpetrations of the same offense on different days previously to complaint to the mother, it appearing that the prisoner had threatened the child on the first occasion, it was held that, virtually, it was in such a case all one continuous offense. *Reg. v. Rearden*, 4 F. & F. 76.

It is now rape under the *New York* statute for a man to have sexual intercourse with a female not his wife under the age of sixteen years. *People v. Connor*, 31 N. Y. St. Rep. 162. Compare *People v. Maxon*, 32 N. Y. St. Rep. 131.

See further as to the carnal knowledge of children and of girls under the age of consent, the statutes of the various States.

2. *Lawrence v. Com.*, 30 Gratt. (Va.) 845; *Givens v. Com.*, 29 Gratt. (Va.) 830; *State v. Hatfield*, 75 Iowa 592.

3. *Wesley v. State*, 65 Ga. 731; *Hartke v. State*, 67 Wis. 552; *Word v. State*, 12 Tex. App. 174; *Davies v. State*, 43 Tex. 189.

4. *Rex v. Jennings*, 4 C. & P. 249; 19 E. C. L. 368; *Rex v. Reek-spear*, 1 M. C. C. 342; *Pennsylvania v. Sullivan*, Add. (Pa.) 143; *Waller v. State*, 40 Ala. 325; *Osgood v. State*, 64

is enough,¹ and evidence of the least penetration is sufficient.²

VI. THE FORCE USED.—Without force, actual or constructive, there can be no rape.³ It must be shown that the prisoner intended to gratify his passion at all events and notwithstanding the utmost resistance on the part of the woman.⁴ The force used must be sufficient to accomplish his purpose,⁵ but need not be such as to create a reasonable apprehension of death. If the woman submits from terror or the dread of greater violence caused by threats, the intimidation becomes equivalent to force.⁶ Accomplishing intercourse by fraud without intending to use force does not constitute rape unless it be shown that the accused intended to use force if the fraud failed.⁷

Wis. 472; Comstock v. State, 14 Neb. 205; People v. Crowley, 105 N. Y. 234; 24 & 25 Vict. ch. 100, § 63; 9 Geo. IV., ch. 31, § 18.

1. Reg. v. Allen, 9 C. & P. 31; 38 E. C. L. 24.

2. State v. Le Blanc, 1 Treadw. Const. (S. Car.) 354; State v. Hargrave, 65 N. Car. 466; State v. Burton, 1 Houst. Crim. C. (Del.) 363; State v. Shields, 45 Conn. 256; Bean v. People, 124 Ill. 576; Taylor v. State, 111 Ind. 279; State v. Hodges, Phil. (N. Car.) 231; Reg. v. Hughes, 9 C. & P. 752; 38 E. C. L. 320; Reg. v. Russen, 1 East P. C. 430; Reg. v. Jordan, 9 C. & P. 118; 38 E. C. L. 63.

If, on the trial of an indictment for carnally knowing and abusing a female child under ten, the jury is satisfied that at any time any part of the virile member of the prisoner was within the labia of the pudenda, no matter how little, this is sufficient to constitute a penetration, and the jury ought to convict. Reg. v. Lines, 1 C. & K. 393; 47 E. C. L. 393.

The extent of the penetration is immaterial. People v. Crowley, 102 N. Y. 234.

Though it is not necessary, in order to complete the offense of rape, that the hymen should be ruptured, provided that it is clearly proved that there was penetration, yet where that which is so very near to the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration so as to sustain the charge. Reg. v. McRue, 8 C. & P. 641; 34 E. C. L. 562.

The proof of penetration may be indirect. Brauer v. State, 25 Wis. 413.

3. McNair v. State, 53 Ala. 453; Os-

good v. State, 64 Wis. 472; State v. Murphy, 6 Ala. 765; 41 Am. Dec. 79.

It is not the persistence with which the prisoner intended to prosecute his design but the force actually used, that is an element in the crime. Dauson v. State, 29 Ark. 116.

The jury must be satisfied that the accused intended to have intercourse by force, and not merely to tempt to consent. Garrison v. People, 6 Neb. 274.

4. Rex v. Lloyd, 7 C. & P. 318; 32 E. C. L. 523; Reg. v. Wright, 4 F. & F. 667; Mahoney v. People, 43 Mich. 39; State v. Hagerman, 47 Iowa 151; Taylor v. State, 50 Ga. 79. Where, in determining the question of intent, the jury was allowed to consider the fact that the prisoner desisted and fled when the woman cried out.

5. Com. v. McDonald, 110 Mass. 405; Waller v. State, 40 Ala. 325.

6. Reg. v. Rudland, 4 F. & F. 495; Pleasant v. State, 13 Ark. 360; Turner v. People, 33 Mich. 363; Huston v. People, 121 Ill. 497; Bass v. State, 16 Tex. App. 62; State v. Ward, 73 Iowa 532.

7. Walter v. People, 50 Barb. (N. Y.) 144; Lewis v. State, 30 Ala. 54; Myatt v. State, 2 Swan (Tenn.) 394; and see Reg. v. Stanton, 1 C. & K. 415; 47 E. C. L. 414, where, on an indictment for an assault with intent to commit a rape, the prosecutrix stated, that the defendant, her medical man, being in her bedroom, directed her to lean forward on a bed, that he might apply an injection; she did so, and the injection having been applied, she found the defendant was proceeding to have connection with her, upon which she instantly raised herself, and ran out of the room. She stated that

VII. RESISTANCE AND CONSENT.—There can be no rape of a female within the age of consent, where there is consent, no matter how reluctantly it be given.¹ The connection must be against her will, and there must be the utmost reluctance and resistance, or her will must be overcome by fear and terror so extreme as to preclude resistance.² The resistance must depend in amount on surrounding circumstances, and on the relative physical strength of the parties.³

There is no arbitrary rule of law that a woman must employ in resistance the utmost physical force and display the utmost reluctance of which she is capable.⁴

Non-resistance to connection, permitted under a misapprehension induced by the conduct of the man, by a woman conscious and capable of consenting, amounts to consent, though unintentional.⁵

But a connection with a woman while asleep,⁶ unconscious,⁷ or

the defendant had penetrated her person a little. *Held*, that, if it had appeared that the defendant had intended to have had a connection with the prosecutrix by force, the complete offense of rape would, upon this evidence have been proved, but that the thus getting possession of the person of the woman by surprise, was not an assault with intent to commit a rape, but was an assault.

1. *Reg. v. Jones*, 4 L. T., N. S. 154; *Pollard v. State*, 2 Iowa 567; *Territory v. Potter*, 1 Arizona 421; *State v. Burgdorf*, 53 Mo. 65; *Whittaker v. State*, 50 Wis. 518; 36 Am. Rep. 856; *Brown v. People*, 36 Mich. 203.

2. *Strang v. People*, 24 Mich. 1; *Don Moran v. People*, 25 Mich. 356; *State v. Ruth*, 21 Kan. 583; *Wright v. State*, 4 Humph. (Tenn.) 194; *People v. Clemons*, 37 Hun (N. Y.) 580; *State v. Ward*, 73 Iowa 532.

3. *Jenkins v. State*, 1 Tex. App. 346; *Bean v. People*, 124 Ill. 576; *People v. Crego*, 70 Mich. 319; *State v. Knapp*, 45 N. H. 148; *Nugent v. State*, 18 Ala. 521.

4. *Com. v. McDonald*, 110 Mass. 405; *State v. Shields*, 45 Conn. 256.

Compare the following cases, where it appears that, at the time of the offense, the prosecutrix was conscious, in the possession of her natural mental and physical powers, was not overawed by the number of assailants nor terrified by threats of death, nor in such place and position as to make resistance useless, she must resist until exhausted or overpowered. *People v. Dohring*, 59 N. Y. 374; 17 Am. Rep. 349; *Oleson v. State*, 11 Neb. 276; 38 Am. Rep. 366;

People v. Mayes, 66 Cal. 597; 56 Am. Rep. 126; *Mathews v. State*, 11 Neb. 330; *People v. Morrison*, 1 Park. Cr. (N. Y.) 625.

5. *Reg. v. Barrow*, 11 Cox C. C. 191. A woman, with her baby in her arms, was lying in bed between sleeping and waking, and her husband was asleep beside her. She was completely awakened by a man having connection with her, and pushing the baby aside. Almost directly she was completely awakened she found that the man was not her husband, and awoke her husband. *Held*, that a conviction for a rape upon these facts could not be sustained.

Reg. v. Clarke, 6 Cox C. C. 412; *Reg. v. Sweeney*, 8 Cox C. C. 223; *Reg. v. Williams*, 8 C. & P. 286; 34 E. C. L. 392; *Reg. v. Saunders*, 8 C. & P. 265; 34 E. C. L. 383; *Rex v. Jackson*, R. & R., C. C. 487; *Lewis v. State*, 30 Ala. 54; *Wyatt v. State*, 2 Swan (Tenn.) 394.

Obtaining intercourse with a weak-minded woman by fraud consisting of a fictitious marriage, is not rape. *Bloodworth v. State*, 6 Baxt. (Tenn.) 614; 32 Am. Rep. 546.

So as to consent obtained by promises. *Clark v. State*, 30 Tex. 448.

Under the *Texas* statute, rape by fraud is not shown by a mere attempt to have connection with a sleeping married woman. There must be an active stratagem inducing her to believe the offender to be her husband. *King v. State*, 22 Tex. App. 650.

6. *Reg. v. Mayers*, 12 Co. C. C. 311.

7. *Com. v. Burke*, 105 Mass. 376; 7 Am. Rep. 531.

insensible from intoxication¹ is rape; for the capacity to consent is wanting, and there is no necessity that the act should be positively against the woman's will, absence of consent being sufficient;² so where there is idiocy or imbecility of such a degree as to prevent capacity for assent or dissent.³ Where a woman gives her consent through representations that the intercourse is a part of medical treatment, the offense is not rape, but assault.⁴ On the other hand, where the connection is under pretense of performing a surgical operation to which the prosecutrix has given her consent, she consenting to one thing and he doing another by fraud, there may be rape.⁵

1. *Reg. v. Camplin*, 1 C. & K. 746; 47 E. C. L. 746. But in *New York* having carnal connection, forcibly, with a woman intoxicated to the point of insensibility, is not a rape but is merely a crime under § 23 of the act respecting offenses against the person (2 *New York Rev. Stat.* 663, § 23).

And a person cannot properly be convicted of an assault with intent to commit a rape when the circumstances of the assault were such that a violation of the person actually accomplished would not have been a rape. *People v. Quin*, 50 Barb. (N. Y.) 128.

2. *Reg. v. Fletcher*, 8 Cox C. C. 131; *Reg. v. Hallett*, 9 C. & P. 748; 38 E. C. L. 318; *Osgood v. State*, 64 Wis. 472; *State v. Shields*, 45 Conn. 256; *Com. v. Burke*, 105 Mass. 376; 7 Am. Rep. 531.

3. *Reg. v. Barratt*, 12 Cox C. C. 498; *State v. Tarr*, 28 Iowa 397; *State v. Atherton*, 50 Iowa 189; 32 Am. Rep. 134; *Reg. v. Fletcher*, 8 Cox C. C. 131. But the mere fact of connection with an idiot girl capable of recognizing and describing the prisoner, but incapable, so far as her idiocy rendered her so, of expressing dissent or consent, and therefore without her consent, is not sufficient evidence of the commission of a rape upon her to be left to a jury. *Reg. v. Fletcher*, 14 W. R. 764; 10 Cox C. C. 248.

The cases of *Reg. v. Fletcher*, 8 Cox C. C. 131; and of *Reg. v. Fletcher*, 10 Cox C. C. 248; 1 L. R. C. C. 39, are not adverse to one another. The principle is properly laid down in the first case, and the second case was only a decision to the effect that there was not that requisite testimony of want of assent to justify leaving the case to the jury. *Reg. v. Barrett*, 12 Cox C. C. 498.

In decisions made under the *Texas* code, imbecility has been held not to be

presumption of want of consent. See *Baldwin v. State*, 15 Tex. App. 275; *Rodriguez v. State*, 20 Tex. App. 542.

See also *McQuirk v. State* (Ala.), 4 So. Rep. 775; *People v. Cornwell*, 13 Mich. 327, where it was held that the crime of rape was not committed where a man had intercourse with a woman of good size and strength and of mature age, who was shown to be in a state of *dementia* not idiotic but approaching to it, and no circumstances of fraud or force were shown.

4. *Reg. v. Case*, 5 Cox C. C. 222; *Don Moran v. People*, 25 Mich. 356; 12 Am. Rep. 283. See also *Walter v. People*, 80 Barb. (N. Y.) 144.

5. *Reg. v. Flattery*, 13 Cox C. C. 388; *Pomeroy v. State*, 94 Ind. 96; 48 Am. Rep. 146.

Mere verbal objections unaccompanied by any outcry or actual resistance are not enough to make the acts of the accused rape or an attempt to commit rape. *Reynolds v. People*, 41 How. Pr. (N. Y.) 279; *Lawson v. State*, 17 Tex. App. 292. So where besides lack of outcry no complaint was made within a reasonable time, and before instituting criminal proceedings the prosecutrix had brought suit for seduction under promise of marriage. *Eyler v. State*, 71 Ind. 49. So where there was another person in the room who could have heard had there been resistance or outcry. *Pollard v. State*, 2 Iowa 567. So where the prosecutrix, a girl of fourteen, weighed thirty-five pounds more than the accused and admitted that she made neither outcry nor resistance. *Brown v. Com.*, 82 Va. 653. See also *Barney v. People*, 22 Ill. 160. But see *Bailey v. Com.*, 82 Va. 107, where the defendant had intercourse with a fourteen-year old step-daughter in her bed in a room where three younger children were sleeping; she

VIII. INDICTMENT—1. Joinder of Parties.—Two or more may be indicted jointly as principals for the commission of rape,¹ for one may be present, aiding and abetting others, which, in the law of rape, constitutes him a principal.²

A count charging A as a principal in the first degree and B as a principal in the second degree may be joined with another count charging B as principal in the first degree and A as principal in the second degree.³

told him not to get into the bed and threatened to tell her mother, but made no outcry, and no complaint for six days. It was held that under the circumstances, a conviction of rape must be sustained; and where a father has established a kind of reign of terror in his family, and his daughter, under the influence of dread and terror, remains passive while he has connection with her, he may be found guilty of rape. *Reg. v. Jones*, 4 L. T., N. S. 154. Where there was evidence tending to show consent of the prosecutrix, and also that she withdrew such consent before the act was consummated, a conviction will not be disturbed. *State v. McCaffeny*, 63 Iowa 479.

The facts that the female made no violent outcry, that her garments were uninjured, are strong, but not conclusive, evidence to rebut the charge of the commission of a rape upon her, and are to be weighed by the jury in connection with her age, and the other circumstances of the case. *State v. Cross*, 12 Iowa 66; 79 Am. Dec. 519.

In the case of a very young child, to wit fifteen years old, there may be a conviction, although she made no opposition at all, as submission does not necessarily imply consent. *State v. Cross*, 12 Iowa 66.

Consent cannot be inferred from the fact that the clothes of the prosecutrix were not soiled, and that she was not hurt, nor can consent to the act with a negro defendant be inferred from the fact that the prosecutrix has lived and associated with negroes. *Barnett v. State*, 83 Ala. 40.

The fact that the victim made no outcry is of weight even though the relation between the parties and the friendly and ignorant condition of the sufferer accounts for the silence. *State v. Cone*, 1 Jones (N. Car.) 18.

When the testimony of the prosecutrix is that the parties were in her room engaged in conversation, when

she was surprised and suddenly overcome, and her mouth stopped, and that she became unconscious, and received grievous injuries, of which she soon after complained to her sister, the explanation of why no outcry was made after she became conscious is for the jury, and the judgment will not be set aside for refusal to grant a new trial on defendant's motion, though he says the prosecutrix was not unconscious. *State v. Reid*, 39 Minn. 277.

How far the fact that the prosecutrix made no outcry, although she knew there were neighbors within hearing, nor showed any marks of violence, may be considered in favor of the accused. See *Crockett v. State*, 49 Ga. 185.

1. *Dennis v. State*, 5 Ark. 230.

2. *State v. Comstock*, 46 Iowa 265. A person aiding may be charged as an accessory according to the fact, or as a principal in the first degree, as he is in law. *Reg. v. Crishan*, Cor. & M. 187; *Reg. v. Folkes*, 1 M. C. C. 354.

Evidence may be given of several rapes on the same woman, at the same time, by the prisoner and other men, each assisting the other in turn, without putting the prosecutrix to elect on which count to proceed. *Reg. v. Folkes*, 1 M. C. C. 354.

3. *Rex v. Gray*, 7 C. & P. 164; 32 E. C. L. 480.

An indictment charged H with rape, and W with aiding and abetting in the rape. The jury found H and W guilty of misdemeanor; H of attempting to commit a rape, and W of aiding H in the attempt. It was contended that this verdict amounted to an acquittal of W, as the case did not fall within 14 & 15 Vict., ch. 100, § 9, by which a person indicted for a crime may be found guilty of an attempt to commit the crime. The objection was overruled. *Held*, that the conviction ought to be affirmed. *Reg. v. Hapgood*, 1 L. R., C. C. 221; 18 W. R. 356.

2. Joinder of Counts.—A count in an indictment charging rape may be joined with others charging an assault with intent to commit rape, or a simple assault and battery—the lesser offense being merged in the greater.¹

On an indictment for rape, the prosecutor will not be compelled to elect between counts for rape and assault with intent to commit rape, or simple assault and battery; but as the indictment charges one substantive offense, rape, the defendant may be placed on trial for that crime without taking out of the case the minor offense necessarily included in a charge of rape.²

So also, a count for an attempt to commit rape may be joined to one for the carnal knowledge of a child, and the prisoner, though acquitted of the latter, may be convicted of the assault.³

1. *State v. Sutton*, 4 Gill (Md.) 494; *People v. Tyler*, 35 Cal. 553; *Prindle v. People*, 42 Ill. 217; *State v. Johnson*, 30 N. J. L. 185; *Cook v. State*, 24 N. J. L. 843; *Stevens v. State* 66 Md. 202; *Campbell v. People*, 34 Mich. 351; *Stephen v. State*, 11 Ga. 225; *Richardson v. State*, 54 Ala. 158; *Richie v. State*, 58 Md. 355; *People v. Draper*, 28 Hun (N. Y.) 1; *Com. v. Thompson*, 116 Mass. 346; *Com. v. Cooper*, 15 Mass. 187. But see *Com. v. Roby*, 12 Pick. (Mass.) 496, 507.

Under the *Iowa* Code, the prisoner cannot be convicted of an assault and battery on an indictment for assault with intent to commit rape, unless there be an averment that the attempt was accompanied by actual violence. *State v. McAvoy*, 73 Iowa 557.

For cases under the *Texas* statute which specifies three modes of committing the offense—namely, force, threats, and fraud, see *Williams v. State*, 1 Tex. App. 90; 28 Am. Rep. 399; *Cornelius v. State*, 13 Tex. App. 349; *Sharp v. State*, 15 Tex. App. 171; *Bass v. State*, 16 Tex. App. 62; *Lawson v. State*, 17 Tex. App. 293.

Under the *Indiana* statute defining rape to be either the unlawful carnal knowledge of a woman against her will, or 2nd, carnal knowledge of a female child under twelve years of age, a charge of assault and battery with intent to commit rape of one class cannot be sustained by evidence showing an assault with intent to commit rape of the other class. *Greer v. State*, 50 Ind. 267; 19 Am. Rep. 709.

So, in *Alabama*, rape and carnal knowledge of an infant under ten years of age are not identical, and an indictment for rape is not sustained when it is proved that the victim is

under ten, unless there is also proof of force sufficient to constitute rape proper. *Vassar v. State*, 55 Ala. 264.

So also in *Mississippi*. See *Bonner v. State*, 65 Miss. 293. See also *Howard v. State*, 11 Ohio St. 328.

On an indictment for rape the defendant cannot be convicted of adultery. *State v. Hooks*, 69 Wis. 182; nor of fornication. *State v. Shear*, 51 Wis. 460; *Speer v. State*, 60 Ga. 381; *Com. v. Murphy*, 2 Allen (Mass.) 163.

But under the *Massachusetts* statute he may be convicted of incest, if the jury find the criminal connection, but that it was not by force and not against the consent of the female. *Com. v. Goodhue*, 2 Met. (Mass.) 193.

An indictment charging defendant with forcibly and unlawfully breaking into and entering a dwelling house at night "with intent then and there to commit the crime of rape," does not charge a burglary, as it lacks an allegation of burglarious intent; nor an assault with intent to commit rape, as it fails to set forth the essential ingredients of that offense. *State v. Williams*, 41 Tex. 98; *State v. Ryan*, 15 Oregon 572.

2. *Mills v. State*, 52 Ind. 87; *People v. Satterlee*, 5 Hun (N. Y.) 167.

On an indictment joining a count for an assault with intent to commit rape on A B, with one charging an assault of the same nature on C D on a different day, the prosecutor may give evidence of both assaults. *Reg. v. Davies*, 5 Cox C. C. 328.

3. *Reg. v. Rylands*, 11 Cox C. C. 101; *Reg. v. Folkes*, 2 M. & Rob. 460.

Conviction of Attempt or Assault on Indictment for Rape, etc.—By 14 & 15 Vict. ch. 100, § 9, upon an indictment for a rape, a prisoner may be convicted

It is not ground for acquittal on an indictment for an assault with intent to commit rape, that the evidence amounts to proof of rape.¹

3. Descriptive Allegations.—An indictment for rape is not defective for omission to charge that the offense was committed by a male, or that the prisoner was over fourteen;² or that the female assaulted was of the human species;³ or that the complainant was not the wife of the defendant;⁴ or that the crime was committed on a female, where the indictment gives a woman's name and uses the pronouns "she" and "her" in speaking of the person on whom the rape was committed;⁵

of an attempt to commit the same, and will be liable to the same consequences as if charged and convicted of the attempt. Therefore, where an indictment charged the defendant with an assault and an intent to abuse and carnally know a female child, it was held that he might be convicted of an assault to abuse her simply, as the averment of such intention is divisible. *Rex v. Dawson*, 3 Stark. 62.

An indictment contained one count, charging that the prisoner in and upon a girl between the ages of ten and twelve "unlawfully did make an assault and her did then unlawfully and carnally know and abuse against the form of the statute." The offense of carnally knowing and abusing was disproved, but there was evidence of an indecent assault, which was left to the jury, who found the prisoner guilty of a common assault. *Held*, that the indictment charged an assault as a distinct and separable offense, and that the conviction was good. *Reg. v. Guthrie*, 1 L. R., C. C. 241; 18 W. R. 792.

When a man is indicted under 38 & 39 Vict., ch. 94, § 3, for rape upon a child under twelve years of age, he cannot, upon that indictment, be found guilty of an assault, indecent or otherwise. *Reg. v. Catherall*, 13 Cox C. C. 109.

1. *State v. Vadnais*, 21 Minn. 382.

In *England*, before 14 & 15 Vict., ch. 10, § 12, a defendant would be acquitted on an indictment for an assault with intent to ravish, if the evidence amounted to proof of an actual rape. *Rex v. Harmwood*, 1 East P. C. 411; and on an indictment for the misdemeanor of carnally knowing a girl between the ages of ten and twelve the prisoner must be acquitted on proof that the girl is under ten. *Reg. v. Shott*, 3 C. & K. 206.

2. *Cornelius v. State*, 13 Tex. App. 349; *Word v. State*, 12 Tex. App. 174; *Davis v. State*, 42 Tex. 226; *People v. Ah Yek*, 29 Cal. 575; *Com. v. Scannel*, 11. Cush. (Mass.) 547.

3. *State v. Tom*, 2 Jones (N. Car.) 414; *Anderson v. State*, 34 Ark. 257.

4. *Com. v. Scammel*, 11 Cush. (Mass.) 547; *Com. v. Fogerty*, 8 Gray (Mass.) 489; 69 Am. Dec. 264; *People v. Estrada*, 53 Cal. 600.

5. *Taylor v. Com.*, 20 Gratt. (Va.) 825; *State v. Warner*, 74 Mo. 83; *State v. Hussey*, 7 Iowa 409; *State v. Hammond*, 77 Mo. 157; *State v. Farmer*, 4 Ired. (N. Car.) 8, 224; *Hill v. State*, 3 Heisk. (Tenn.) 317.

An indictment describing a woman as a female is good. *State v. Myers*, 84 Ala. 11; *Gibson v. State*, 17 Tex. App. 574; *Com. v. Bennet*, 2 Va. Cas. 235.

Owing to the fact that the statute provides a severer penalty when the crime is committed upon a daughter or sister of the perpetrator in *Ohio*, it is necessary to state that the woman or female child upon whom the rape is charged to have been committed is not the daughter or sister of the accused, and an indictment against H and R, charging them jointly with having carnal knowledge of U, forcibly and against her will, the said U "not being the daughter or sister of them, the said H and R," is not a sufficient negative averment; for, notwithstanding such averment, the said U may be the daughter or sister of H or R. *Howard v. State*, 11 Ohio St. 328. *Compare Williams v. State*, Wright (Ohio) 42.

In indictments under the *Virginia* statutes against rape, which enacted a punishment against free persons different from that of slaves, it was adjudged not necessary to allege that a prisoner

nor is it necessary to state that she was over the age of consent.¹

The unnecessary averment if inserted need not be proved.² When the act is committed upon an infant under the age of consent, she must be described as such.³ But where her age is not alleged, a conviction may be had, if rape with force and against the consent of the child be alleged and proved.⁴

It need not be alleged that the offense was committed at any particular place in the county.⁵

4. Charging the Offense.—In every written legal accusation of the crime of rape, it must be laid down as a felony, by the use of the word "feloniously."⁶ The omission of the word "unlaw-

was a white person. *Young v. Com.*, 2 Va. Cas. 328.

An information for rape which charged that the offense was committed by "Louis Girous" upon the person of "Sarah Tougaw" is supported by an affidavit charging that it was committed by "Lewis Geraux" upon one "Sarah F. Tugaw." *Girous v. State*, 29 Ind. 93.

1. *Com. v. England*, 4 Gray (Mass.) 7; *O'Meara v. State*, 17 Ohio St. 515; *State v. Farmer*, 4 Ired. (N. Car.) 224; *State v. Storkey*, 63 N. Car. 7; *Hill v. State*, 3 Heisk. (Tenn.) 317; *State v. Gaul*, 50 Conn. 578.

2. *Mobley v. State*, 46 Miss. 501.

3. *O'Rourke v. State*, 8 Tex. App. 70; *State v. Terry*, 4 Dev. & B. (N. Car.) 152; *McClure v. State*, 116 Ind. 169; *State v. Johnson*, 100 N. Car. 494.

An indictment for the abuse of a female child, which avers that the defendant at a certain time and place did assault "one B C, a female child under the age of ten years," and "her the said B C, then and there" did abuse, is not fatally defective, by reason of omitting the words "she then and there being" or other like words, after the first mention of the name of the child; nor by omitting to repeat her age after the second mention of her name. *Com. v. Sullivan*, 6 Gray (Mass.) 477.

But compare *Nugent v. State*, 19 Ala. 540. An allegation that the child is "under ten years of age, to wit, etc.," giving the age is good, and when the evidence shows a variance, though not that the child is over ten, the superfluous allegation will not be fatal. *People v. Mills*, 17 Cal. 276.

Where in an indictment for the carnal abuse of an infant, a second count omitted the words of description "an infant above the age of ten, and under

the age of twelve" it was held that they could not be imported into the second count from the first, by the use of "the said" etc., and merely repeating the girl's name. *Reg. v. Martin*, 9 C. & P. 215; 38 E. C. L. 87.

Where it is immaterial whether the child is under or over ten years of age, and the proof shows that she is older, an allegation that she was under ten will not render this indictment defective. *Nicholas v. State*, 23 Tex. App. 317. But see *State v. Erickson*, 45 Wis. 86, where an indictment charged that the prisoner with force and against her will ravished and cruelly knew a child under the age of ten. The verdict found the defendant guilty of rape on the child "being of the age of over ten years." The higher court held that the indictment charged sufficiently an abuse of a child and that the allegation of force was surplusage, and being surplusage would not sustain a conviction of rape with force. The rule that the accused may be convicted of a lower crime when charged with a greater applies only when the proof necessary to convict of the greater is sufficient to prove the less.

4. *Rex v. Wedge*, 5 C. & P. 298; 24 E. C. L. 329; *Rex v. Martin*, 9 C. & P. 215; 38 E. C. L. 87; *Rex v. Nicholls*, 15 Cox C. C. 476; *Rex v. Dicken*, 14 Cox C. C. 8; *Com. v. Sugland*, 4 Gray (Mass.) 7; *State v. Gaul*, 50 Conn. 579; *O'Meara v. State*, 17 Ohio St. 515; *State v. Storkey*, 63 N. Car. 7; *State v. Staton*, 88 N. Car. 654; *Vassar v. State*, 55 Ala. 264.

5. *O'Connell v. State*, 6 Minn. 279; *People v. Mills*, 17 Cal. 276.

6. *Mears v. Com.*, 2 Grant. Cas. (Pa.) 385; *Hays v. State*, 57 Miss. 783. But in *Massachusetts*, in an indictment for rape it is no longer necessary

fully" in an indictment does not render it fatally defective, provided the description is in accordance with the common law definition of the offense.¹ The word ravish is necessary in charging the offense in an indictment for rape, and its omission will even after conviction be ground for reversal.² The word rape is unnecessary where other sufficiently descriptive words are used,³ and is an insufficient substitute in their absence.

In some of the States the words "forcibly and against the will" are indispensable,⁴ except when charging the offense upon a child under the age of consent.⁵ The words "and consent" need not be added to "against her will," as the former expression includes the latter.⁶ The allegation is sufficiently full without specifying further the manner in which connection was had or the means employed.⁷ An allegation that the act was committed by force and violence and against the will and consent of the female, is equivalent to an allegation that she resisted or was prevented from resisting.⁸ The word "violently," however, may be substituted for "forcibly."⁹ The word "ravish" is equivalent to "forcibly and against the will."¹⁰ The omission of the word "did" before "ravish, etc.," does not render an indictment fatally defective.¹¹ There need not be an express allegation of an assault.¹² In charging an assault with intent to commit rape the use of the word "intention" instead of "intent" is not

to aver that the act was committed "with force and arms" or "feloniously." *Com. v. Scammel*, 11 Cush. (Mass.) 547.

1. *Weinzorpfli v. State*, 7 Blackf. (Ind.) 186.

2. *Gogleman v. People*, 3 Park. Cr. (N. Y.) 15; *Christian v. Com.*, 23 Gratt. (Va.) 954; *Davis v. State*, 42 Tex. 226.

3. *People v. McDonald*, 9 Mich. 150; *State v. Hart*, 33 Kan. 218.

4. *State v. Jim*, 1 Dev. (N. Car.) 142; *State v. Black*, 63 Me. 210. *Compare* *Elschlep v. State*, 11 Tex. App. 301. In *Alabama*, the words "against her will" are not indispensable.

5. *State v. Smith*, Phil. (N. Car.) 302; *Davis v. State*, 42 Tex. 226; *People v. Mills*, 17 Cal. 276.

6. *State v. Gaul*, 50 Conn. 578.

7. *McMath v. State*, 55 Ga. 303; *Cooper v. State*, 22 Tex. App. 419; *Territory v. Keyes*, 5 Dak. 244.

Under *California* Pen. Code, § 261, defining rape as an act of sexual intercourse with a female, not the wife of the perpetrator, under the following circumstances: With a child of tender years; with a lunatic or insane woman; by intimidation; by the administration of intoxicating or narcotic substances,

etc.—the information need only charge that the crime was committed by force, violence, and against the will of the prosecuting witness, without setting out under which of the above circumstances it was accomplished. *People v. Snyder*, 75 Cal. 323.

8. *People v. Pacheco*, 70 Cal. 473.

9. *State v. Williams*, 32 La. Ann. 335; 36 Am. Rep. 272; *disapproving* *State v. Blake*, 39 Me. 322; *Walling v. State*, 7 Tex. App. 625; *State v. Johnson*, 67 N. Car. 55; *Gutienez v. State*, 44 Tex. 587. See also *State v. Daly*, 16 Oregon 240, where it is held that violently meets the requirements of the statutory words "assault with intent to commit rape."

10. *Williams v. State*, 1 Tex. App. 90; 28 Am. Rep. 399; *Gibson v. State*, 17 Tex. App. 574; *Hannan v. Com.*, 12 S. & R. (Pa.) 69.

11. *Whitney v. State*, 35 Ind. 503.

12. *O'Connell v. State*, 6 Minn. 279.

A was convicted on an indictment, which charged that he "in and upon E F," "feloniously and violently did make (omitting the words 'an assault,')" and her, then and there, and against her will, violently and feloniously did ravish and carnally know—*held*, that the omission of the words,

fatal;¹ but it is otherwise as to the use of "attempt." An indictment is sufficient, which alleges carnal knowledge of a child, under a statute providing for that offense without adding "abuse" also.²

5. **Conclusion.**—The indictment need not conclude in the form of the statute, as rape is a common-law offense.³

IX. EVIDENCE—1. **The Prosecutrix**—*a.* AS A WITNESS.—The ravished female is a competent witness, even to the extent of testifying against her husband, where he is indicted as an accessory.⁴ Yet, her testimony must be scrutinized with caution, and its credibility determined by the jury in the light of the corroborating circumstances.⁵

Where the defendant denies the crime, the woman's testimony must be corroborated,⁶ though, if her testimony is fairly corroborated as to material facts and circumstances, the fact of the rape need not be proved by other witnesses.⁷

The prisoner may be convicted of an assault with intent to commit rape without the testimony of the party injured.⁸

b. WHEN AN INFANT.—One may be convicted of rape upon the unsupported evidence of an infant under years of discretion, if the jury is satisfied that the evidence is such as to leave no reasonable doubt of guilt.⁹ It is not necessary that her testimony be confirmed by an examination of her person at the time, or by medical testimony.¹⁰

The infant witness must be sworn, even though under seven years of age.¹¹ If too young to know the nature of an oath, her evidence cannot be received.¹²

"an assault," was no ground for arresting the judgment. *Reg. v. Allen*, 9 C. & P. 521; 38 E. C. L. 206.

1. *State v. Tom*, 2 Jones (N. Car.) 414. Compare *State v. Martin*, 3 Dev. (N. Car.) 329.

2. *Reg. v. Holland*, 10 Cox C. C. 478.

A count in an indictment charging that a defendant did attempt to assault a girl by soliciting and inducing her to place herself in an indecent attitude, he doing the like, is bad. *Rex v. Butler*, 6 C. & P. 368.

3. *O'Connell v. State*, 6 Minn. 279.

For a contrary doctrine in *North Carolina*, see *State v. Dick*, 2 Murph. (N. Car.) 338; *State v. Storkey*, 63 N. Car. 7.

4. *Rex v. Castlereagle*, 1 St. Trials, 387; 1 Hob. P. C. 629.

The prosecutrix, however, cannot testify that the accused attempted to ravish her, but did not accomplish his purpose, as that is a conclusion of law. *Scott v. State*, 48 Ala. 420.

5. *People v. Hulse*, 3 Hill (N. Y.) 309; *Innis v. State*, 42 Ga. 473.

6. *Mathews v. State*, 19 Neb. 330.

Contra, even though the woman be of ill fame. *Boddie v. State*, 52 Ala. 395; *Barnett v. State*, 83 Ala. 40.

7. *Fager v. State*, 22 Neb. 332.

8. *People v. Bates*, 2 Park. Cr. (N. Y.) 27.

9. *Anonymous*, 1 Russ. C. & M. 932; *Territory v. Keyes*, 5 Dak. 244.

But as to cases where the testimony is open to suspicion, and numerous improbabilities exist, see *Gazley v. State*, 17 Tex. App. 267; *Montresser v. State*, 19 Tex. App. 281.

Defendant was charged with committing rape upon a girl eleven years old. She swore to the fact. *Held*, that the jury were justified in disregarding her testimony, and finding defendant guilty of an assault with intent to rape, and that the prisoner had no cause for complaint. *Jones v. State*, 68 Ga. 760.

10. *State v. Sattin*, 29 Conn. 389.

11. *Rex v. Brasier*, 1 East P. C. 443; *McMath v. State*, 55 Ga. 303.

12. *Reg. v. Cockburn*, 3 Cox. C. C. 543.

In a case of carnally knowing and

Family discussion as to the birthday and acts done on that day are admissible to show the age of an infant prosecutrix;¹ also the opinion of medical experts;² so also the mother's evidence, though on cross-examination her knowledge seems by no means clear.³ But a register of the child's baptism, and a statement of her father that he left home a week before the recorded date of that baptism, and, returning on that day, found this child and was told that it was born the day before, are not sufficient.⁴

C. HER COMPLAINT AT THE TIME.—For the purpose of corroborating her testimony on the trial, the fact, that the prosecutrix made a complaint immediately after the occurrence, is admissible in evidence, although it is hearsay;⁵ also when, where and to whom it was made,⁶ but not as substantive testimony to prove the commission of the offense.⁷ But it is not permitted to state the name of the person whom she charged with the crime, or the

abusing a girl under ten years old, it appeared, on an application on the part of the prosecution to postpone the trial, that the girl was only six years old, and, by reason of her age, quite incompetent to take an oath. *Held*, that the trial ought not to be postponed in order that the child might be instructed as to the nature of an oath; but that there might be cases of children of more matured intellect, *e. g.*, of ten or twelve years old, who might be from neglected education incapable of being sworn, in which such a postponement might be proper.

Where in such a case the child, from her tender age, was incompetent to be sworn, the judge would not receive evidence of what the child stated to her mother shortly after the alleged offense took place, nor allow the mother to prove that the child mentioned to her the name of any particular person. *Reg. v. Williams*, 7 C. & P. 320; 32 E. C. L. 524; *Reg. v. Nicholas*, 2 C. & K. 246; 61 E. C. L. 245.

1. *Reg. v. Hughes*, 2 Cox C. C. 226.

2. *State v. Smith*, Phil. (N. Car.) 302.

3. *Reg. v. Nicholls*, 10 Cox C. C. 476.

4. *Rex v. Wedge*, 5 C. & P. 298; 24 E. C. L. 329.

5. *Lacy v. State*, 45 Ala. 80; *Smith v. State*, 47 Ala. 540; *Rex v. Clarke*, 2 Stark. 241; 3 E. C. L. 339; *Phillips v. State*, 9 Humph. (Tenn.) 246; 49 Am. Dec. 709; *State v. Niles*, 47 Vt. 82. Compare *State v. Peter*, 14 La. Ann. 527.

Such evidence is admissible, although the prosecutrix did not testify until after such corroborative testimony had

been given. *State v. Mitchell*, 68 Iowa 116; or even though, the witness is allowed to give the name of the accused (where objection was not raised on that ground). *Burt v. State*, 23 Ohio St. 394.

6. *Thompson v. State*, 38 Ind. 39. On the direct examination, the practice has been merely to ask whether she made complaint that such an outrage had been committed upon her and to receive in answer only a simple yes or no; this statement is only corroborative of her testimony, and is not evidence of the fact upon which the jury can find the prisoner guilty; when she is not a witness in the case it is wholly inadmissible. But as to the last statement, see *Reg. v. Megson*, 9 C. & P. 420; 38 E. C. L. 173.

7. *Johnson v. State*, 17 Ohio 593; *Laughlin v. State*, 18 Ohio 99; *McCombs v. State*, 8 Ohio St. 643; *People v. McGee*, 1 Den. (N. Y.) 19.

The rule is the same although it appear that the prosecutrix is incompetent to testify on account of immature age, idiocy or other mental defect.

Where the injured person is of sufficient age and of competent though weak understanding, but is unable to talk, and can communicate and receive ideas only through signs, she may yet be sworn as a witness, and examined through the medium of a person who can understand her, who is sworn to interpret between her and the court and jury. *People v. McGee*, 1 Den. (N. Y.) 19.

The statements of an infant to her mother immediately after the commission of the crime are admissible as part

particulars as narrated by her.¹ But the particulars of the complaint are admissible on cross-examination, and to confirm the testimony of the prosecutrix after it has been impeached.²

of the *res gesta*. *McMath v. State*, 55 Ga. 303.

1. *Reg. v. Osborne*, Car. & M. 622; 41 E. C. L. 338; *Reg. v. Walker*, 2 M. & Rob. 212; *Thompson v. State*, 38 Ind. 39; *Stephen v. State*, 11 Ga. 225; *State v. Shettleworth*, 18 Minn. 209; *State v. Richards*, 33 Iowa 420; *State v. Mitchell*, 68 Iowa 116; *State v. Clark*, 69 Iowa 294; *Oleson v. State*, 11 Neb. 276; 38 Am. Rep. 366; *Reg. v. Mercer*, 6 Jur. 243; *Parker v. State*, 67 Md. 329; *People v. Mayes*, 66 Cal. 597; 56 Am. Rep. 126; *State v. Robertson*, 38 La. Ann. 618; 58 Am. Rep. 201; *People v. Clemmons*, 37 Hun (N. Y.) 580; *Pefferling v. State*, 40 Tex. 486; *Holst v. State*, 23 Tex. App. 1; 59 Am. Rep. 770; *People v. Tierney*, 67 Cal. 54; *State v. Campbell*, 20 Nev. 122; *Baccio v. People*, 41 N. Y. 265. The same restrictions must be enforced even where the party ravished has died before the trial. *Reg. v. Megson*, 9 C. & P. 420; 38 E. C. L. 173.

Contra, not only what the prosecutrix said immediately after the occasion, but what was said in answer to her, is evidence. *Reg. v. Eyre*, 2 F. & F. 579. But this case is meagerly reported, and no author is given. See 1 Russ. on Crimes 924, note (f).

But compare the decisions in *Michigan* which base the admission of such evidence on the principle of *res gesta*. *People v. Brown*, 53 Mich. 531; *People v. Gage*, 622 Mich. 371; *People v. Glover*, 71 Mich. 303. See also *Johnson v. State*, 17 Ohio 593; *Laughlin v. State*, 18 Ohio 99; *McCombs v. State*, 8 Ohio St. 643; *State v. De Wolf*, 8 Conn. 93; *State v. Kinney*, 44 Conn. 153; *State v. Byrne*, 47 Conn. 465.

2. *State v. Clark*, 69 Iowa 294; *State v. Richards*, 33 Iowa 420; *State v. Jones*, 61 Mo. 232; *Barnett v. State*, 83 Ala. 40; *State v. De Wolf*, 8 Conn. 93; 20 Am. Dec. 90; followed in *State v. Kinney*, 44 Conn. 153; *State v. Byrne*, 47 Conn. 465; *State v. Freeman*, 100 N. Car. 429, 921; *Scott v. State*, 48 Ala. 420.

Where prosecutrix is cross-examined as to the particulars of her complaint and persons present at the time are examined by the defense for the purpose of impeaching her, the prosecution may examine other persons in reference to

said particulars who were present when she complained of the injury. *Griffin v. State*, 76 Ala. 29.

Further Corroboration.—Evidence may be introduced showing violent conduct of the prisoner in the presence of the prosecutrix immediately after consummating the rape upon her. *Conkey v. People*, 1 Abb. App. Dec. (N. Y.) 418; the condition of the woman's undergarments the day after the rape. *Grimmett v. State*, 22 Tex. App. 36; 58 Am. Rep. 630; bruises found on her person two or three weeks after the offense. *State v. McLaughlin*, 44 Iowa 82.

A physician's testimony as to her condition ten days after the offense. *Myers v. State*, 84 Ala. 11; her husband's testimony as to bruises on her person, and the condition of her clothing and the bed. *Hannon v. State*, 70 Wis. 448.

On a trial for a rape, the prosecutrix, a servant, stated that she made almost immediate complaint to her mistress, and that on the next day a washerwoman washed her clothes, on which was blood. Neither the mistress nor the washerwoman was under recognizance to give evidence, nor were their names on the back of the indictment, but they were at the assizes attending as witnesses for the prisoner. The judge directed that both the mistress and the washerwoman should be called by the counsel for the prosecution, but allowed the counsel for the prosecution every latitude in their examination. *Reg. v. Stroner*, 1 C. & K. 650; 47 E. C. L. 650.

Corroboration by an examination of the woman's person by a medical expert is not necessary, nor does her refusal to submit to such examination discredit her testimony. *Barnett v. State*, 83 Ala. 40.

It is proper to allow the husband of the prosecutrix to testify as to her complaint, and as to marks of violence on her person. *Hanna v. State*, 70 Wis. 448; and it is not error, where, when she complained to her husband and others, her husband only was put on the stand. *Woodin v. People*, 1 Park. Cr. (N. Y.) 464.

The husband's statements made in the woman's presence on the day of the offense are admissible to corrob-

Although it is material to show that the complaint was made while the injury was still recent, yet the lapse of time between the commission of the injury and the making of the complaint is not the test of the admissibility of such evidence, but is only matter to be considered by the jury in weighing the evidence.¹ To ask the prosecutrix, "Was it done with or without your consent?" is not improper as being impertinent and leading.²

d. HER CROSS-EXAMINATION.—It is proper to ask her whether the treatment complained of was with her consent or against her will;³ or whether she told the priest or any one else of the outrage.⁴ But she need not be compelled to repeat *verbatim* the vulgar language used by the accused at the time of the assault when another witness has testified concerning it;⁵ when the testimony of the prosecutrix is uncorroborated, a wide latitude should be allowed in cross-examination.⁶

e. HER CHARACTER.⁷—The general reputation of the female for chastity may be shown by the defense not in justification, but on the issue as to the probability of her consent.⁸ The evidence

rate her testimony. *Conkey v. People*, 1 Abb. App. Dec. (N. Y.) 418.

Statements as to her injuries made by the prosecutrix to a physician two days after the offense are admissible, though public complaint was delayed until the next day. *State v. Reid*, 39 Minn. 277.

But the following evidence is not admissible: That the child of the prosecutrix resembles the defendant. *State v. Danforth*, 48 Iowa 43; 30 Am. Rep. 387. Acts and declarations of the husband of the woman on whom the offense is alleged to have been committed, *McCombs v. State*, 8 Ohio St. 643; testimony of a physician as to the effect of indecent liberties on the mind of a female, *People v. Royal*, 53 Cal. 62; declarations of the girl during travail as to the paternity of her child, especially if she is a witness, *State v. Hussey*, 7 Iowa 409; that the prosecutrix some days after the outrage threatened to commit suicide, *People v. Batterson*, 50 Hun (N. Y.) 44.

1. *State v. Niles*, 47 Vt. 82; *State v. Byrne*, 47 Conn. 465, following *State v. DeWolf*, 8 Conn. 93; 20 Am. Dec. 90; *State v. Peter*, 8 Jones (N. Car.) 19; *Higgins v. People*, 58 N. Y. 377; *State v. Marshall*, Phil. (N. Car.) 49; *State v. Cross*, 12 Iowa 66; 79 Am. Dec. 519; *People v. Brown*, 53 Mich. 531; *People v. Gage*, 62 Mich. 271; *People v. Glover*, 71 Mich. 303; *Mail-*

let v. People, 42 Mich. 262; *State v. Reid*, 39 Minn. 277.

But a woman's disclosure first made eleven months afterward is inadmissible, a delay caused by threats at confession of the defendant, who was a priest, being inexcusable. *People v. O'Sullivan*, 104 N. Y. 481; 58 Am. Rep. 530. See also *Topolanck v. State*, 40 Tex. 160.

Compare *State v. Wilson*, 91 Mo. 410.

It is competent for the prosecutrix to state that she made complaints to her mother a week or ten days after the offense, and that she thus delayed making complaint for the reason that her parents were out of health and she feared the effect upon them. *State v. Knapp*, 45 N. H. 148.

2. *Coates v. State*, 2 Tex. App. 16.

3. *Woodin v. People*, 1 Park. Cr. (N. Y.) 464.

4. *Maillet v. People*, 42 Mich. 262.

5. *State v. Hatfield*, 72 Mo. 518.

6. *Rogers v. People*, 34 Mich. 345.

7. See also CHASTITY, vol. 3, p. 758.

8. *Favors v. State*, 20 Tex. App. 155; *O'Blens v. State*, 47 N. J. L. 279; *State v. Danill*, 87 N. Car. 507.

Evidence to establish her good character cannot be introduced until it has been attacked by the defense. *People v. Hulse*, 3 Hill (N. Y.) 309. Compare *People v. Tyler*, 36 Cal. 522; *Turney v. State*, 8 Smed. & M. (Miss.) 104.

Evidence that the complainant is a woman of drunken and dissipated

must be confined to her general reputation and to acts of illicit intercourse with the defendant only previous to the time of the offense.¹ Evidence as to her reputation must be confined to what is generally said of her by those among whom she dwells or with whom she is chiefly conversant.² According to the weight of authority, her character cannot be shown by proof of particular acts of unchastity with third persons.³ The prosecutrix may be asked on cross-examination whether, previously to the commission of the alleged offense, the accused had not had intercourse with her by her own consent.⁴ According to the weight of authority, the prosecutrix is not bound on cross-examination to answer questions as to acts of unchastity committed with persons other than the defendant.⁵

habits, sleeping in hall-ways, and accustomed to go in at two or three o'clock in the morning, is admissible to show general immoral character; and it is also proper to admit evidence to contradict the testimony of the prosecutrix to the effect that she did not go with a man to a lumber yard, and afterward accompany him to a liquor shop, and solicit him to have intercourse with her. *Brennan v. People*, 7 Hun (N. Y.) 171.

Evidence may be adduced by the prisoner to show the general light character of the prosecutrix, and of her being a street-walker. *Reg. v. Clay*, 5 Cox C. C. 146.

1. *Wilson v. State*, 17 Tex. App. 525; *State v. Ward*, 73 Iowa 532.

2. *Conkey v. People*, 1 Abb. App. Dec. (N. Y.) 418.

3. *McQuerk v. State*, 84 Ala. 435; *State v. Campbell*, 29 Nev. 122; *Shartzer v. State*, 63 Md. 149; 52 Am. Rep. 501; *CHASTITY*, vol. 3, p. 158, *et seq.*

But see *Shirwin v. People*, 69 Ill. 55, where it was held that evidence as to particular acts of unchastity with third parties is admissible where the chief evidence for the prosecution was that of a physician to the effect that the woman had lost the physical evidence of virginity, in order to rebut the inference that the accused occasioned the loss. The complainant swore that she was unconscious and did not know whether the accused had intercourse with her at the time or not.

4. *Reg. v. Martin*, 6 C. & P. 562; 25 E. C. L. 544.

5. *Rex v. Hodgson*, R. & R. C. C. 211. See also, *CHASTITY*, vol. 3, p. 159, n.; *State v. Turner*, 1 Houst. Crim. C. (Del.) 76. Compare *People v. McLean*, 71 Mich. 309. American authorities in favor of the view stated in the text

are: *Pleasant v. State*, 15 Ark. 524; *State v. Knapp*, 45 N. H. 148; *Com. v. Regan*, 105 Mass. 593; *State v. Turner*, 1 Hous. C. C. (Del.) 76; *Richie v. State*, 58 Ind. 355; *State v. Vadnais*, 21 Minn. 382; *McCombs v. State*, 8 Ohio St. 642.

It is not allowable on cross-examination to ask the prosecutrix if she had not been, before, a person of unchaste character. *Fry v. Com.*, 82 Va. 334.

To the contrary see *Titus v. State*, 7 Baxt. (Tenn.) 132; *People v. Benson*, 6 Cal. 221; 65 Am. Dec. 506; *State v. Reed*, 39 Vt. 417; *State v. Johnson*, 28 Vt. 512.

A prosecutrix, on a charge of rape, having, on cross-examination, said that she had herself been charged with stealing money, and on that occasion had accounted to a police constable for the possession of the money by stating that it was given her for not complaining of a person who had insulted her by solicitations against her chastity, but denied that she had said the money was given her for having connection with him, it was held that the prisoner could not call the constable as a witness to contradict the prosecutrix by proving that she had said so. *Reg. v. Dean*, 6 Cox C. C. 13.

The prosecutrix may be asked, on cross-examination, whether she had not allowed another man than the prisoner to take liberties with her, in the interval between the commission of the alleged offense and the first complaint of it. *Reg. v. Mercer*, 6 Jur. 243.

On a trial for rape, the defendant may ask the prosecutrix, with a view of attacking her credibility, whether she had not been delivered of a bastard child, and whether she had not

2. Previous Conduct of the Accused.—Evidence as to improper acts and solicitations by the accused at other times is admissible, for the purpose of showing motive.¹

But evidence that the accused, five years previous to the commission of the offense, boasted of the possession of an aphrodisiac drug,² or that he had made declarations as to misconduct with females other than the prosecutrix,³ is not admissible, nor that, at various times he had beaten and harshly treated the prosecutrix who was living with his family.⁴

3. Various Matters of Evidence.—Evidence of condonation of the crime by the woman ravished is not admissible;⁵ nor of convic-

had sexual intercourse with other men, and if refused, it is error, and the error will not be cured by defendant's showing that she had been delivered of a bastard child, and that her character for chastity was bad. *State v. Murray*, 63 N. Car. 31.

Compare State v. Freeman, 100 N. Car. 429, where it was held that such refusal is not reversible error when it is rendered harmless through the placing of the same facts in evidence by the prosecution afterward.

A question asked the prosecuting witness on cross-examination, whether she had not voluntarily submitted to sexual intercourse a short time before the alleged rape, with one of defendants, who, according to her testimony, had participated in the rape, is relevant, as bearing upon her credit, and does not tend to criminate her; and a refusal to compel her to answer is error, though the indictment had been *not pros.* as to such defendant, and the fact had been testified to by him. *Bedgood v. State*, 115 Ind. 275.

A being indicted for committing a rape upon B, it was held, that evidence showing bad character on the part of B's parents was inadmissible. *State v. Anderson*, 19 Mo. 241.

In an action of trespass, for breaking and entering the plaintiff's house, with intent to ravish the plaintiff's wife, evidence that she was a woman of lewd and abandoned character is inadmissible. *Davenport v. Russell*, 5 Day (Conn.) 143.

In a prosecution for rape of a girl under fourteen years of age, the age of consent under the *Michigan* act of 1887, where the State attempted to show that she had thereby contracted venereal disease, evidence offered by defendant of the character of the girl for chastity, and of specific acts of lewdness with small boys nine months before, was

properly rejected, as the girl was too young to consent, and the evidence did not tend to disprove the fact that the disease was contracted as stated. *People v. Glover*, 71 Mich. 303.

Evidence that the prosecutrix was in the habit of following him about the house is admissible to establish the inference that the prosecutrix permitted the accused to have voluntary intercourse with her, and a remark of the court in excluding such evidence "that even if she did follow him it would not show that she wanted a rape committed on her," is improper. *Sherwin v. People*, 69 Ill. 55.

In a trial for rape, the defendant may show, as bearing on the character of the prosecutrix, that on the same day, a short time before the alleged rape, the prosecutrix said to one who had seen her in questionable relations with the defendant a few moments before, "that she had had sexual intercourse with the defendant, and would have it again, and did not care what other people might say." *State v. Cook*, 65 Iowa 560.

Defendant, in a prosecution for rape, has a right to show that his previous relations with complainant were of a friendly character, even though the testimony has no tendency to show that they were improper or that her general character or reputation was bad. *Hall v. People*, 47 Mich. 636.

1. *Taylor v. State*, 22 Tex. App. 529; *State v. Knapp*, 45 N. H. 148; *People v. Manahan*, 32 Cal. 68; *People v. O'Sullivan*, 104 N. Y. 481; 58 Am. Rep. 530; *contra Rex v. Lloyd*, 7 C. & P. 218; 32 E. C. L. 523. *Compare Hardtke v. State*, 67 Wis. 552.

2. *Tomlin v. State*, 25 Tex. App. 676.

3. *People v. Bowen*, 46 Cal. 654.

4. *People v. Tyler*, 36 Cal. 522.

5. *Com. v. Slattery*, 147 Mass. 423.

tion before a justice of the same assault as that charged in the indictment;¹ nor that the prosecutrix knew the bad character of the accused;² nor that a brother of the prosecutrix had soon after the alleged offense nominated the defendant for leader of the village band;³ nor as to the consent of an infant prosecutrix.⁴ But the accused may produce evidence, on laying the proper foundation, that the prosecutrix had declared that he was not guilty, and that the prosecution was carried on to extort money from him or his friends.⁵ And he may put in evidence letters showing a conspiracy to make a false charge against him, although the prosecutrix is not proved to have received the letters or to have had any knowledge of their contents.⁶

When evidence is produced as to the good character of the accused, the witness may be asked by the State as to whether a certain lewd woman did not live in the house of the accused for some time;⁷ or as to the reputation of the defendant for selling liquor without a license.⁸

Where the prisoner himself is sworn and testifies in his own behalf, a record of his conviction of larceny is admissible as affecting his credit.⁹ But he cannot be compelled to state on cross-examination that he had visited houses of ill-fame and had connection with the inmates.¹⁰

Where, on examination before a justice of the peace, the prosecutrix testified that the rape was committed in a certain field, and, in the circuit court, testified that it was in a barn, evidence may be introduced by the defense to show the motive for changing the place of the alleged crime.¹¹

It is error, on cross-examination of the magistrate before whom the prosecutrix shortly after the alleged outrage made complaint, to exclude his testimony that the prosecutrix had been informed that the act of sexual intercourse which constituted the alleged crime had been witnessed by other persons.¹²

1. *People v. Saunders*, 4 Park. Cr. (N. Y.) 196.

2. *State v. Porter*, 57 Iowa 691.

3. *Bean v. People*, 124 Ill. 576.

4. *Territory v. Keyes*, 5 Dak. 244.

5. *Shirwin v. People*, 69 Ill. 55.

6. *Reg. v. McGavaran*, 6 Cox C. C.

64.

7. *State v. Jerome*, 53 Conn. 265.

8. *State v. Knapp*, 45 N. H. 148.

9. *People v. Satterlee*, 5 Hun (N. Y.)

167.

10. *Gifford v. People*, 87 Ill. 210.

11. *Bessitt v. State*, 101 Ind. 85.

12. *McFarland v. State*, 24 Ohio St.

329.

Evidence Sufficient to Sustain a Conviction.—Evidence that the accused overtook the prosecutrix on the highway, threw her down, and had a forcible connection is sufficient. *Johnson v. State*, 26 Tex. App. 399.

ble connection is sufficient. *Johnson v. State*, 26 Tex. App. 399.

Where the defense of *alibi* was set up, the evidence showed that the crime was committed between 8:30 and 10 P. M. Defendant was a watchman employed in a building about a block from the place of the crime, and testified that he left the building about 8 o'clock, and was away one and one-half or two hours. Only one of the persons in whose company defendant claimed to have been during that time was produced, and she stated that she was with him about eight minutes, but was indefinite as to the time of night. At no time was defendant more than four blocks from the place of the crime. On preliminary examination he testified that he was away from the building

about three-quarters of an hour. Prosecutrix positively identified the accused. The *corpus delicti* having been clearly proved, held that the jury's finding of defendant's guilt would not be disturbed. *Ackerson v. People*, 124 Ill. 563.

So where the rape was alleged to have been committed on prosecutrix in her father's garden, in a village, in view of many houses, and not very distant from the house, prosecutrix testified that, while she was leaning against a fence, defendant suddenly, and unseen by her, approached her from the other side of the fence, climbed over, seized her, declared he would have the best of her, dragged her a distance, threw her to the ground, and ravished her; that she resisted and cried out loud all the time. Her father, who was then sick in bed, testified that prosecutrix came into the house sobbing, and made complaint; and her brother testified to the same effect, and that her hair was all down, and the back of her clothes dirty, and that, while witness was going home, he had seen the defendant near the place of the alleged crime after its accomplishment. *Held*, that though there was an air of improbability about the evidence, a conviction would not be disturbed, the credit of witnesses being for the jury. *Bean v. People*, 124 Ill. 575.

But a conviction cannot be supported where it appears that the woman went with the defendant to a room in the hotel at night; that she did not scream; that she told contradictory stories as to being married to the accused, etc. *Dickey v. State*, 21 Tex. App. 340.

Nor will a conviction be sustained on the uncorroborated testimony of the prosecutrix that three men broke into a room where she was sleeping with another person, took her out, carried her two miles on horseback, to a place where she was outraged, and then carried her back, it also being shown that she was unchaste. *People v. Ardaga*, 51 Cal. 371; nor on the testimony of a witness who lived in rooms below the girl who was beneath the age of consent, that the witness heard the sound of bed springs while the accused and the girl were upstairs with the door locked, the girl denying the fact of the intercourse. *State v. Crawford*, 39 Kan. 257.

Evidence that the woman was knocked down by the accused, who got on the ground by her, began to un-

cover her person, struck her in the face, pinched her limbs above the knees so that they were discolored, etc., and that on the complainant crying out he ran away, will support a conviction for assault with intent to commit rape. *Com. v. Thompson*, 116 Mass. 346.

But evidence of an unwarranted liberty with the person of a female, however gross, in the absence of circumstances showing an attempt to commit rape by force, threats or fraud, will not support a conviction. *Thompson v. State*, 43 Tex. 483. And a conviction of an assault, etc., must be set aside when supported only by evidence that the defendant gave the girl wine and persuaded her to accompany him to a hotel where they occupied a room together during the night, but did not have connection, and the prisoner made no indecent proposals. *Jacques v. People*, 66 Ill. 84.

The evidence must be closely and carefully criticised and a conviction can be had only when after such scrutiny the jury have no reasonable doubt of the prisoner's guilt. *Anderson v. State*, 41 Wis. 430.

For a conviction sustained by circumstantial evidence as to the identity of the prisoner, see *Bill v. State*, 5 Humph. (Tenn.) 155.

If the evidence leave in it great doubt whether a rape was in fact committed, a conviction cannot stand. *Brown v. State*, 76 Ga. 623. See also *Pless v. State*, 23 Tex. App. 73.

Evidence.—In a case of rape against five, the prosecutrix, when before the grand jury, did not know the names of the different prisoners, but could identify the persons. *Held*, that the grand jury might call in another witness, who was before the examining magistrate, and there saw the prisoners, and let the prosecutrix describe the different prisoners, and the other witness give their names; and that, if the prisoners could not be identified by this mode, they might be brought before the grand jury. *Reg. v. Jenkins*, 1 C. & K. 536; 47 E. C. L. 534.

On trial for rape, the chief question was as to the identity of the prisoner. The female was examined, and swore positively that the prisoner was the person who committed the outrage upon her, but she declined giving a description of him at the time of the outrage. The commonwealth then introduced a witness to prove the particulars of the description of the per-

son who committed the outrage, as to him, by the female on the morning after the rape was committed, and before she had seen the prisoner, in corroboration or proof of the *causa scientiæ* of the female witness. *Held*, that such proof was inadmissible. *Brogy v. Com.*, 10 Gratt. (Va.) 722.

The mere fact that, in an action for rape, the district attorney pointed out defendant before prosecutrix recognized him is held not sufficient ground for reversal. *State v. Blunt*, 59 Iowa 468.

Admissions by Accused.—The prisoner was convicted of a rape upon the prosecutrix, who was an apparent idiot. She proved the act done, and said that it was wrong, but that she said nothing to the prisoner, and that she did not do anything to him, and that "she did not like to hurt nobody." The constable told the prisoner that he was charged with committing a rape upon the prosecutrix and against her will. The prisoner, in answer to that, said: "Yes, I did; and I am very sorry for it." *Held*, that there was evidence to sustain the conviction. *Reg. v. Pressy*, 10 Cox. C. C. 635.

A statement of the defendant to the district attorney at the time of the preliminary examination that he wanted the prosecution stopped; that he did not hurt the girl much; that he would give the attorney \$8 or \$10, and that the girl would get over it again," does not amount to a confession of the crime of rape or of anything more than an assault. *Hardtke v. State*, 67 Wis. 552.

It may be shown on a trial for rape that the defendant offered the mother of the girl alleged to have been violated \$5 to stop the prosecution, and the defendant may show that the mother who was a witness upon the trial, agreed to drop the prosecution in consideration of the payment of the \$5. *McMath v. State*, 55 Ga. 303.

Depositions.—If it is proved on the part of the prosecutrix that the party alleged to have been ravished has been kept out of the way by the prisoners, the judge will allow her deposition before the magistrate to be given in evidence. Where the deposition of the prosecutrix taken before the magistrate was not proved, and she was not at the trial, evidence of complaints made by her recently after the outrage was rejected; no such evidence is receivable as confirmatory evidence

only. *Reg. v. Guttridges*, 9 C. & P. 471; 38 E. C. L. 188.

On an indictment for rape, the deposition of the injured party (who had died meantime), made before a justice on applying for the warrant, and in the absence of the prisoner, is not admissible evidence against him. *State v. Hill*, 2 Hill (S. Car.) 608; 27 Am. Dec. 406.

The prisoner was taken before a mayor, charged with rape; the prosecutrix was sworn, and her statement taken down by the mayor, who asked her some further questions, the answers to which were taken down, and the prisoner was discharged. That which was taken down by the mayor was not read over to the prosecutrix, neither was it signed by her or by the mayor. The prisoner was afterwards committed for trial by other magistrates. *Held*, that at the trial the prisoner's counsel might cross-examine the prosecutrix as to what she said before the mayor, without producing that which was taken down on that examination. *Reg. v. Griffiths*, 9 C. & P. 746; 38 E. C. L. 188.

A writing subscribed by a witness, drawn up by one who is a justice of the peace, and an attorney, purporting to be a complaint to grand jurors, charging the defendant with an attempt to commit a rape upon her, is not admissible for the purpose of impeaching her testimony, in a public prosecution for another offense, but relating to the same transaction. *Fowler v. State*, 5 Day (Conn.) 81.

In an indictment for a rape, the deposition of a girl taken before the committing magistrate, and signed by him, may, after her death, be read in evidence at the trial of the prisoner, although it was not signed by her, and she was under 12 years of age, provided she was sworn, and appeared competent to take an oath; and all the facts necessary to complete the crime may be collected from her testimony so given in evidence. *Rex v. Flemming*, 2 Leach C. C. 854; 1 East P. C. 440.

Veneral Disease.—Where it is claimed that the female in consequence of the alleged ravishment became inoculated with a venereal disease, testimony by physicians as to the result of their examination of the accused made by his consent fifteen days after the rape, after informing him that they were

X. INSTRUCTIONS.—The court must instruct the jury as to what constitutes the offense of rape.¹ The rule requiring the court to instruct as to a lesser degree of the crime charged, if the evidence is not conclusive as to the defendant's guilt of the higher crime, does not apply in a case of rape, of which offense there are no degrees.²

It is error on the part of the court to fail to give explicit instructions as to the meaning of the terms, "force and threats," where the indictment charges a rape committed by those means.³

An instruction as to the presumption against the prosecutrix if she fails to resist or cry out "unless there was good legal excuse," without stating what constitutes legal excuse, is bad.⁴

An instruction is bad which characterizes a voluntary statement by the accused that he had intercourse with the prosecutrix the night before the alleged rape, as a confession.⁵ Where the prisoner admits as a witness the fact of the sexual intercourse, he cannot complain if the court assumes the fact in charging the jury.⁶

The court, in telling the jury that the woman must resist by all means in her power, need not particularize as to the means of resistance.⁷

An instruction is bad which does not sufficiently impress the jury that the use of force is essential to constitute the offense.⁸

The words "carnal knowledge" in an instruction are sufficiently definite without going into the details of the act.⁹

Where there is evidence to show that the story of the prosecutrix is a pure fabrication, it is error for the judge to ignore this in his charge to the jury, and proceed on the assumption that the defense is lack of sufficient resistance on the part of the girl.¹⁰

sent by the prosecuting attorney, is admissible; where the defendant denies the rape, and that he had at the time any venereal disease he may be cross-examined as to his physical condition with reference to such disease and as to why he used certain bottles of medicine in jail shortly after his arrest. *People v. Glover*, 71 Mich. 303.

Where such a claim is made, it is proper to inquire on cross-examination whether, prior to that time, the girl had suffered from any private disease. *State v. Otey*, 7 Kan. 69.

When an attempt to carnally know a child is testified to by her, and she is shown to be bruised and infected with venereal disease, proof of sexual intercourse between her and other persons before or near the time of the commission of the alleged offense may be introduced to weaken the force of the circumstances corroborating her testimony. *Nugent v. State*, 18 Ala. 521.

Map of the Place.—In a prosecution for rape a plan of the interior of the house where the crime was said to have been committed, made without any personal examination or survey by the draughtsman, but sworn to be correct by one of the occupants of the premises, was introduced by the State in explanation of their oral testimony, but it did not go to the jury in the jury room. *Held*, that there was nothing objectionable in this use of the plan. *State v. Jerome*, 33 Conn. 265.

1. *Fulcher v. State*, 41 Tex. 233.
2. *State v. Johnson*, 91 Mo. 439.
3. *Jones v. State*, 10 Tex. App. 552.
4. *Austine v. People*, 110 Ill. 248.
5. *Hogan v. State*, 46 Miss. 274.
6. *Anderson v. State*, 104 Ind. 467.
7. *Anderson v. State*, 104 Ind. 467.
8. *Cato v. State*, 9 Fla. 163.
9. *Burk v. State*, 8 Tex. App. 336.
10. *People v. Evans*, 72 Mich. 367.

An instruction is erroneous which, while charging that the defendant may be found guilty of an assault with intent to commit rape, if there is a reasonable doubt as to his guilt of the higher crime, does not also charge that he may be found guilty of a simple assault in case there is doubt as to his being guilty of an assault with intent, etc.¹

XI. VERDICT.—As to the verdict nothing especial need be said in this connection, the general rules of law governing verdicts in criminal cases being applicable.²

XII. ASSAULT WITH INTENT TO COMMIT RAPE.³—An attempt to commit rape is an ineffectual offer by force to have carnal connection.⁴

1. *State v. Vinsant*, 49 Iowa 241.

Other cases where the principles of law governing instructions to juries are applied in rape trials are *Jenkins v. State*, 1 Tex. App. 346; *Taylor v. State*, 24 Tex. App. 299; *People v. Bates*, 70 Mich. 234; *Leoni v. State*, 44 Ala. 110; *Convers v. State*, 47 Wis. 523; *State v. Freeman*, 100 N. Car. 429; *State v. Hatfield*, 75 Iowa 592; *Hannon v. State*, 70 Wis. 448; *Bean v. People*, 124 Ill. 576; *People v. Crego*, 70 Mich. 319.

2. **Verdict.**—A first count charged an assault with intent to ravish; the second, a common assault. The record went on to state that the jury found the defendant guilty of the misdemeanor and offense in the indictment specified, in manner and form as by the indictment is alleged against him, and the judgment was, imprisonment and hard labor. *Held*, that the word "misdemeanor" was *nomen collectivum*, and that the finding of the jury was in effect, that the defendant was guilty of the whole matter charged, and that the judgment was therefore warranted by the verdict. *Rex v. Powell*, 2 B. & Ad. 75; 22 E. C. L. 26.

Three boys, under fourteen years of age, were indicted for assaulting a girl nine years of age. It was proved that each of the boys had had connection with her. The jury returned as their verdict, "that the prisoners were guilty, the child being an assenting party, but that, from her tender years, she did not know what she was about." *Held*, upon this finding, a verdict of acquittal must be entered. *Reg. v. Read*, 2 C. & K. 957; 61 E. C. L. 956; 1 Den. C. C. 377; 3 Cox C. C. 266.

Where one count charged rape, and another assault with intent, etc., a verdict that the defendant "is guilty as charged in the indictment," and that he

"for his offense aforesaid shall suffer death by hanging," *held*, to be valid. *Kelly v. State*, 7 Baxt. (Tenn.) 84.

On an indictment for rape, a verdict finding the accused not guilty of the crime charged, but "guilty of an attempt to commit rape," will not support a conviction for "an assault with intent to commit rape," under 74 Ohio Laws 245, § 14, *Boynton, J.*, dissenting. *Fox v. State*, 34 Ohio St. 377.

3. See ASSAULT, vol. 1, p. 805.

4. *Kelly v. Com.*, 1 Grant Cas. (Pa.) 484.

A man's chasing a woman who is alone in a private place does not necessarily raise an inference of an intent to rape. *State v. Donovan*, 61 Iowa 369. But *contra*, *State v. Neely*, 44 N. Car. 425; 21 Am. Rep. 496; *Lewis v. State*, 35 Ala. 380.

Evidence that defendant entered the room of the prosecutrix, and called her by her given name, and when she screamed fled, is insufficient to support a conviction for an assault with intent to rape. *Carroll v. State*, 24 Tex. App. 366.

To make a burglarious entering of a house an attempt to commit rape, the intent must be shown to have existed at the moment of entering. *Kelly v. Com.*, 1 Grant's Cas. (Pa.) 484.

When a man burglariously entered a room, where a young lady was sleeping, and grasped her ankle, without any attempt at explanation, when she screamed—*held*, that this was some evidence of an attempt to commit a rape, and must be submitted to the jury. *State v. Boon*, 13 Ired. (N. Car.) 244; 57 Am. Dec. 555.

Where the evidence went to prove that defendant, a hack driver, received prosecutrix in his hack at a ball for the purpose of conveying her to her home,

An indictment for an intent to commit rape may be sustained by proof of a rape.¹

An indictment for an assault with intent to commit rape which omits the word "feloniously" is bad.²

Evidence of the general bad reputation of the prosecutrix for chastity is admissible upon the question of consent, in an indictment for an assault for taking indecent liberties.³

The rule that the proof must show the utmost resistance relates to rape only and not to a charge of assault with intent, etc.⁴

An assault upon a woman with desire to have connection with her, but not with intent to force her to it against her consent, is not an assault with intent to commit rape, but an aggravated assault.⁵ Where one indicted for rape fails of conviction by reason of proof of the woman's consent, if it also appears that he used such force as to evince an intention to commit rape, he may be convicted of an assault with intent to commit rape.⁶

XIII. THE CIVIL ACTION.—The woman ravished may maintain a civil action for the injury; and an averment "that the defendant made an indecent assault upon the plaintiff and then and there debauched and carnally knew her" is a sufficient allegation in such action.⁷

RASURE.—See ALTERATION OF INSTRUMENTS, vol. I, p. 497.

in a distant part of the city, and that, before reaching her destination, he entered the hack without her consent, and made an indecent assault on her, *held*, that it was for the jury to determine the intent of such assault. *State v. Daly*, 16 Oregon 240.

1. *State v. Shepard*, 7 Conn. 54; *Mears v. Com.*, 2 Grant (Pa.) 384.

2. *State v. Scott*, 72 N. Car. 461.

3. *Com. v. Kendall*, 113 Mass. 210.

4. *State v. Montgomery*, 63 Mo. 301.

Under the *Texas* Code, rape, assault with intent to commit rape, and an attempt to commit rape are three distinct offenses. *Melton v. State*, 24 Tex. App. 284; *Melton v. State*, 24 Tex. App. 284.

A conviction for an assault with intent to commit rape will not be set aside, as unsupported by the evidence, where the woman assaulted and her companion identify defendant as the perpetrator; defendant's mother and other members of the family testify that defendant was in bed before the time of the assault, and other witnesses testify that they saw defendant after the time of the assault. *State v. Hatfield*, 75 Iowa 592.

Iowa Code, § 4560, providing that a conviction for rape cannot be had on

the uncorroborated testimony of the person injured, does not apply to an assault with intent to commit rape. *State v. Hatfield*, 75 Iowa 592.

To constitute an assault upon a female child under ten years of age, with the intent to carnally know her, an offense under *Iowa* Code, § 3873—the defendant need not know she was under ten; that she was so is sufficient. *State v. Newton*, 44 Iowa 45.

5. *Outlaw v. State*, 35 Tex. 481.

In *Virginia*, upon an indictment against a free negro, under the act of 1822-3, ch. 34, § 3, it was found that the defendant, not intending to have carnal knowledge of the woman by force, but intending to have such knowledge of her while she was asleep, got into bed with her, and pulled up her night garment, which waked her, using no force. *Held*, that this was not an attempt to ravish, within the meaning of the statute. *Field's Case*, 4 Leigh (Va.) 648.

But compare *Dibrell v. State*, 3 Tex. App. 456.

6. *State v. Atherton*, 50 Iowa 189; 32 Am. Rep. 134.

7. *Koenig v. Nott*, 2 Hilt. (N. Y.) 323. See also 2 *New York* Rev. Stat. 563.

RATE.—A public valuation or assessment of every man's estate, or the ascertaining how much tax every one should pay. The term "rate" may apply either to the percentage of taxation or to the valuation of property.¹

RATIFICATION.—(See also AGENCY, vol. 1, p. 429).—Ratification is an agreement to adopt an act performed by another for us, and is either express or implied.² The term is used, as applying to the unauthorized contracts of one acting as an agent or representative of another, to contracts made during infancy, to treaties and to the amendment of written constitutions, in the sense of "confirmation," "adoption" and "affirmation."³ It is said, however, that "ratification" applies properly only to agency,⁴ and that its only synonym is the term "adoption."⁵

RAVINE.—See note 6.

READ.—See note 7.

1. Attorney-Gen'l v. Eau Claire, 37 Wis. 426; State v. Utter, 34 N. J. L. 494; Coventry Co. v. Assessors, 16 R. I. 240; Bouv. Law Dict. See also TAXATION.

Ratable estate, within the meaning of a tax law, is taxable estate. Marshfield v. Middlesex, 55 Vt. 545.

Ratable property means property in its quality and nature capable of being rated; that is, appraised, assessed. Reg. v. Overseers, 10 B. & S. 323; Coventry Co. v. Assessors, 16 R. I. 240. See also TAXATION.

2. Bouv. L. Dict., followed in Halton v. Steward, 2 Lea (Tenn.) 235.

Ratification by One, Upon Attaining His Majority, of his Promises, etc., Made During Infancy.—See INFANTS, vol. 10, p. 644.

Master's Ratification of Servant's Tortious Acts.—See MASTER AND SERVANT, vol. 14, p. 826.

Ratification of the Contract of a Married Woman.—See MARRIED WOMEN, vol. 14, p. 619.

Ratification of a Treaty.—See INTERNATIONAL LAW, vol. 11, p. 445; TREATIES.

A Partner's Ratification of the Acts of His Co-partner.—See PARTNERSHIP, vol. 17, p. 498.

Ratification of the Acts of Officers of a Corporation.—See CORPORATIONS, vol. 4, p. 228; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 17, p. 162.

Ratification of the Acts of Public Officers.—See PUBLIC OFFICERS.

3. Pearsoll v. Chapin, 44 Pa. St. 9; Art. "Ratification," 19 Cent. L. J. 482.

4. Clough v. Clough, 73 Me. 487; 40 Am. Rep. 386.

5. In Ellison v. Jackson Water Co., 12 Cal. 542, the court by Field, J., said: "The terms 'adopted' and 'ratified' are properly applicable only to contracts made by a party acting, or assuming to act, for another. . . . To adoption and ratification there must be some relation, actual or assumed, of principal and agent." See also Art. "Ratification," 19 Cent. L. J. 482.

6. An Iowa statute authorizes county judges to cause the erection of bridges over any "streams" in their counties, when they shall deem it necessary, the cost not to exceed \$500. A judge contracted for the erection of a bridge over a "ravine," and, upon the question of whether this contract was within the authority given by the statute, the court defined "stream," as used in this connection, to mean simply "water;" and ravine to mean "a long, deep and narrow hollow, worn by a stream or torrent of water; a long, deep and narrow hollow or pass through the mountains. Hence the presence of water, at least occasionally, is almost inseparable from the idea of a ravine." And it was held, in accordance with these definitions, that the judge had authority, under the statute, to contract for such a bridge. Long v. Boone Co., 36 Iowa 60.

7. Read and Write.—The Criminal Code of Texas disqualifies for jury service any one who cannot "read and write." In Wright v. State, 12 Tex. App. 167, it was held that the words "read and write" employed in the statute must

READY.—See note 1.

REAL.—See note 2.

REAL ACTIONS are such as are brought for the specific recovery of a freehold estate in lands, without regard to any damages for the wrongful detention.³

They are distributed into two classes, *droitural* and *possessory*—*droitural* when they are based upon the right of property, and *possessory* when based upon the right of possession.⁴

The *possessory* actions are the writ of forcible or unlawful entry, or unlawful detainer,⁵ the writ of entry,⁶ and the writ of *assize*.⁷

The several actions called *droitural*, are the writ of *quod ei*

be held to mean an ability to read and write in the English language, and the qualification of being able to read and write the German language would not remove the objection or qualify the juror."

1. **Ready Money.**—(See also *CASH*, vol. 3, p. 31; *MONEY IN HAND*, vol. 15, p. 710.) A bequest of "ready money" will include cash at the testator's bank, whether a balance on current account, or a deposit, or a sum withdrawable after notice. *Parker v. Marchant*, 12 L. J. Ch. 385; *Langdale v. Whitfield*, 27 L. J. Ch. 797; *Taylor v. Taylor*, 1 Jur. 401; *Tallent v. Scott*, 68 W. N. 236; *Stein v. Ritherdend*, 68 W. N. 65. But the words have been held not to include unreceived dividends on stock. *May v. Graves*, 18 L. J. Ch. 401. But it has been said that this last case cannot be reconciled with *Parker v. Marchant*, 12 L. J. Ch. 385, nor with *Fryer v. Ranken*, 9 L. J. Ch. 337; *Stewart, V. C.*, in *Cook v. Wagster*, 23 L. J. Ch. 496. And see also upon this question *Smith v. Butler*, 9 Ir. Eq. Rep. 398; *Bevan v. Bevan*, L. R., 5 Ir. 57; *Vaisey v. Reynolds*, 6 L. J. Ch. O. S. 172; *Smith v. Butler*, 3 J. & L. 565; *Knight v. Knight*, 30 L. J. Ch. 644.

Ready and Willing.—The words "ready and willing" imply not only the disposition, but the capacity to do an act. *De Medina v. Norman*, 9 M. & W. 827.

"I cannot conceive any circumstance more indicative of want of readiness than incapacity." *Bosanquet, J.*, in *Lawrence v. Knowles*, 5 Bing. N. Cas. 399, 35 E. C. L. 150.

2. **Real Danger.**—Upon a trial for murder the court instructed the jury as follows: "It would be immaterial wheth-

er the danger was real, provided the defendant acted upon the real appearance of danger." This instruction was objected to by counsel for defendant, as limiting and abridging "the right of the defendant to act upon real appearances of danger, and omits reasonable appearances of danger." The appellate court by *Hurt, J.*, said: "Danger, with reference to whether the appearance of it is 'real' or 'reasonable,' takes its classification under the one or the other, according as whether the manifestations are positive, threatening, and eminent, or are merely such as reasonably create alarm or apprehension for one's safety. 'Real' danger is a danger such as is manifest to the physical senses; 'reasonable' danger, as the very force of the term imports, is something to be judged of by an exercise of reason and judgment. It is manifest from the facts in evidence that whatever danger there was to the appellant, if any at all, was 'real,' and hence the court discharged its duty when it instructed the jury upon that character of danger, it not being bound to instruct upon another form of danger which the facts not only did not present, but absolutely precluded." *Allen v. State*, 24 Tex. App. 216.

3. 4 Min. Inst. 339; *Bouv. L. Dict.*; *Hall v. Decker*, 48 Me. 255, quoting *Stevens' Pl.* 3.

4. *Bouv. L. Dict.*; 4 Min. Inst. p. 340, *et seq.*

5. **Forcible and Unlawful Entry, etc.**—See *FORCIBLE ENTRY AND DETAINER*, vol. 8, p. 101.

6. **Writ of Entry.**—See *ENTRY, WRIT OF*, vol. 6, p. 651.

7. **Writ of Assize.**—See *ASSIZE*, vol. 1, p. 881.

*deformceat*¹ the writ of right of dower,² the writ of *formcedon*,³ and the writ of right.⁴

Several of these actions are now obsolete, and the common law, as regards those yet in practice, has been much modified by statute, as may be seen by an examination of the citations in the notes.

In the Code States, real actions are generally abolished, and one form of action, called a civil action, is substituted.⁵

1. **Writ of Quod Ei Deformceat.**—The name of a writ given by the Stat. Westm. 2, 13 Edw. 1, ch. 4, to a tenant for life who has lost the right of possession, by a recovery had against him through his default or non-appearance in a possessory action. The writ is also applicable to a tenant in tail. Though the writ may exist theoretically in some of the States, it is practically obsolete. 4 Min. Inst. 342, 469; Bouv. L. Dict.

2. **Writ of Right of Dower.**—See also DOWER, vol. 5, p. 925.

"The writ of right of dower is employed to recover a widow's dower, whereof she is deformed, where a part of her dower in the same tract has been already assigned to her. (3 Bl. Com. 183.) As this action, although demanding only a life estate, is said to be of the same nature as the 'grand writ of right' (3 Bl. Com. 183), it may perhaps be considered as abolished along with the latter writ in *Virginia* (V. C. 1873, ch. 131, § 38). The conjecture, however, is not likely to be brought to judicial arbitrament, this remedy for the recovery of a widow's dower having been for more than a century superseded in practice, as well in *England* as with us, by a bill in chancery. (1 Stor. Eq., §§ 624, *et seq.*) This jurisdiction of the court of chancery to assign dower, originated in the various embarrassments which often obstructed a widow's recovery of her dower in a court of law, in consequence of her ignorance of the state of her husband's title to the lands of which he was seised (the title-papers being in *England* in the hands of the heir, or of the devisee or trustee), and also in consequence of the difficulty of ascertaining the comparative value of the husband's different tracts, etc.; but the ultimate result is, that the courts of equity now entertain a general concurrent jurisdiction with courts of law, in the assignment of dower, in all cases where the legal title of the husband is not disputed; but if the title is disputed, it is first required to be established by an issue at law or otherwise. (1 Stor. Eq., § 624.) And this intervention of

the courts of equity has received with us the direct sanction of the legislature (V. C. 1873, ch. 106, § 10); which has, moreover, allowed the widow to recover her dower, and damages for its being withheld, by such remedy at law as would lie on behalf of a tenant for life having a right of entry. (V. C. 1873, ch. 106, § 10.) As, for example, by ejectment, in which provision is made for the assignment of dower by commissioners appointed for the purpose. (V. C. 1873, ch. 131, §§ 29, 6, 7, *et seq.*.)" 4 Min. Inst. 343.

3. **Formcedon.**—A writ which lay for a person who, being interested in an estate tail, was liable to be defeated of his right by a discontinuance of the estate. And. L. Dict. Now entirely obsolete.

"The writ of *formcedon* is a droital action, adapted to recover real property in pursuance of a gift in tail (*per formam doni*), where by the wrongful alienation in fee-simple, of the tenant in tail, the estate-tail is discontinued, and the remainder or reversion, or the interest of the issue in tail, is turned into a mere right. If the writ of *formcedon* is prosecuted by the issue in tail, it is denominated *formcedon in descender*; and if by him in remainder, or in reversion, it is styled *formcedon in remainder*, or *formcedon in reverter*. (3 Bl. Com. 191-2)." 4 Min. Insts. 344.

4. **Writ of Right.**—The writ of right was the remedy appropriate to the case where a party claimed the specific recovery of corporeal hereditaments in fee-simple; founding his title on the right of property or mere right arising either from his own seisin, or the seisin of his ancestor or predecessor. Steph. Pl. (3 Am. ed.) p. 43. The writ of right is employed to recover not an estate for life like a writ of *quod ei deformceat* nor an estate tail like a writ of *formcedon*, but an estate in fee-simple, where the right of possession is barred by a recovery on the merits in a possessory action or by the lapse of time. 4 Min. Inst. (2d ed.) 344.

5. **Ejectment**, vol. 6, p. 200.

REAL COVENANTS.—(See also COVENANT, vol. 4, p. 463; DAMAGES, vol. 5, p. 1; DEEDS, vol. 5, p. 423; ESTOPPEL, vol. 7, p. 1; EVICTION, vol. 7, p. 36; IMPLIED COVENANTS, vol. 9, p. 960; INCUMBRANCES, vol. 10, p. 361; LANDLORD AND TENANT, vol. 12, p. 658; LEASE, vol. 12, p. 974; WARRANTY.)

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|---|---|
| <p>I. Definition, 973.
 II. Kinds of Real Covenants, 974.
 1. <i>Covenants as to the Use of Real Estate</i>, 974.
 2. <i>Covenants for Title</i>, 974.
 a. <i>Covenant for Seisin</i>, 976.
 b. <i>Covenant for Good Right to Convey</i>, 981.
 c. <i>Covenant Against Incumbrances</i>, 982.
 d. <i>Covenant for Quiet Enjoyment</i>, 982.
 e. <i>Covenant for Further Assurance</i>, 984.</p> | <p> f. <i>Covenant of Warranty</i>, 985.
 3. <i>Covenants between Landlord and Tenant</i>, 997.
 III. <i>Running with the Land</i>, 997.
 IV. <i>Release of Real Covenants</i>, 1009.
 V. <i>Limitation of Real Covenants</i>, 1010.
 VI. <i>Parties Liable Upon Real Covenants</i>, 1011.
 VII. <i>Notice to Defend Title</i>, 1012.
 VIII. <i>Measure of Damages for Breach</i>, 1014.
 IX. <i>Operation of Real Covenants by Way of Estoppel</i>, 1020.</p> |
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I. DEFINITION.¹

1. A real covenant is, "that whereby a man doth bind himself to pass a real thing, as lands or tenements, . . . or when it doth run in the realty so with the land that he that hath the one hath or is subject to the other." Shep. Touch., ch. 7, p. 161.

"Covenants real are those which have for their object something annexed to, or inherent in or connected with land or other real property." Cruise Real Prop., tit. 32, ch. 26, § 23.

See also Fitzherbert Nat. Brev. 145; 2 Bl. Comm. 304.

In Platt on Covenants, 60-62, Cruise's definition is regarded as inadequate and that of Sheppard approved, and the latter has generally been adopted.

It may be suggested, however, that the distinctive nature of a real covenant is that its burden or benefit is attached primarily to real estate, so that it affects persons only by reason of their sustaining certain definite relations to such real estate, as owners, lessees, etc., and that Sheppard's statement that a real covenant runs with the land describes a consequence of the nature of such a covenant rather than that nature itself. The definition in the text is submitted as an attempt to bring into prominence the nature of a real covenant, as distinguished from one that is merely personal.

In *England* the Conveyancing Act of 1881, 44 & 45 Vict. 41, provides, in

effect, that every covenant or provision in a lease having reference to the subject-matter thereof shall run with the land, and also that all other covenants relating to land shall run with the land benefited. This is regarded as depriving real covenants of "any title to form a separate class." Hamilton, Covenants, Preface.

It is almost superfluous to state that where the act covenanted for or against is that of one or more particular persons it cannot possibly be regarded as real covenant in the sense of binding any land, although during the period when it could be performed, it might, if so expressed, be a real covenant as regards the land benefited. Thus a covenant by a grantor of real estate for himself, his heirs and assigns, that he will not erect on an adjoining lot, owned by him, any building which shall be regarded as a nuisance, is a covenant to be performed or broken by him alone; and as no breach could possibly occur except during his ownership, when that is at an end the covenant expires, and never could bind the land. The words "his heirs and assigns" are in such a case mere surplusage. *Clark v. Devoe*, 124 N. Y. 120.

Contracts as Covenants.—Though, strictly, every covenant should be by instrument under seal, yet in equity a simple contract in regard to land which has been partially performed will be

A real covenant¹ is one where either the liability imposed by it or the right to take advantage of it exists by reason either of the ownership of an estate or interest in real property,² corporeal or incorporeal, or of an undertaking to grant such estate or interest.³

II. KINDS OF REAL COVENANTS—1. Covenants as to the Use of Real Estate.—These include covenants to build, where such covenant is connected with the grant, building restrictions, covenants in regard to party walls, or to the use to be made of premises granted or other premises whose use affects the value of those granted, covenants to pay rent, etc.⁴

2. Covenants for Title.—These are agreements, either express or implied from the language used, in regard to the title to the real

treated as a covenant, and run with the land as such. *Rome etc. R. Co. v. Ontario Southern R. Co.*, 16 Hun (N. Y.) 445.

Acceptance Equivalent to a Covenant.—A grantee's acceptance of a deed containing a covenant or stipulation on his part, makes it binding on him without his signature. *Spaulding v. Hallenbeck*, 35 N. Y. 206; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; 13 Am. Rep. 556; *Wales v. Sherwood*, 52 How. Pr. (N. Y.) 413. See *DEEDS*, vol. 5, p. 423.

1. Real covenants may be either "express" or "implied." As to the latter, see *IMPLIED COVENANTS*, vol. 9, p. 960.

Although an express covenant is most clearly denoted by the words "covenant and agree," no precise form of words is essential. *Shep. Touch. 162*; *Rigby v. Great Western R. Co.*, 14 M. & W. 811. It is necessary to distinguish carefully between covenants, the breach of which can be measured in damages and conditions subsequent, where a breach divests the estate. See *CONDITION*, vol. 3, p. 422.

Conditions not being favored in law, the fact that a deed used the words "upon the express condition," or other equivalent language, is not conclusive of an intention to create an estate upon condition, and if the context and surrounding circumstances indicate that a covenant was intended, the deed will be so construed whatever the language used. *Avery v. New York Cent. etc. R. Co.*, 106 N. Y. 142; *Post v. Weil*, 115 N. Y. 361; *Clement v. Burtis*, 121 N. Y. 708.

A *habendum*, that the land is to be used for certain purposes only is not equivalent to a covenant not to use it

for other purposes. *Chautauqua Assembly v. Alling*, 42 Hun (N. Y.) 582; *Burgman v. Noyes*, 6 Wis. 1.

A fortiori, it is not a covenant to erect the buildings necessary for such purposes. *Madore's Appeal*, 129 Pa. St. 15.

2. A real covenant must affect the nature, quality, value or mode of enjoyment of real estate, independently of collateral circumstances. *Mayor of Congleton v. Pattison*, 10 East 130.

It is not enough that a covenant should merely concern real estate in order to render it a real covenant. Thus a proviso in a deed that if the grantee should ever sell any of the property, it should be sold to the grantor at the original price, is, if a covenant at all, a purely personal one by the grantee, and has no vitality after his death. *Maynard v. Polhemus*, 74 Cal. 141.

The benefit of such a covenant would pass to the covenantee's representatives at his death. Thus an agreement to take back the land and repay the purchase money at any time within a year from the conveyance if the purchaser should be dissatisfied, may be enforced by the purchaser's representatives. *Fuller v. Dempster* (Pa. 1887), 11 Atl. Rep. 670. But that is entirely different from running with the land.

In further illustration of this point, see *infra*, this title, *Running with the Land*.

3. As in the case of covenants for title where no valid title passes, see *infra*, this title, *Covenant for Seisin*, *Covenant of Warranty*.

4. These are sufficiently illustrated *infra*, this title, *Running with the Land*.

estate intended to be conveyed by the instrument containing the agreements.¹ An agreement for the mortgage or conveyance of real estate contemplates a mortgage or conveyance with such covenants as are usual in the State where the property lies.² In *America*, an agreement to convey by "warranty deed," or other equivalent language, usually means that the deed shall contain a covenant of warranty against the acts or claims of all persons.³ A fiduciary grantor, having himself no interest in the property conveyed, but merely a naked legal title, is required to covenant only that he has done nothing to incumber the estate.⁴ A power

1. **Rise of Covenants for Title.**—These are the modern substitute for the incident of feudal tenure, known as warranty (itself a real covenant in the strictest sense), by which, in return for the homage of the vassal, the lord was bound to protect him in the enjoyment of the fief, and if the title were in dispute, to establish its validity, or else furnish another fief of equal value. When deeds came to be used to authenticate conveyances, the same warranty was either expressed by the word *warrantizo* or implied from the word of feoffment, *dedi*, but when, after the passage of the Statute of Uses, feoffments were replaced by a deed of bargain and sale or lease and release, warranty disappeared along with livery of seisin, of which it had hitherto been an invariable consequence, and at least as early as Elizabeth its place was taken by certain covenants to the effect that the grantor was lawfully seized of the property and could lawfully convey it. The covenants now actually in use, however, except the American covenant of warranty, were introduced about the time of the Restoration. Rawle, *Covenants* (5th ed.), ch. 1.

2. Sugden, *Vend.* (14th ed.) 615; Rawle, *Covenants* (5th ed.), § 108.

Under What Circumstances Used.—There are six covenants for title known to the law. They are the covenants for seisin, for right to convey, against incumbrances, for quiet enjoyment, for further assurance, and of warranty, the last being expressly American. The covenant of non-claim sometimes used in the New England States is practically the same as the covenant of warranty. They may all be used in the case of sales in fee simple and mortgages, while in ordinary leases the covenant for quiet enjoyment alone is customary, and on the assignment or transfer of leasehold interest

there is added to this a covenant that the lease is a valid and subsisting one, which amounts to a covenant for seisin and for right to convey. Marriages and family settlements sometimes contain covenants similar to those used in the case of sales. Rawle, *Covenants* (5th ed.), §§ 20-23.

The question of the particular covenant applicable to each form of conveyance is now regulated to a great extent by the statutes establishing implied covenants. See IMPLIED COVENANTS, vol. 9, p. 960.

3. *Clark v. Redinan*, 1 Blackf. (Ind.) 379; *Linn v. Barkey*, 7 Ind. 70; *Fleming v. Harrison*, 2 Bibb (Ky.) 171; 4 Am. Dec. 691; *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 293; 19 Am. Dec. 92; *Hedges v. Kerr*, 4 B. Mon. (Ky.) 528; *Andrews v. Word*, 17 B. Mon. (Ky.) 520; *Dwight v. Cutler*, 3 Mich. 519; 64 Am. Dec. 566; *Faircloth v. Isler*, 75 N. Car. 551; *Rucker v. Lowther*, 6 Leigh (Va.) 259; *Hoback v. Kilgore*, 26 Gratt. (Va.) 442.

In *Pennsylvania* a deed of special warranty against the acts of the vendor and those claiming under him only is required. *Withers v. Baird*, 7 Watts (Pa.) 229; 32 Am. Dec. 754; *Espy v. Anderson*, 14 Pa. St. 312; *Cadwalader v. Tryon*, 37 Pa. St. 322; *Lloyd v. Farrell*, 48 Pa. St. 78; 86 Am. Dec. 563. But no suspicion of the title arises from the use of general covenants. *Cresson v. Miller*, 2 Watts (Pa.) 276; *Forster v. Gillam*, 13 Pa. St. 343.

In *England* it has long been settled that a person can demand of a vendor covenants against his own acts only. *Browning v. Wright*, 2 B. & P. 23.

The increasing use of implied covenants practically regulates this matter also in most States. See IMPLIED COVENANTS, vol. 9, p. 960.

4. *Staines v. Morris*, 1 Ves. & B. 10; *White v. Foljambe*, 11 Ves. 345; *Wilkins v. Fry*, 1 Mer. 244; *Worley v.*

of attorney to convey implies a power to make covenants which bind the principal as grantor.¹ No covenants for title can be required (nor implied from the grants) of ministerial grantors²—*e. g.*, sheriffs, marshals, etc.—nor of the State.³ Covenants for title are always deemed to have been intended to cover known defects in the title, unless these are expressly excepted.⁴

a. THE COVENANT FOR SEISIN, *i. e.*, that the grantor is lawfully seised of the premises to be conveyed. In *England* and, for the most part, the *United States*, the word "seisin" is used in this connection as equivalent to "title"⁵ and the covenant has

Frampton, 5 Hare 560; *Worthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399; *Redwine v. Brown*, 10 Ga. 311; *Aven v. Beckom*, 11 Ga. 1; *Chastain v. Staley*, 23 Ga. 26; *Brackenridge v. Dawson*, 7 Ind. 387; *Dwinel v. Veazie*, 36 Me. 509; *Sumner v. Williams*, 8 Mass. 201; *Hodges v. Saunders*, 17 Pick. (Mass.) 476; *Barnard v. Duncan*, 38 Mo. 181; *Eunis v. Leach*, 1 Ired. Eq. (N. Car.) 416; *Shontz v. Brown*, 27 Pa. St. 134; *Grantland v. Wight*, 5 Munf. (Va.) 295; *Allen v. Winston*, 1 Rand. (Va.) 71; *Goddin v. Vaughn*, 14 Gratt. (Va.) 102; *Fleming v. Holt*, 12 W. Va. 143. But if a fiduciary makes covenants of greater scope, though in his capacity as fiduciary, he is personally liable. *Cradock v. Stewart*, 6 Ala. 77; *Barnett v. Hughey* (Ark. 1891), 15 S. W. Rep. 464; *Coe v. Talcott*, 5 Day (Conn.) 92; *Mitchell v. Hazen*, 4 Conn. 495; 10 Am. Dec. 169; *Belden v. Seymour*, 8 Conn. 24; 21 Am. Dec. 661; *Sterling v. Peet*, 14 Conn. 245; *Aven v. Beckom*, 11 Ga. 1; *Mason v. Caldwell*, 10 Ill. 196; 48 Am. Dec. 330; *Foster v. Young*, 35 Iowa 27; *Klopp v. Moore*, 6 Kan. 30; *Graves v. Mattingly*, 6 Bush (Ky.) 361; *Stinchfield v. Little*, 1 Me. 231; 10 Am. Dec. 65; *Thacher v. Dinsmore*, 5 Mass. 299; 4 Am. Dec. 61; *Forster v. Fuller*, 6 Mass. 56; *Sumner v. Williams*, 8 Mass. 162; *Whiting v. Dewey*, 15 Pick. (Mass.) 433; *Donahue v. Emery*, 9 Met. (Mass.) 66; *Mellen v. Boorman*, 13 Smed. & M. (Miss.) 100; *Magee v. Mellon*, 23 Miss. 586; *Murphy v. Price*, 48 Mo. 247; *Holyoke v. Clark*, 54 N. H. 578; *Godley v. Taylor*, 3 Dev. (N. Car.) 178; *Welsh v. Davis*, 3 S. Car. 110; 16 Am. Rep. 690; *Taylor v. Harrison*, 47 Tex. 454; 26 Am. Rep. 304; *Duvall v. Craig*, 2 Wheat. (U. S.) 56; *Taylor v. Davis*, 110 U. S. 330.

The fiduciary can, however, expressly limit his liability to his fiduciary capacity. *Nicholas v. Jones*, 3 A. K. Marsh. (Ky.) 385; *Maniffee v. Morrison*,

1 Dana (Ky.) 208; *Glenn v. Allison*, 58 Md. 527; *Day v. Brown*, 2 Ohio 345; *Thayer v. Wendell*, 1 Gall. (U. S.) 37. He cannot under ordinary circumstances bind the estate. *Worthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399; *Clark v. Whitehead*, 47 Ga. 521; *Shacklett v. Rawson*, 54 Ga. 350; *Klopp v. Moore*, 6 Kan. 30; *Mason v. Ham*, 36 Me. 573; *Osborne v. McMillan*, 5 Jones (N. Car.) 109; *Lockwood v. Gilson*, 12 Ohio St. 52; *Shontz v. Brown*, 27 Pa. St. 134; *Mabie v. Matterson*, 17 Wis. 11.

1. *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 293; 19 Am. Dec. 92; *Hedges v. Kerr*, 4 B. Mon. (Ky.) 528; *Ward v. Bartholomew*, 6 Pick. (Mass.) 410; *Bronson v. Coffin*, 118 Mass. 161; 11 Am. Rep. 335; *Hunter v. Jameson*, 6 Ired. (N. Car.) 252; *Peters v. Farnsworth*, 15 Vt. 155; 40 Am. Dec. 671; *Rucker v. Lowther*, 6 Leigh (Va.) 259; *LeRoy v. Beard*, 8 How. (U. S.) 451; *Laggart v. Stanbery*, 2 McLean (U. S.) 543.

2. *Corbitt v. Dawkins*, 54 Ala. 282; *London v. Robertson*, 5 Blackf. (Ill.) 276; *Doe v. Lewis*, 4 Gray (Mass.) 473; *Stephens v. Ells*, 65 Mo. 456; *Wilson v. Cochran*, 14 N. H. 397; *Friedly v. Scheetz*, 9 S. & R. (Pa.) 156; 11 Am. Dec. 691; *Rogers v. Horn*, 6 Rich. (S. Car.) 361; *Mitchell v. Pinckney*, 13 S. Car. 203; *Gibson v. Mussey*, 11 Vt. 212.

3. *Com. v. Andri*, 3 Pick. (Mass.) 224; *State v. Crutchfield*, 3 Head (Tenn.) 113.

4. *Miller v. Desverges*, 75 Ga. 407; *Flynn v. White Breast Coal etc. Co.*, 72 Iowa 738; *Barlow v. Delaney*, 40 Fed. Rep. 97.

See INCUMBRANCES, vol. 10, p. 361.

5. *I. e.*, practically the *juris et seisinæ conjunctio* of the common law, and hence this covenant is regarded as a covenant for the title as distinguished from the covenant for quiet enjoyment, which purports to assure the pos-

therefore been defined as "an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey;"¹ but in *Maine* and *Massachusetts*,² and, with

session. *Cooke v. Fowns*, 1 Keb. 95; *Gregory v. Mayo*, 3 Keb. 755; *Howell v. Richards*, 11 East 641; *Young v. Raincock*, 7 C. B. 310.

In this sense the covenant for seisin implies a good right to convey and may be said to include a covenant to that effect. *Nervin v. Munns*, 3 Lev. 46; *Browning v. Wright*, 2 B. & P. 13. But the converse is not true, and the covenants, though sometimes said to be synonymous (as in *Marston v. Hobbs*, 2 Mass. 433), are not so in all respects.

1. Per Lord Ellenborough, *Howell v. Richards*, 11 East 641.

In other words the covenant for seisin, unless expressly qualified, means that the grantor is seised of an indefeasible estate. *Lockwood v. Sturdevant*, 6 Conn. 385; *Comstock v. Comstock*, 23 Conn. 343; *Clapp v. Herdmann*, 25 Ill. App. 509; *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Brandt v. Foster*, 5 Iowa 535; *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 430; 19 Am. Dec. 139; *Real v. Hollister*, 20 Neb. 112; *Parker v. Brown*, 15 N. H. 186; *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1; *Morris v. Phelps*, 5 Johns. (N. Y.) 49; 4 Am. Dec. 323; *Abbott v. Allen*, 14 Johns. (N. Y.) 248; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161; *McCart v. Leggett*, 3 Hill (N. Y.) 134; *Mott v. Palmer*, 1 N. Y. 564; *Coit v. McReynolds*, 2 Robt. (N. Y.) 655; *Pringle v. Witten*, 1 Bay (S. Car.) 256; 1 Am. Dec. 612; *Woods v. North*, 6 Humph. (Tenn.) 309; 44 Am. Dec. 312; *Kincaid v. Brittain*, 5 Sneed (Tenn.) 119; *Recohs v. Younglove*, 8 Baxt. (Tenn.) 385; *Hastings v. Webber*, 2 Vt. 407; *Catlin v. Hurlburt*, 3 Vt. 407; *Richardson v. Dorr*, 5 Vt. 21; *Mills v. Catlin*, 22 Vt. 106; *Thomas v. Perry*, Pet. (C. C.) 57; *Pollard v. Dwight*, 4 Cranch (U. S.) 430.

2. Doctrine of "Actual Seisin." — This doctrine was apparently first announced in 1807 in *Marston v. Hobbs*, 2 Mass. 433. The defendant, holding by a tax-title afterwards turning out to be invalid, conveyed with covenants, but there was no evidence of ouster or other actual damage to the plaintiff having as yet resulted from the failure

of the title. Defendant's counsel claimed that nominal damages only could be recovered, and also that the defendant should not be compelled to prove his title, which was *prima facie* a good one, until the plaintiff showed that his possession had been disturbed or threatened on account of an older title. The court by Parsons, C. J., decided against this, saying: "The defendant to maintain the issues on his part, was obliged to prove his seisin when the deed was executed. But," he added, going on to state a doctrine which does not seem to have been advanced up to that time, "it was not necessary to show an indefeasible title. A seisin in fact was sufficient, whether he gained it by his own disseisin or whether it was under a disseisor. If at the time he executed the deed he had the exclusive possession of the premises claiming the same in fee simple by a title adverse to the owner, he was seised in fee and had a right to convey. If *Weare Drake* [the constable who executed the tax-deed] had no authority to convey the premises to the defendant, yet if in fact he entered under color, though not by virtue of that deed, and acquired a seisin by disseisin by ousting the former owner, he has not broken these covenants."

The same doctrine was applied the next year in *Bearce v. Jackson*, 4 Mass. 408, the grantor having entered upon the lands, claiming to hold them by a grant from the commonwealth. The court by Parsons, C. J., said: "It is very clear that the defendant's intestate [the grantor] being in possession, claiming a fee simple in the land, was able to convey. So the covenant of seisin was not broken." The doctrine has been adhered to in *Massachusetts*, *Chapel v. Bull*, 17 Mass. 219; *Wait v. Maxwell*, 5 Pick. (Mass.) 217; 16 Am. Dec. 391; *Cornell v. Jackson*, 3 Cush. (Mass.) 509; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Follett v. Grant*, 5 Allen (Mass.) 175; *Kirkendall v. Mitchell*, 3 McLean (U. S.) 144; and followed in *Maine*, *Fairbrother v. Griffin*, 10 Me. 91; *Cushman v. Blanchard*, 2 Me. 268; 11 Am. Dec. 76; *Wheeler v. Hatch*, 12 Me. 389; *Boothby v. Hathaway*, 20 Me. 255; *Baxter v. Brad-*

certain qualifications, in *Ohio*,¹ "seisin" is used in the older and narrower sense of "possession," and bare actual possession under color of title² fulfills the covenant,³ as well as that for a good

bury, 20 Me. 260; 37 Am. Dec. 49; *Wilson v. Widenham*, 51 Me. 567; *Montgomery v. Reed*, 69 Me. 510.

The doctrine of "actual seisin" was adhered to in *New Hampshire* in *Willard v. Twitchell*, 1 N. H. 178, and *Breck v. Young*, 11 N. H. 491; but discarded in *Parker v. Brown*, 15 N. H. 186, the court by Parker, C. J., saying: "After contracting that they are the lawful owners of the premises, the grantor's covenant that they are lawfully seised in their own right in fee simple. This engagement is certainly not satisfied in any just sense by evidence that the grantors are unlawfully seised, in their own wrong, or of no fee simple except such as is claimed wrongfully, and in disseisin of the true owner. This may be a good seisin against all but the true owner, but is not a seisin in the parties' own right in fee. The grantee who takes such a covenant for his security has a right to understand that his grantor transmits to him some seisin other than one which will make him liable to the rightful action of a third person the moment he enters upon his deed."

In *Illinois* the *Massachusetts* doctrine (as also that prevailing in *Ohio*, see next note, no distinction being taken between the two) was approved in *Watts v. Parker*, 27 Ill. 228, though the case did not admit of its application; but in the much later case of *Clapp v. Herdman*, 25 Ill. App. 509, it was explicitly held that an indefeasible estate alone fulfilled the covenant for seisin, no mention being made of *Watts v. Parker*.

1. In *Ohio*, actual seisin fulfills these covenants at the time that they are made, and if this seisin ripens into a good title by lapse of time the covenants are held not to have been broken; but if the seisin of the grantee or of those claiming under him fail at any time, actually or constructively, then and not till then there is a breach of the covenants.

In *Nebraska* the *Ohio* doctrine was followed in *Scott v. Twiss*, 4 Neb. 133, but discarded, without notice of that case, in *Real v. Hollister*, 20 Neb. 112.

2. The covenantor must at least

claim to have the lawful title. *Wheeler v. Hatch*, 12 Me. 389.

3. *Origin of the Doctrine.*—The origin of the doctrine of actual seisin cannot be stated with absolute certainty. In *Wilcox's Note to Foote v. Burnet*, 10 Ohio 327, it is said that "the rule seems in some measure to have grown out of the hardship, real or apparent, of permitting the grantee to recover back the consideration, money and interest, while he or his assignee is enjoying a possession that in lapse of time may ripen into a perfect title," but in point of fact this is not permitted even where the covenant is held to have been broken. See *infra*, this title, *Measure of Damages*.

The doctrine cannot be explained by the fact that "seisin" is here used in the sense of "possession," which might in time ripen into a valid title, for the same construction is put upon the covenant for good right to convey, which is not necessarily based upon possession. See, *infra*, this title, *Covenant for Good Right to Convey*.

The best and in all probability the true explanation is that suggested by *Hutchinson, C. J.*, in *Catlin v. Hurlburt*, 3 Vt. 407, and elaborated by *Mr. Rawle* (*Covenants*, 5th ed., §§ 47-54), that the doctrine sprang from that of adverse possession as connected with the champerty acts. The "Pretended Title Act," 32 Hen. VIII. ch. 9, § 2 (A. D. 1540), prohibited the bargain, sale or transfer of any premises of which the party had not been in possession or received the rents and profits for a year previously, under a penalty, imposed upon a purchaser who bought knowingly, as well the seller, of the forfeiture of the value of the premises. This statute has been re-enacted in some of our States, either literally or with modifications; in others (including *Massachusetts*, see *Brinley v. Whiting*, 5 Pick. (Mass.) 348, and formerly *Maine*, see *Buck v. Babcock*, 36 Me. 491) the prohibition of champerty was regarded as part of the common law of the State, while in still others it is not prohibited in any way. See *CHAMPERTY*, vol. 3, pp. 68, 80. In the two former classes of States it results that a conveyance

right to convey, unless an indefeasible estate be expressly assured.¹

Understood in the broader sense, the covenant is broken if no such land exists as that purported to be conveyed,² or if the grantor has no title to the premises³ or to some part of them,⁴ or if he has only an estate tail,⁵ or an estate in common when an entire estate is covenanted for,⁶ or if partition has been made when an undivided portion of the premises is covenanted for,⁷ or if an estate for life,⁸ or (under certain circumstances) for years,⁹ be outstanding, or if other parties have rights (other than easements) in the premises or in any part thereof.¹⁰ The covenant also

of real estate of which there is an adverse possession is of itself champerty and an offense. The courts of *Maine* and *Massachusetts*, which first held the doctrine of actual seisin, seem to have regarded the covenants for seisin and of good right to convey as assurances to the purchaser that there was no such adverse possession of the land as would bring upon him the penalties of champerty, and, should this be untrue, to furnish him with a recompense. The transfer of an actual seisin fulfilled the covenant within the spirit of the champerty acts, and also showed that the vendor had, in the same sense, a good right to convey the premises. If the purchaser bought with such knowledge of the state of the title as to bring the case within the champerty acts, of course the covenants would be of no avail to him. Under the doctrine of actual seisin, understood with reference to the champerty acts, moreover, it is immaterial whether the adverse possession was recent, or had ripened into a perfect title under the limitation acts. The existence of such a possession is a breach of the covenants.

1. *Prescott v. Freeman*, 4 Mass. 631; 3 Am. Dec. 249; *Smith v. Strong*, 14 Pick. (Mass.) 132; *Raymond v. Raymond*, 10 Cush. (Mass.) 134.

2. *Bacon v. Lincoln*, 4 Cush. (Mass.) 212; 1 Am. Rep. 765; *Basford v. Pearson*, 9 Allen (Mass.) 389; 85 Am. Dec. 764.

3. *Clapp v. Herdman*, 25 Ill. App. 509; *Montgomery v. Reed*, 69 Me. 510, where the covenantor had not even "actual seisin."

It has been held that as the recording of a tax deed vests constructive possession, the covenant for seisin of vacant land is broken by the recording, subsequently to the conveyance,

of such a deed issued to a third party on a certificate of a tax sale made prior to the conveyance. *Daggett v. Reas* (Wis. 1891), 48 N. W. Rep. 137.

But a third party's claim of title to the premises, unless valid, does not affect the covenant, and no money paid to extinguish a void title, by a coveantee holding the true title, is recoverable. *Sample v. Whorton*, 68 Wis. 626.

4. As where the grantor had previously conveyed the fee of a strip of ground, and not merely a right of way to a railroad company. *Messer v. Oestreich*, 52 Wis. 684.

5. *Comstock v. Comstock*, 23 Conn. 352.

6. The breach in such a case is not total, but as to a part of the estate proportioned to the interest of the other tenant in common besides the covenantor. *Downer v. Smith*, 38 Vt. 464.

7. *Morrison v. McArthur*, 43 Me. 567.

8. *Frazer v. Peoria Co.*, 74 Ill. 282; *Wilder v. Ireland*, 8 Jones (N. Car.) 85; *Mills v. Catlin*, 22 Vt. 106.

9. *I. e.*, such a term of years as practically affects the quantity and quality of the estate covenanted to be conveyed. *Van Wagner v. Van Nostrand*, 19 Iowa 422. Usually, however, the existence of a term is no breach, and the rent is apportioned at the time of the conveyance. *Lindley v. Dakin*, 13 Ind. 389; *Page v. Lashley*, 15 Ind. 152; *Kellum v. Berkshire, L. Ins. Co.*, 101 Ind. 455.

10. Thus a breach results from the paramount right of a third party to divert a spring. *Clark v. Conroe*, 38 Vt. 471; *Lamb v. Danforth*, 59 Me. 322; or to prevent water from being dammed up to the height permitted by the deed. *Traster v. Snelson*, 29

extends to all such things as should properly be appurtenant to the land and pass by a conveyance of it;¹ but it is not broken by the existence of such easements or incumbrances as do not affect the seisin.²

It has been held that where the title transferred is not actually invalid, but defeasible merely,³ the covenant is not broken, but this is very questionable.⁴ If the covenantee himself hold the true title at the time of the conveyance, the breach of covenant for seisin confers no right of action.⁵

The existence of an adverse possession, other than such as has ripened into a valid title under the limitation acts,⁶ is held in *England* not to affect the covenant,⁷ but this is not so certain in the *United States*.⁸

Ind. 96; *Walker v. Wilson*, 13 Wis. 522; *Hall v. Gale*, 14 Wis. 55; 20 Wis. 293; or even when the deed is silent as to the right to dam up. *Adams v. Conover*, 87 N. Y. 422.

1. As where the right to remove buildings or fixtures is vested in other parties. *Van Wagner v. Van Nosstrand*, 19 Iowa 427; *Powers v. Dennison*, 30 Vt. 752. But no breach results from a conveyance without mention of the buildings on the land, when such buildings are partly on adjoining property and other parties have a right to move that portion of them which is so situated. *Burke v. Nichols*, 2 Keyes (N. Y.) 671.

2. Thus an unauthorized removal of fixtures by a tenant is of course no breach of the covenant (*Loughran v. Ross*, 45 N. Y. 792; 6 Am. Rep. 173) as the existence of a highway over part of the land does not interfere with the ownership of the soil. (2 Co. Inst. 705; *Goodtitle v. Alker*, 1 Burr. 133; *Peck v. Smith*, 1 Conn. 147; 6 Am. Dec. 216; *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) 357; 3 Am. Dec. 439; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 449; 8 Am. Dec. 263; *Lewis v. Jones*, 1 Pa. St. 336; 44 Am. Dec. 138) it is no breach of this covenant. *Moore v. Johnston*, 87 Ala. 220; *Vaughn v. Stuzaker*, 16 Ind. 340; *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483; 8 Am. Dec. 272.

But in a deed for land bounded by a certain street, the words "said street forever to be and remain free and open as a public street" may perhaps be regarded as a covenant for seisin. *McDonald v. McElroy*, 7 Pac. Coast L. J. 343.

The same is true of a judgment or a

right of dower in the lifetime of the husband, as they do not divest the grantor's technical seisin. *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429; 19 Am. Dec. 139; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 380; *Tuite v. Miller*, 10 Ohio 382; *Massey v. Craine*, 1 McCord (S. Car.) 489; *Lewis v. Lewis*, 5 Rich. (S. Car.) 12.

And though a mortgage purports to pass the legal bill, it is now almost universally regarded as merely a security for the debt, so that it does not affect the seisin, unless the mortgagee has actually entered. *Reasoner v. Edmundson*, 5 Ind. 393.

3. As where one of the parties to the deed was a minor. *Van Nosstrand v. Wright, Hill & D. Supp.* (N. Y.) 260. See *Bool v. Mix*, 17 Wend. (N. Y.) 132; 31 Am. Dec. 285. This would certainly be a breach of the covenant for good right to convey. *Nash v. Ashton, T. Jones* 195.

Where a sheriff's vendee conveyed, and subsequently the judgment was opened and the sale set aside, this was held not to be a breach. *Coit v. McReynolds*, 2 Robt. (N. Y.) 658.

4. Rawle, Covenants (5th ed.), § 61.

5. *Beebe v. Swartwout*, 8 Ill. 180; *Horrigan v. Rice*, 39 Minn. 49; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161.

6. As to this, see *Wilson v. Forbes*, 2 Dev. (N. Car.) 30.

7. *Doe v. Hull*, 2 D. & R. 38; *Cully v. Doe*, 11 A. & E. 1008; *Doe v. Martyn*, 8 B. & C. 497; *Jewitt v. Weare*, 3 Price 575; but as to the last case see *Sugd. Vend.* (14th ed.) 601; *Dart. Vend.* (5th ed.) 583.

8. In *Thomas v. Perry*, Pet (C. C.) 52, and *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 430, 19 Am. Dec. 139.

In assigning a breach of this covenant or of that for good right to convey, in common law pleading, it is enough to negative the words of the covenant generally,¹ and it is unnecessary in the declaration to aver an eviction or to lay any special damage,² nor at any stage of the proceedings to set out the particulars of the paramount title.³ The burden of proof is in the first instance upon the defendant.⁴ But under the modern codes of practice, there being no replication, the complaint, or statement of claim, must set out the defects in the title with sufficient particularity to allow a defense to be framed, and the burden of proof is on the plaintiff.⁵

b. THE COVENANT FOR GOOD RIGHT TO CONVEY.—This has sometimes been said to be synonymous with the covenant for seisin,⁶ but although seisin implies a right to convey⁷ the converse is not true,⁸ as is seen in the case of a conveyance in execution of a power.⁹ As already stated, the meaning of this

the courts were of opinion that possession was essential to the performance of the covenant.

3. *Abbott v. Allen*, 14 Johns. (N.Y.) 248.

1. *Bradshaw's Case*, 9 Rep. 60. The action was on a covenant for good right to convey, contained in a lease, and it was held that the lessor naturally knew what his own estate was better than the lessee could be expected to do. This was followed in *Glinister v. Audley*, T. Ray, 14, though there, the conveyance being of a freehold, it was argued that the grantee held all the deeds, and must therefore be presumed to know the title. The rule has been uniformly adhered to since. *Muscot v. Ballet*, Cro. Jac. 369; 2 Saund. 181 b, n. 10; *Floom v. Beard*, 8 Blackf. (Ind.) 76; *Traster v. Snelson*, 29 Ind. 96; *Slocum v. Haun*, 36 Iowa 138; *Blanchard v. Hoxie*, 34 Me. 376; *Marslow v. Hobbs*, 2 Mass. 432; 3 Am. Dec. 61; *Wait v. Maxwell*, 4 Pick. (Mass.) 88; 19 Am. Dec. 391; *Bacon v. Lincoln*, 4 Cush. (Mass.) 212; 1 Am. Rep. 765; *Lot v. Thomas*, 2 N. J. L. 386; *Abbott v. Allen*, 14 Johns. (N.Y.) 248; *Rickert v. Snyder*, 9 Wend. (N. Y.) 421; *Bender v. Fromberger*, 4 Dall. (Pa.) 436; *Clarke v. McAnulty*, 3 S. & R. (Pa.) 372; *Mackey v. Collins*, 2 Nott & M. (S. Car.) 186; 10 Am. Dec. 586; *Pollard v. Dwight*, 4 Cranch (U. S.) 430; *Duvall v. Craig*, 2 Wheat. (U. S.) 62, n.

4. *Baker v. Hunt*, 40 Ill. 266; 89 Am. Dec. 346; *Swafford v. Whipple*, 3 Greene (Iowa) 264; 54 Am. Dec. 498; *Schofield v. Iowa Homestead Co.*, 32 Iowa 321; 7 Am. Rep. 197; *Blackshire v. Iowa Homestead Co.*, 39 Iowa 624; *Marston v. Hobbs*, 2 Mass. 437; 3 Am. Dec. 61; *Bircher v. Watkins*, 13 Mo. 521; *Cockrell v. Procter*, 65 Mo. 41; *Abbott v. Alled*, 14 Johns. (N. Y.) 253; *Potter v. Kitchen*, 5 Bosw. (N. Y.) 566; *Mecklen v. Blake*, 16 Wis. 102; 82 Am. Dec. 707; *Beckmann v. Henn*, 17 Wis. 412.

5. *Ingalls v. Eaton*, 25 Mich. 32; *Peck v. Houghtaling*, 35 Mich. 127; *Woolley v. Newcombe*, 87 N. Y. 605.

6. *Marston v. Hobbs*, 2 Mass. 438; 3 Am. Dec. 61; *Slater v. Rawson*, 1 Met. (Mass.) 456; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Millard v. Twitchell*, 1 N. H. 178.

7. *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429; 19 Am. Dec. 139.

8. Except in the case of a minor, whose conveyance is always subject to disaffirmance by him after attaining his majority. *Nash v. Ashton*, *Skinner* 42; *T. Jones* 195.

9. *General Finance Co. v. Liberator Building Soc.*, L. R., 10 Ch. Div. 23.

The covenant is to be understood according to the natural meaning of the words, as in regard to the right to the premises, the *jus*, as distinguished from the *seisina*. Rawle, *Covenants* (5th ed.) § 68.

9. Until rather lately it was usual

There would seem to have been some State statutes to the contrary. See *Wilford v. Rose*, 2 Root (Conn.) 14; *Robinson v. Neil*, 3 Ohio 525.

2. *Bird v. Smith*, 8 Ark. 368; *Abbot v. Allen*, 14 Johns. (N.Y.) 248.

covenant is affected in a few States by the doctrine of "actual seisin,"¹ and it is governed by the same rules as the covenant for seisin in regard to the breach, the pleading and the measure of damages.

c. THE COVENANT AGAINST INCUMBRANCES.²

d. THE COVENANT FOR QUIET ENJOYMENT.³—This has been defined as "an assurance against disturbance consequent upon a defective title."⁴ When restricted to disturbances by the grantor or lessor himself and those claiming by title from him, it covers the case of disturbance by an appointee,⁵ mortgagee,⁶ or lessee⁷ of the covenantor, or by his widow under her dower rights,⁸ but does not include a disturbance resulting from a claim against him,⁹ or from such constitutional or legal conditions affecting the

in *England*, to save the expense of having in future to levy a fine to bar dower, to convey property to such uses as the purchaser should appoint, and in default of appointment to the use of him and his heirs. A conveyance by the purchaser, being made by virtue of the power only, was properly accompanied by the covenant for right to convey, and not by that for seisin. Sugd. Vend. (14th ed.) 573. Rawle, Covenants (5th ed.), § 66.

1. *Supra*, this title, *Covenant for Seisin*.

2. See INCUMBRANCES, vol. 10, p. 361.

3. In *England* this is known as "the sweeping covenant," but in *America* that term is more applicable to the covenant of warranty. In *England*, too, the covenant for quiet enjoyment is very often directly joined to that against incumbrances, the latter following the former and being expressed in the words "and that *i. e.* the quiet enjoyment, free and clear of all incumbrances." The two covenants must then be construed in connection with each other. Platt, Covenants 331.

A similar arrangement of the covenants is seen in *Hall v. Dean*, 13 Johns. (N. Y.) 105; but in *America* that against incumbrances usually precedes that for quiet enjoyment. Rawle, Covenants (5th ed.), § 21, n. 3.

The covenant for quiet enjoyment is usually the only covenant for title inserted in a lease (see LEASE, vol. 12, p. 974), and, in *Pennsylvania* and perhaps elsewhere, in ground rent deeds. Rawle, Covenants (5th ed.), § 91.

4. *Howell v. Richards*, 11 East 641. As was said in the case of a lease, "the covenant only means that the tenant shall not be evicted or disturbed by good title in the possession of the

demised premises or some part thereof." *Moore v. Weber*, 71 Pa. St. 429.

It is clearly a covenant *in futuro*, and hence where a tenant for life conveys in fee with this covenant it is not broken till eviction by the remainderman after the termination of the life estate. *Wilder v. Ireland*, 8 Jones (N. Car.) 88; *Parker v. Richardson*, 8 Jones (N. Car.) 452.

5. Thus where there was a power to lease and to appoint a remainder, and a lease not warranted by the power was made, and the lease was evicted by the remainderman, the latter was held to be one claiming under the lessor, so that the covenant was broken. *Hurd v. Fletcher*, 1 Doug. 43.

So, under somewhat similar circumstances, it was held that a remainderman in tail claimed under his father, the tenant for life, who had been himself the settlor, and that the latter's covenant was broken. *Evans v. Vaughan*, 4 B. & C. 261.

And in general it may be said that any appointee claims "by, from, or under," the person appointing, within the meaning of this covenant. *Calvert v. Sebright*, 15 Beav. 156.

6. *Carpenter v. Parker*, 3 C. B. N. S. 206. It is otherwise, of course, if the mortgage has been made by a prior owner. *Tooker v. Grotenkemper*, 1 Cin. Sup. Ct. (Ohio) 88.

7. *Sanderson v. Mayor of Berwick*, L. R., 13 Q. B. D. 547. In this case the disturbance was the flooding of a tenant's farm by reason of the defective construction of a drain used, by virtue of his lease, by the tenant of an adjoining farm owned by the same lessor.

8. Anonymous, Godb. 333; *Shep. Touch*. 171.

9. If a lessee or vendee be com-

enjoyment of property as may from time to time be established.¹ If the "acts and means" of the grantor or others be covenanted against, the breach must arise from something actually done by the person whose acts are covenanted against,² and a similarly strict construction is put upon the words "neglect or default."³

An eviction is necessary to a breach of this covenant,⁴ but the law as to what constitutes an eviction, as also in regard to pleading and evidence in actions upon it, is the same as in the case of the covenant of warranty.

pelled to pay taxes, due by the lessor or vendor before the lease or conveyance was made, or due by any prior owner, this is not a breach of the covenant when restricted. *Stanley v. Hayes*, 3 A. & E., N. S. 105; *West v. Spaulding*, 11 Met. (Mass.) 556.

In *Ireland v. Bircham*, 2 Scott 207, a sub-tenant had been evicted on account of non-payment of rent by his covenantor, the original lessee, but the question of whether this was a disturbance "by, from, or under him" was not decided.

1. *Barns v. Wilson*, 116 Pa. St. 303. The adjoining owner had pulled down the party wall rendering the lessee's premises temporarily uninhabitable. It was contended that the injury was from a paramount title, *i. e.*, from the exercise of the adjoining owner's right, subject to which the covenantor owned the wall which was part and parcel of the demised premises. The court, by Clark, J., said: "The right arises out of a provision of the law, to which all owners of real property in Philadelphia are subject, and in reference to which all conveyances of land, whether in fee or for years, must be supposed to have been made and accepted. These provisions are not defects in title; they are simply the legal conditions which affect the owner's enjoyment of his own property."

2. The eviction of a sub-tenant by the original lessor, on account of the violation of the original lease by the uses to which the sub-tenant put the property is not produced by anything proceeding from the sub-tenant's covenantor. *Spencer v. Marriott*, 1 B. & C. 457; *Dennett v. Atherton*, L. R., 7 Q. B. 316; *Bellamy v. Barnes*, 44 U. C., Q. B. 315; and see *Thackeray v. Wood*, 5 B. & S. 325; *affirmed* 6 B. & S. 766.

Where the words used were "means, title, or procurement," they were held in an old case to include a disturbance by any person by force of any title ac-

quired by means of the covenantor. *Butler v. Swinerton*, 2 Rolle 286; *Palmer* 339; *Cro. Jac.* 657.

3. Thus where the lease was made by a tenant for life and remainderman in tail, and both died, and the next remainderman evicted the lessee, it was held that the eviction, being by title paramount, could not be brought within the covenant except by averring that the covenantors could have suffered a common recovery and neglected to do so. *Woodhouse v. Jenkins*, 9 Bing. 431. See also *Blatchford v. Mayor of Plymouth*, 3 Bing. N. Cas. 691; *Anderson v. Oppenheimer*, L. R., 5 Q. B. D. 602.

In *Jones v. Hawkins*, 3 T. L. Rep. 59, there was a covenant "against any let, suit, trouble, denial, interruption, or molestation by or from" the lessor, his superior lessor, or any person claiming by, from, or under him, etc. The head lease expiring, the sub-tenant was allowed to recover the sums paid as premium for a new lease and under the agreement for repairs required therein by the superior lessor.

In *Howes v. Brushfield*, 3 East 491, it was held to be the default of a covenantor that quit rents were in arrear when the conveyance was made, even though they might have accrued before his ownership of the premises. This decision has been seriously criticised. *Sugd. Vend.* (14th ed.) 602; *Rawle, Covenants* (5th ed.), § 94.

4. "Hence a covenant for the quiet enjoyment of certain lots and all the appurtenances is not broken by the covenantor's plotting an extension of the street, on which the lots front, through adjoining lots, and giving that portion of the street another name; nor by his inducing the purchasers of lots across the street to so place their houses that the outbuildings were opposite the lots sold to the covenantee. *Molitor v. Sheldon*, 37 Kan. 246.

c. *THE COVENANT FOR FURTHER ASSURANCE.*—This is a covenant to do such further acts for the purpose of perfecting the covenantee's title as the latter may reasonably require,¹ and it is not broken until such a request is made and refused.² The acts required must be necessary,³ practicable,⁴ and lawful,⁵ and the request must not be unreasonably delayed.⁶ They must also depend upon the scope of the other covenants in the deed,⁷ and

A covenant for quiet enjoyment, in a lease of part of a house, is not broken by the landlord's letting out the floor above for use as a dancing room. The dancing is at most merely a nuisance. *Jenkins v. Jackson*, L. R., 40 Ch. D. 71.

Where part of a building is leased, no use which the landlord may make of the rest of the building can be a breach of this covenant unless such use unfits the portion leased for the uses for which it was known to him to be leased. *Robinson v. Kilvert*, L. R., 41 Ch. D. 71.

1. *E. g.*, to levy a fine, or to discharge a judgment or other incumbrance. *King v. Jones*, 5 Taunt. 418.

A covenant that if the grantor should obtain title from the United States, he would convey the same with warranty, is a covenant for further assurance, under which the covenantor could be compelled to convey his after-acquired title. *Lamb v. Burbank*, 1 Sawy. (U. S.) 227.

This covenant is but infrequently used in the *United States*, though its importance is testified to in *Cochran v. Pascault*, 54 Md. 16.

In *England*, the usual mode of requiring is for the purchaser to submit to the grantor a draft of the intended assurance, with an opinion of counsel as to its necessity and propriety, and a tender of the vendor's necessary costs. *Dart. Vend.*, (6th. ed.) 888; *Sugd. Vend.* (14th ed.) 614.

There seems to have been some uncertainty in former times as to whether the purchaser could have the advice of counsel in drafting the assurance, if the covenant were silent as to this, or whether he could draft it himself if the covenant provided for counsel. *Rawle, Covenants* (5th ed.), § 99 n. 1.

2. In equity, a neglect to perform this covenant is equivalent to a default, and hence the bringing of suit is a sufficient request for performance. *Fields v. Squires, Dendy* (U. S.) 388.

3. *Waou v. Bickford*, 7 Price 550.

Hence the title must be shown to be imperfect. *Gwynn v. Thomas*, 2 Gill & J. (Md.) 420; *Kramer v. Ricke*, 70 Iowa 535. The latter was a case of an agreement "to clear title," apparently equivalent to a covenant for further assurance.

In *England*, a duplicate of the deed to the covenantee is sometimes required under this covenant. *Trapper v. Allington*, 1 Eq. Cas. Abr. 166.

But a new deed of covenant to produce title deeds is outside the scope of a covenant for further assurance. *Fain v. Ayers*, 2 Sim. & Stu. 533.

4. *Pet. & Cally's Case*, 1 Leon. 304; *Anonymous*, Moore 124.

It was formerly held that a covenant—or could, as a matter of course, be required to levy a fine, and that if his wife refused to join, he could be imprisoned till she consented. *Boulney v. Curteys*, Cro. Jac. 251; *Middlenore v. Goodale*, Cro. Cas. 503; *Hall v. Hardy*, 3 P. Wms. 189. But this was long ago doubted, and is wholly repugnant to modern ideas. *Outram v. Round*, 4 Vin. Abr., Baron & Feme, H b, pt., 4; *Emery v. Wase*, 8 Ves. 505; 2 Story's Eq. (13th ed.), §§ 731–735.

5. *Heath v. Crealock*, L. R., 10 Ch. App. 31, per Lord Cairns.

6. *Nash v. Ashton*, T. Jones 195; *Skim*, 42.

7. *I. e.*, if they are general, extending to all paramount titles and incumbrances, then this covenant will be construed as general also; but if they are limited to defects of title or incumbrances created by the vendor, then the covenant is so likewise. This is clear from the fact that the purpose of this covenant is to enable a grantee to call upon his grantor to remedy defects in the title or remove incumbrances, the existence of which defects or incumbrances has been covenanted against.

The statement in 2 *Sugd. Vend.* (14th ed.) 612, that "if the title prove bad and the defect can be supplied by the vendor," the covenant for further

on the nature of the estate conveyed.¹ Performance in accordance with the spirit of the covenant will be enforced, and cannot be escaped by technicalities.² A deed executed in pursuance of this covenant need not itself contain covenants for title, unless this be expressly covenanted for.³

In actions at law, a breach may be assigned in the words of the covenant,⁴ but the pleadings must show what assurance is required and that the plaintiff is entitled to it.⁵

f. THE COVENANT OF WARRANTY.—The covenant (unknown in *England*)⁶ that the grantor and his heirs will "warrant and forever defend"⁷ the premises conveyed, though held in some States

assurance may be resorted to, must be understood as referring to cases where this covenant stands alone or where the other covenants are limited. See *Rawle Covenants* (5th. ed.), § 104.

Thus in *Armstrong v. Darby*, 26 Mo. 517, it was held that the implied covenant against incumbrances being restricted to those done or suffered by the grantor, he could not, under the implied covenant for further assurance be required to discharge a mortgage created by his grantor.

1. If the estate or interest conveyed be limited, then, though the covenants be general, their operation is necessarily restricted, and the covenant for further assurance cannot require the conveyance of a greater estate. Thus a tenant in tail who mortgaged all the property to which he was entitled "in possession, reversion, remainder, or expectancy, or otherwise howsoever," with a covenant for further assurance, could not be compelled to execute a disentailing deed. *Davis v. Tollemache*, 2 Jur., N. S. 1181. See also *Taylor v. Dabar*, 1 Ch. Cas. 274; *Smith v. Baker*, 1 Y. & C. Ch. 222.

2. *Bankes v. Small*, L. R., 36 Ch. D. 716.

In *Zabriskie v. Baudendistel*, (N.J. 1890), 20 Atl. Rep. 163, it was intimated that on proceedings to foreclose a purchase-money mortgage given by the covenantee, he might file a cross-bill for specific performance of the covenant for further assurance, so as to determine the validity of taxes and assessments levied prior to the conveyance, and that, if valid, their payment would be made a condition of the foreclosure.

3. "Where the conveyance is really a further assurance, the purchaser must be supposed to have already obtained all such covenants for title as he

was entitled to." *Sugd., Vend.* (14th ed.) 615.

This differs from the case of an agreement to convey "by reasonable assurance," which would now be held to mean a deed with the usual covenants. It was formerly held, however, that such "assurance" might be without covenants, and even without a seal. *Shep. Touch.* 168; *Coles v. Kinder*, Cro. Jac. 571; *Wye's Case*, 2 Leon. 130; *Pudsey v. Newsam*, Yelv. 44; *Lassels v. Catterton*, 1 Mod. 67.

4. *Blicke v. Dymoke*, 2 Bing. 105.

5. *Wara v. Bickford*, 7 Price 550; 9 Price 43; *Gwynn v. Thomas*, 2 Gill & J. (Md.) 420; *Miller v. Parsons*, 9 Johns. (N.Y.) 336.

6. Almost the only instance of a covenant of warranty to be found in the English reports is in *Williamson v. Codrington*, 1 Ves. Sr. 511, where the deed was executed in Barbadoes.

The American colonies having been settled when the modern covenants for title were in their infancy, and there being no Sir Orlando Bridgman in America, the use of covenants here was more influenced by the old doctrine of warranty, both as to their scope and the names given to them, than was the case in England.

7. *What Does Not Constitute.*—A *habendum*, that the premises are to be held "as a good and indefeasible estate in fee simple," is not a covenant of warranty. *Wheeler v. Wayne Co.*, 132 Ill. 599.

Nor can a warranty be gathered from a recital of the incidents leading to the previous conveyance of the property to the grantor, such conveyance being stated as made in consideration of the discontinuance of a suit to annul the prior legal title and other good and valid considerations. *Clark v. Post*, 113 N. Y. 17.

to contain within itself all the other covenants for title,¹ may be regarded for most purposes as a covenant for quiet enjoyment.² It may be either general, *i. e.*, extending to the claims of all persons whomsoever, or special, *i. e.*, restricted to the acts of the grantor and those claiming under him, or of any other person particularly named.³ Even when general, this covenant and that for quiet enjoyment are not broken by tortious disturbances,⁴

Covenant of Non-claim.—In the New England States what is practically the covenant of warranty is sometimes found under another form and name, the covenant being that the persons covenanted against shall not "have, claim, challenge, or demand any estate, right or title to" the premises conveyed, but "of and from all such claims and demands shall be utterly barred and forever excluded by virtue of" the covenant. This is less used now than formerly. See *Fairbanks v. Williamson*, 7 Me. 99; *Trull v. Eastman*, 3 Met. (Mass.) 121; 37 Am. Dec. 126; *Newcomb v. Presbrey*, 8 Met. (Mass.) 406; *Lothrop v. Snell*, 11 Cush. (Mass.) 453; *Porter v. Sullivan*, 7 Gray (Mass.) 441; *Gibbs v. Thayer*, 6 Cush. (Mass.) 33; *Kimball v. Blaisdell*, 5 N. H. 533; 22 Am. Dec. 476; *Everts v. Brown*, 1 D. Chip. (Vt.) 99.

1. The statutory warranty for a deed in fee (Miller's Rev. Code Iowa 1888, § 1970, p. 732) is so construed in *Iowa*. *Funk v. Cresswell*, 5 Iowa 62; *Van Wagner v. Van Nostrand*, 19 Iowa 422.

In *South Carolina* the form of a covenant of general warranty, contained in the short form of a deed of lease and release provided by the statute of Dec. 12, 1795 (5 Stats. 256), has received the same construction. *Jeter v. Glenn*, 9 Rich. (S. Car.) 374; *Evans v. McLucas*, 12 S. Car. 62.

Even in many States where this view has never been taken, the covenant of warranty is the only one used in deeds of conveyance in fee simple.

2. *Caldwell v. Kirkpatrick*, 6 Ala. 62; 41 Am. Dec. 36; *Athens v. Nale*, 25 Ill. 178; *Bostwick v. Williams*, 36 Ill. 70; 85 Am. Dec. 385; *Emerson v. Proprietors*, 1 Mass. 464; 2 Am. Dec. 34; *Reed v. Hatch*, 55 N. H. 336; *Fowler v. Poling*, 2 Barb. (N. Y.) 303; 6 Barb. (N. Y.) 196; *Stewart v. West*, 14 Pa. St. 336. See *Rawle Covenants* (5th ed.), § 114.

3. For the validity of such a covenant, see *Barlow v. Delaney*, 40 Fed. Rep. 97.

If the covenant be general, except as to certain persons named, this exception will be strictly construed. *Woodroff v. Greenwood*, Cro. Eliz. 518.

4. *Hayes v. Bickerstaff*, Vaugh. 118. A lease of a portion of a long term of years had been made with a general covenant for quiet enjoyment, and the reversion in the term had been assigned to a third person, who evicted the tenant, although the latter had attorned to him. On action brought by the tenant against his lessor, it was held that the covenant, however generally expressed, must be understood as applying merely to the acts of those claiming by title, because (1) the grantor does not expressly covenant tortious acts of strangers; (2) he could not reasonably be required to do so, as he could neither foresee nor prevent them; (3) the covenantee has his legal remedy against the wrong-doer; (4) he does not need a remedy against the covenantor also; (5) such a remedy would enable him to injure his covenantor by procuring a stranger to make a tortious disturbance; and (6) the express words of the covenant were that the covenantee should lawfully enjoy the premises without let or hindrance.

This was in accord with the oldest authorities. "If one lease for years and covenant to warrant the land, and the lessee be ousted by wrong, he shall not have covenant; otherwise if it be by elder title." Brooke's Ab. Guaranties, pt. 1; Y. B., 26 Hen. VIII, 71; Y. B. 22 Hen. VI, (Pasch.), 26. Later cases had thrown doubt on this doctrine. See *Mountford v. Catesby*, 3 Dyer 52, and cases there cited. But the doctrine is now established. *Tisdale v. Essex*, Hob. 34; *Wotten v. Hele*, 2 Saund. 178, n.; *Nokes v. James*, Cro. Eliz. 675; *Lewis v. Smith*, 9 M. G. & S. 610; *Hoppes v. Cheek*, 21 Ark. 585; *Playter v. Cunningham*, 21 Cal. 232; *Branger v. Manceit*, 30 Cal. 624; *Davis v. Smith*, 5 Ga. 274; 47 Am. Dec. 279; *Beebe v. Swartwout*, 8 Ill. 180; *Gazzolo v. Chambers*, 73 Ill. 75; *Avery v. Dough-*

unless so expressed,¹ but even when special they cover the tortious acts² (other than mere trespasses)³ of the covenantor himself, or the tortious acts of any other person specially named,⁴ or of persons acting under their directions.⁵ A general warranty is not broken by the exercise of the State's right of eminent domain or other lawful acts of sovereignty.⁶ A disturbance of the title or

erty, 102 Ind. 443; 52 Am. Rep. 680; *Bartlett v. Farrington*, 120 Mass. 284; *Kimball v. Grand Lodge*, 131 Mass. 59; *Surget v. Arighi*, 11 Smed. & M. (Miss.) 96; *Greenby v. Wilcocks*, 2 Johns. (N.Y.) 1; *Folliard v. Wallace*, 2 Johns. (N.Y.) 402; *Kelly v. Dutch Church*, 2 Hill (N.Y.) 111; *Gardner v. Keteltas*, 3 Hill (N.Y.) 330; 38 Am. Dec. 637; *Meeks v. Bowerman*, 1 Daly (N.Y.) 100; *Butterworth v. Volkening*, 4 Thomp. & C. (N.Y.) 650; *Johnson v. Oppenheimer*, 34 N.Y. Super. Ct. 416; *Coddington v. Dunham*, 35 N.Y. Super. Ct. 412; *Wilder v. Ireland*, 8 Jones (N.Car.) 88; *Brick v. Coster*, 4 W. & S. (Pa.) 499; *Spear v. Allison*, 20 Pa. St. 200; *Schuylkill R. Co. v. Schmoele*, 57 Pa. St. 273; *Moore v. Weber*, 71 Pa. St. 327; *Rantin v. Robertson*, 2 Strobb. (S.Car.) 366; *Gleason v. Smith*, 41 Vt. 293; *Underwood v. Birchard*, 47 Vt. 305; *Yancey v. Lewis*, 4 Hen. & M. (Va.) 395; *McInnis v. Lyman*, 62 Wis. 191; *Noonan v. Lee*, 2 Black (U.S.) 507; *Andrus v. St. Louis Smelting etc. Co.*, 130 U. S. 643.

1. *E.g.*, where the words are "against all claiming or pretending to claim." *Chaplain v. Southgate*, 10 Mod. 383.

2. *Cave v. Brookesby*, W. Jones 360; *Andrews' Case*, Cro. Eliz. 214; *Cones v. ———*, Cro. Eliz. 544; *Crosse v. Young*, 2 Show. 425; *Lloyd v. Tomkies*, 1 T. R. 671; *Wotton v. Hele*, 2 Saund. 180, n.; *Seaman's Case*, 1 Leon. 157; *Levitzky v. Canning*, 33 Cal. 308; *O'Keefe v. Kennedy*, 3 Cush. (Mass.) 325; *Sedgwick v. Hollenback*, 7 Johns. (N.Y.) 376; *Mayor etc. of N.Y. v. Mabie*, 13 N.Y. 156; 64 Am. Dec. 538; *Platt, Covenants* 318.

3. Even the acts of the covenantor himself must apparently be done under assumption of right to constitute a breach of covenant. *Crosse v. Young*, 2 Show. 425; *Lloyd v. Tomkies*, 1 T. R. 671; *Seddon v. Senate*, 13 East 72; *Wotton v. Hele*, 2 Saund. 180, n.; *Avery v. Dougherty*, 102 Ind. 443; 52 Am. Rep. 680; *O'Keefe v. Kennedy*, 3 Cush. (Mass.) 325; *Sherman v. Williams*, 113 Mass. 481; 18 Am. Rep. 522;

Sedgwick v. Hollenback, 7 Johns. (N.Y.) 376; *Levy v. Band*, 1 E. D. Smith (N.Y.) 169; *Mayor etc. of N.Y. v. Mabie*, 13 N.Y. 151; 64 Am. Dec. 538.

A fortiori, a mere interruption of the use and enjoyment of the premises, consequent upon repairs being made by the landlord to other parts of the building, without an actual entry upon the demised premises, or any actual or constructive eviction of the tenant, is no breach of the covenant. *Doupe v. Genin*, 1 Sweeney (N.Y.) 25.

4. Thus, in *Nash v. Palmer*, 5 M. & S. 374, Lord Ellenborough, after stating that a general covenant did not apply to tortious acts, added: "It is, however, different where an individual is named, for there the covenantor is presumed to know the person against whose acts he is presumed to covenant, and may reasonably be expected to stipulate against any disturbance from him, whether from lawful title or otherwise."

To the same effect, *Foster v. Mapes*, Cro. Eliz. 212; *Fowle v. Welsh*, 1 B. & C. 29; *Patton v. Kennedy*, 1 A. K. Marsh. (Ky.) 389; 10 Am. Dec. 744; *Pence v. Duval*, 9 B. Mon. (Ky.) 48.

5. *Seaman's Case*, 1 Leon. 157.

Disturbance by a mob, due to their exasperation at the covenantor is not within the covenant; it is not, even constructively, his act. *Jones v. Morley*, 21 La. Ann. 404; *Surget v. Arighi*, 11 Smed. & M. (Miss.) 96.

6. *Stephenson v. Loehr*, 57 Ill. 509; *Kuhn v. Freeman*, 15 Kan. 426; *Ellis v. Welch*, 6 Mass. 246; 4 Am. Dec. 122; *Brimmer v. Boston*, 102 Mass. 19; *Boston etc. Steamboat Co. v. Munson*, 117 Mass. 34; *Cooper v. Bloodgood*, 32 N. J. Eq. 209; *Folts v. Huntley*, 7 Wend. (N.Y.) 210; *Frost v. Earnest*, 4 Whart. (Pa.) 86; *Dobbins v. Brown*, 12 Pa. St. 75; *Bailey v. Miltenberger*, 31 Pa. St. 37; *Schuylkill R. Co. v. Schmoele*, 57 Pa. St. 273; *Dyer v. Wightman*, 66 Pa. St. 427.

In *Osborne v. Nicholson*, 13 Wall. (U.S.) 655, the court, by Swayne, J., said: "All contracts are inherently

possession of the land by a suit in equity is a breach of the covenant.¹

It has been held in a few States that if the covenantee fails to put his deed or mortgage on record, and a subsequent conveyance is made by the covenantor to a third party and recorded, or the premises are sold under a judgment against the covenantor, the latter is liable upon his covenant of warranty.²

subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation, and is not within that provision of the national constitution which forbids a State to pass laws impairing their obligation. The power acts upon the property which is the subject of the contract, and not upon the contract itself."

A fortiori, the existence of a public easement in the land at the time of the conveyance, and the fact that at and before that time the State or a municipal corporation had perpetually enjoined the owners of the premises from building a wharf thereon below high-water mark, without a license, is no breach of the covenant of warranty. *Barre v. Fleming*, 29 W. Va. 314.

The act of a sovereign *de facto* is equally outside the scope of the covenant. If the sovereignty be eventually recognized as *de jure* also, the act is an act of sovereignty, and lawful; otherwise, it is merely tortious. *Dudley v. Folliott*, 3 T. R. 584; *Watkins v. De Lancey*, 4 Doug. 354.

1. *Calthorp v. Heyton*, 2 Mod. 54; *Hunt v. Danvers*, T. Ray. 370; *Trust Co. v. Covert*, 30 U. C., Q. B. 239; 39 U. C., Q. B. 327.

But there is no breach if only a particular mode of enjoyment of the land be interfered with. *Morgan v. Hunt*, 2 Vent. 213; *Dennett v. Atherton*, L. R., 7 Q. B. 326.

2. This seems to have been first held in 1835 in *Curtis v. Deering*, 12 Me. 499, where the covenant was contained in an unrecorded mortgage, of which the subsequent conveyance made no mention. The reason given was that, as between the mortgage and the deed, the title dated from the time of the registry only, and that, therefore, the latter was the elder title, thus bringing the case within the rule that the covenant extended to older and better titles only. It was also laid down that the execution of the deed making no mention of the mortgage, was a

disseisin, an unlawful act, "although it might have been lawful, if it had not affected his interests," which would seem to mean, if the mortgage had been recorded. This case was cited with approval in *Maeder v. Carondelet*, 26 Mo. 112, and followed in *Lukens v. Nicholson*, 4 Phila. (Pa.) 22 (A. D. 1860), where a ground-rent had been assigned by a deed, which the assignee did not record, and subsequently mortgaged by the assignor.

It was also held in *Clark v. O'Neal*, 13 La. Ann. 381, that, because under the *Louisiana Code*, art. 2442 [2417] a defect of registering the sale of an immovable could not be pleaded between the parties to the sale, their heirs or assigns, though an unregistered sale was void as against creditors, therefore where the sale of a tract of land had not been registered, and the land had subsequently been sold for the vendor's debt, this did not relieve her of her obligation to warrant the title; and this doctrine was recently approved in *Boyer v. Amet*, 41 La. Ann. 721.

In *Wade v. Comstock*, 11 Ohio St. 71, however, where the land conveyed was subsequently taken in execution and sold as the covenantor's property, the covenantee having failed to record his deed, the covenant of warranty was held not to have been broken, and the doctrine of *Curtis v. Deering*, 12 Me. 499, disapproved, though of course it was admitted that in that case the defendant was liable, but not upon the covenant.

In *Scott v. Scott*, 70 Pa. St. 244, the instrument containing the covenant sued on was held to be a will, but apart from this the court by *Sharswood, J.*, said: "No authority has been or can be cited to support the position that a deed or will subsequently made by a grantor is itself a breach of the covenant of warranty contained in his conveyance, more especially when such deed or will is a lawful act.

The doctrine of *Curtis v. Deering*,

This covenant and that for quiet enjoyment cannot be broken without an eviction.¹ To constitute a sufficient "actual eviction"

12 Me. 499, is regarded as unreasonable by Mr. Rawle (Covenants, 5th ed., p. 168, n. 5). The rule that, in an action on the covenant for quiet enjoyment or of warranty, the plaintiff must state in his declaration that the person evicting had a better title before or at the time of the date of the grant to the plaintiff, is well settled. *Kirby v. Hansaker*, Cro. Jac. 315; *Wotton v. Hele*, 2 Saund. 177, n. 10; *Marston v. Hobbs*, 2 Mass. 433; 3 Am. Dec. 61; *Ellis v. Welch*, 6 Mass. 246; 4 Am. Dec. 121 (relying, however, upon a miscitation of *Grenelife v. W—*, 1 Dy. 42 a, the word "against" being interpolated and changing the sense); *Folliard v. Wallace*, 2 Johns. (N. Y.) 395; *Grannis v. Clark*, 8 Cow. (N. Y.) 36; *Kelly v. Dutch Church*, 2 Hill. (N. Y.) 105. The application of this rule in *Curtis v. Deering*, 12 Me. 499, is unnatural and forced, for though as between the mortgagee and the vendee the latter's title was, under the registry acts, the elder, it was not so as between the former and his covenantor. Besides, there is nothing extraordinary in a mortgagor's conveyance of the equity of redemption without recital of the mortgage, and although, if a vendor or mortgagor of real estate take advantage of the fact that the deed or mortgage was not recorded in order to effect a subsequent sale or mortgage, and take away the rights of the first vendee or mortgagee in the property, the latter would have a right of action, it is hard to see how the latter's own neglect would enlarge the scope of the covenant made to him. In fact the observation of the judges in *Grenelife v. W—*, 1 Dy. 42 a, would seem applicable in such a case, viz, that the "plaintiff in this action is the cause of the breach of the condition, whereof he shall not himself take advantage, so as to give himself an action by his own act."

In *Brown v. Allen*, 57 Hun (N. Y.) 219, the fact that the covenantees had not recorded their deed was immaterial, as at the time of the sale to them the premises were subject to the lien of taxes previously assessed, by virtue of which a paramount title was acquired at a subsequent tax sale.

1. Hence a covenant of warranty cannot be treated as a covenant against

existing incumbrances. *Grist v. Hodges*, 3 Dev. (N. Car.) 198; *Findlay v. Toncray*, 2 Rob. (Va.) 379; *Marbury v. Thornton*, 82 Va. 702.

Where the covenantee gave a purchase money mortgage, which the covenantor proceeded to foreclose, it was held that taxes and assessments due prior to the sale could not be set off as breaches of the covenants for quiet enjoyment and of warranty, although the covenantor had been notified to pay them, and by reason of his failure to do so the premises had been sold and bid in by the city, there having been no disturbance of the covenantee's possession, nor any suit as yet brought against the covenantee by the city. *Zabriskie v. Baudendistel* (N. J. 1890), 20 Atl. Rep. 163.

In *Blevins v. Smith* (Mo. 1891), 16 S. W. Rep. 213, an inchoate right of dower was held to be a breach of what the reported opinion states as a "covenant of warranty." As the case relied upon in support of this decision (*Walker v. Deaver*, 79 Mo. 664) held such a right to be a breach of the implied covenant against incumbrances, it is probable that the words "covenant of warranty" were not used in a technical sense, but as equivalent to "covenants in a warranty deed" or words to that effect.

An exception to the general rule of the necessity of eviction sometimes occurs where, as in the marshaling or administration of assets, a court of equity has all the parties before it and can adjust all conflicting claims. See Rawle, Covenants (5th ed.), ch. 9, 14, 15.

In *Stewart v. West*, 14 Pa. St. 336, the court by Gibson, C. J., drew a distinction between the covenant for quiet enjoyment and that of warranty, viz, "that the former is broken by the very commencement of an action on the better title," but the cases do not seem to warrant a distinction on this ground. What is essential to the breach of both these covenants is the hostile assertion of an adverse title (*infra*, this title, p. 990, note 2), and such assertion is necessarily involved in the bringing of any well founded action.

Where, as is usual in *England*, the covenant against incumbrances is so connected with that for quiet enjoyment that the enjoyment is to be free

for this purpose the adverse title must be actually paramount at the time of the conveyance,¹ and it must be hostilely asserted,²

from whatever disturbance may be occasioned by the existence of any incumbrance, the existence of an incumbrance is itself a breach of the latter covenant, and the covenantee may bring an action for the breach, on paying off the incumbrance, without waiting to be evicted. *Hall v. Dean*, 13 Johns. (N. Y.) 105.

Rule When Covenant of Warranty Includes Other Covenants.—In *Moore v. Lanham*, 3 Hill (S. Car.) 304, is a *dictum*: to the effect that in that State the existence of a paramount title was a breach of the covenant of warranty, so that, without eviction, the covenantee could either sue on the covenant or avail himself of it as a defense in an action for the purchase money. The cases cited in support of this *dictum* do not seem to justify it, except, perhaps, as to the use of the covenant as a defense. The position taken by the courts of *South Carolina* is better stated in *Jeter v. Glenn*, 9 Rich. (S. Car.) 374, and *Evans v. McLucas*, 12 S. Car. 62, where it is laid down that under the statute of December 12, 1795 (5 Stats. 256) the usual form of a covenant of general warranty, as contained in the short form of a deed of lease and release provided by that statute, must be understood as containing in itself the five other covenants, so that whatever would constitute a breach of any one of these, would be ground for an action upon the covenant in that form of deed.

The same rule holds in *Iowa*, where the form of warranty for a deed in fee (*Miller's Rev. Code*, 1888, § 1970, p. 732) is held to include the usual covenants. *Funk v. Cresswell*, 5 Iowa 91; *Van Wagner v. Van Nostrand*, 19 Iowa 42.

Covenant of Non-claim.—In *Cole v. Lee*, 30 Me. 392, where the covenant was one of non-claim (*supra*, this title, p. 985 n. 7) and the premises proved to be bound by a mortgage, it was laid down that the covenantee "was not bound to wait, till measures should be taken to deprive him of possession, when his remedy upon the defendant might be fruitless," but, that, on the contrary, he could buy in the incumbrance and recover the amount paid therefor in an action on the covenant. The court further said that he could pursue the same course

"under a deed containing the common covenant of warranty against incumbrances," by which is apparently meant something more than a mere covenant of warranty, probably something analogous to the covenant for quiet enjoyment free of incumbrances referred to *supra*, this title, *Covenant for Quiet Enjoyment*.

For what constitutes actual and constructive eviction, see *EVICTIION*.

1. An adverse possession which, though wrongful at the time of the conveyance, ripens into a perfect title under the statutes of limitation, does not cause a breach of those covenants, for the covenantee has his own laches to blame. *Beebe v. Swartwout*, 8 Ill. 183; *Moore v. Vail*, 17 Ill. 185; *Jenkins v. Hopkins*, 8 Pick. (Mass.) 350; *Rindskopf v. Farmers' L. & T. Co.*, 58 Barb. (N. Y.) 49; *Phelps v. Sawyer*, 1 Ark. (Vt.) 157.

2. *Axtel v. Chase*, 83 Ind. 546; *Wilson v. Irish*, 62 Iowa 260; *Shelton v. Pease*, 10 Mo. 482; *Snyder v. Jennings*, 15 Neb. 372; *Real v. Hollister*, 20 Neb. 112; *Anderson v. Buchanan*, 20 Neb. 272; *Hunt v. Amidon*, 4 Hill (N. Y.) 349, 40 Am. Dec. 283; *Fowler v. Poling*, 6 Barb. (N. Y.) 168; *Dickinson v. Voorhees*, 7 W. & S. (Pa.) 357; *Brown v. Dickerson*, 12 Pa. St. 372; *Knepper v. Kurtz*, 58 Pa. St. 480; *Jones v. Richmond*, (Va. 1891), 13 S. E. Rep. 414; *Morgan v. Henderson*, 2 Wash. Ter. 367.

Thus in *Patton v. McFarlane*, 3 P. & W. (Pa.) 419, the purchase money never having been paid to the commonwealth, the covenantee voluntarily paid it, though no claim had been made, and it was held that he could not recover on his covenant of warranty, as his possession had never been disturbed or threatened.

McCoy v. Lord, 19 Barb. (N. Y.) 18, is even a stronger case. Part of the land conveyed had been sold for taxes prior to the conveyance, and was redeemed by the covenantees, without any request from the covenantor, on the last day allowed for redemption. It was held that the covenant for quiet enjoyment was not broken, as there had been no eviction, and that, as there was no covenant against incumbrances, the plaintiffs had no right to pay the taxes and charges voluntarily, and recover from the defendant the amount paid.

but it is not essential that a judgment be recovered in favor of it,¹ nor that there be any physical expulsion of the covenantee, who may, at his discretion, either surrender the premises² or

Had they desired to be able to do so, they should have provided for this by appropriate covenants.

In *Louisiana* a hostile assertion of an adverse title is apparently not essential to an eviction, and hence, "if a perfect title exist in some third person, whereby it is rendered legally certain that the vendor had not title," this is sufficient ground for an "action of warranty," *McDonald v. Vaughan*, 14 La. Ann. 727; *Robbins v. Martin*, 43 (La. 1891), 9 So. Rep. 108.

An action of trespass by a prior lessee against a subsequent lessee, though not brought till after the expiration of the prior lease, has been held in *California* to be such a hostile assertion of title as to amount to an eviction, and to entitle the subsequent lessee to an action on his covenant for quiet enjoyment. *McAlester v. Landers*, 70 Cal. 79.

1. Even in the case of constructive eviction, it is held that the paramount title which is bought in, need not have been established by a judgment or decree. *Amos v. Cosby*, 74 Ga. 793; *Royer v. Foster*, 62 Iowa 321; *Walker v. Deaver*, 79 Mo. 664; *Kramer v. Carter*, 136 Mass. 504; *Loomis v. Bedel*, 11 N. H. 74; *Turner v. Goodrich*, 26 Vt. 709; *Pitkin v. Leavitt*, 13 Vt. 379.

2. Thus in *Hamilton v. Cutts*, 4 Mass. 350, 3 Am. Dec. 222, the title failed as to part of the land, which was entered and taken possession of by the real owner with the consent of the plaintiff, who withdrew therefrom, and was allowed to recover on the breach of covenant. The court, by Parsons, C. J., said: "It is contended that here there was no legal evidence of an ouster; because the dispossession took place with the consent of the tenant in possession. It is true that if the tenant consents to an unlawful ouster, he cannot afterwards be entitled to a remedy for such ouster. But an ouster may be lawful, and in that case the tenant may yield to a dispossession without losing his remedy on the covenant of warranty."

There is no necessity for him to involve himself in a lawsuit to defend himself against a title which he is satisfied must ultimately prevail."

As was said by Gibson, J., in *Clarke*

v. McAnulty, 3 S. & R. (Pa.) 372, "the law does not require the idle and expensive ceremony of being turned out by legal process, where the result would be inevitable."

The validity of such ouster in *pais* is now well established. *Sterling v. Peet*, 14 Conn. 254; *McDowell v. Hunter*, *Dudley* (Ga.) 4; *Leary v. Durham*, 4 Ga. 606; *Thomas v. Stickle*, 32 Iowa 71; *Woodward v. Allan*, 3 Dana (Ky.) 164; *Hanson v. Buckner*, 4 Dana (Ky.) 254; 29 Am. Dec. 401; *Slater v. Rawson*, 1 Met. (Mass.) 455; *Merritt v. Morse*, 108 Mass. 275; *Lambert v. Estes*, 99 Mo. 604; *Loomis v. Bedel*, 11 N. H. 74; *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Fowler v. Poling*, 6 Barb. (N. Y.) 165; *Greenvault v. Davis*, 4 Hill (N. Y.) 643; *Blydenburgh v. Cotheal*, 1 Duer (N. Y.) 196; *Wood v. Fornecrook*, 3 Thomp. & C. (N. Y.) 303; *Cowdrey v. Coit*, 44 N. Y. 382; *Home L. Ins. Co. v. Sherman*, 46 N. Y. 370; *Patton v. McFarlane*, 3 P. & W. (Pa.) 419; *Poyntell v. Spencer*, 6 Pa. St. 254; *Knepper v. Kurtz*, 58 Pa. St. 480; *Friss v. Harshea*, Mart. & Y. (Tenn.) 50; *Callis v. Cogbill*, 9 Lea (Tenn.) 137; *Westrope v. Chambers*, 51 Tex. 178; *Haffery v. Birchett*, 11 Leigh (Va.) 88.

Of course the surrender must be made to the rightful owner, not to the covenantor. *Axtel v. Chase*, 83 Ind. 546.

In *New York* the earliest cases lay stress on the necessity of an actual eviction or disturbance of possession (*Waldron v. M'Carty*, 3 Johns. (N. Y.) 471; *Kortz v. Carpenter*, 5 Johns. (N. Y.) 120; *Kent v. Welch*, 7 Johns. (N. Y.) 258; 5 Am. Dec. 266; *Vanderkarr v. Vanderkarr*, 11 Johns. (N. Y.) 122; *Kerr v. Shaw*, 13 Johns. (N. Y.) 236); but their doctrine has certainly been modified by the later cases cited *supra* in this note.

In *Nebraska* it was at first held in *Real v. Hollister*, 17 Neb. 661, that where the covenantee's title had been annulled by a decree in equity, and a recovery had been had against him in ejectment, proof of his actual eviction from the land was not essential to his recovery on the covenant of warranty, but on a rehearing (*Real v. Hollister*, 20 Neb. 112) the contrary was held,

use the other alternative of buying in,¹ and thereby acquiring, (or

and it was laid down that the covenantee must allege and prove that he has been actually turned out of the premises by legal process based upon a title or some right existing in another at the date of the covenant, or that such outstanding title having been asserted he has yielded to it and surrendered the possession thereto; and further that he was prohibited "from suing on the covenants of his deed while he continues to enjoy the possession obtained under it." While this decision definitely limits the application of the rule of *Hamilton v. Cutts*, 4 Mass. 350, by excluding all cases where possession is retained under the deed containing the covenants sued upon, yet it does not necessarily apply to cases where the covenantee buys in the paramount title, his possession then being no longer under his original deed. But as to this see *Anderson v. Buchanan*, 20 Neb. 272, in next note.

In *Hodges v. Latham*, 98 N. Car. 239, the plaintiff had not himself surrendered the premises, but during his absence he "had lost possession," yielding, apparently, without eviction by process of law. The court below entered a non-suit, but the supreme court granted a new trial.

Rights Under "Occupying Claimants' Acts."—The statutes of some States provide that after a judgment against an occupying claimant, the successful plaintiff may either convey the land to the former on payment of its value without the improvements, or he may take the land on paying for the improvements. Either course is held equivalent to an eviction of the occupying claimant, entitling him to an action on his covenant of warranty. *Ogden v. Ball*, 40 Minn. 94; *King v. Meek*, 6 Mont. 172; *King v. Kerr*, 5 Ohio 154; 22 Am. Dec. 777, explained in *Johnson v. Nyce*, 17 Ohio 66; 49 Am. Dec. 444.

1. Thus where a grantee with covenants for quiet enjoyment and of warranty was threatened with a suit for possession under a mortgage prior to his conveyance, it was held that there was "nothing to distinguish this case from that of *Hamilton v. Cutts*, 4 Mass. 350 (where the covenantee had surrendered possession; see previous note) but a point of form which does not affect the merits of the question. The plaintiff has been disturbed in the enjoyment of his possession, and

he has been compelled to purchase in another title for his own security, which we think very clearly has been a lawful interruption and a breach of the covenant for quiet enjoyment." *Sprague v. Baker*, 17 Mass. 590.

So in *Whitney v. Dinsmore*, 6 Cush. (Mass.) 124, under a similar state of facts the court said: "The premises were offered for sale at public auction, and if the plaintiff had not become a purchaser he had a right to presume that he would be dispossessed by the purchaser, and he was justified in acting upon that presumption, and the defendant could not be thereby injured; for undoubtedly if the plaintiff had not become a purchaser he would have been evicted if he had refused to yield possession, and in such case the defendant would be responsible for the costs of suit in the action against the plaintiff, as well as for the value of the land, if duly notified of the pendency of the action."

In *New York*, although the doctrine of the necessity of actual eviction as laid down in *Waldron v. M'Carty*, 3 Johns. (N. Y.) 471 (where the covenantee had bought in the premises at a foreclosure sale under a mortgage prior to his conveyance), was modified by later decisions so as to allow a breach of the covenant for quiet enjoyment or of warranty to result from the covenantee's surrender of possession, yet a loss of possession, whether by ouster or surrender, seemed for a long time to be regarded as essential (see *New York* cases in last notes). It is to be observed that in *Hunt v. Amidon*, 4 Hill (N. Y.) 345, 40 Am. Dec. 283, the action brought by the covenantee's vendee, who had bought the property in at a foreclosure sale, was not upon the covenant for quiet enjoyment, but an assumpsit for money paid to the covenantee's use; while in *Cowdrey v. Coit*, 44 N. Y. 382, although the grantee bid the property in at the sale, he did not consummate his purchase, but sold his bid to another, surrendered to him, and recovered on the strength of such surrender.

In *Petrie v. Folz*, 54 N. Y. Super. Ct. 223, however, in an action on the covenant of warranty by a covenantee who had satisfied a judgment in ejectment which had been recovered against her, the superior court of the City of New

take a lease under¹) the paramount title (which latter course is considered a "constructive eviction"); but he pursues either course at his own risk,² except when he does so in consequence

York, by Sedgwick, C. J., went even beyond what the facts of the case required in support of the plaintiff's position, and said: "There was no actual eviction, there being no actual disturbance of possession. If, however, to maintain her possession, it was necessary to get the outstanding title, and she was obliged to buy it in, she could recover from the covenantor the amount she was obliged to pay, if she could also prove that the outstanding title was valid and could be enforced by ejectment."

This last *New York* case certainly lays down the doctrine now supported by a decided preponderance of authority. *Depuy v. Roebuck*, 7 Ala. 488; *Gunter v. Williams*, 40 Ala. 561; *Collier v. Cowger*, 52 Ark. 322; *McGary v. Hastings*, 39 Cal. 360; 2 Am. Rep. 456; *Harding v. Larkin*, 41 Ill. 422; *McConnell v. Downs*, 48 Ill. 271; *Claycombe v. Munger*, 51 Ill. 374; *Crance v. Collierbaugh*, 47 Ind. 256; *Mooney v. Burchard*, 84 Ind. 285; *Eversole v. Early*, 80 Iowa 601; *Nolan v. Feltman*, 12 Bush (Ky.) 119; *Donnell v. Thompson*, 10 Me. 170; *Kelly v. Low*, 18 Me. 244; *Cole v. Lee*, 30 Me. 392; *White v. Whitney*, 3 Met. (Mass.) 81; *Bemis v. Smith*, 10 Met. (Mass.) 194; *Estabrook v. Smith*, 6 Gray (Mass.) 572; 66 Am. Dec. 445; *Furnas v. Durgin*, 119 Mass. 500; 20 Am. Dec. 341; *Ogden v. Ball*, 40 Minn. 94; *Morgan v. Hannibal etc. R. R. Co.*, 63 Mo. 129; *Stewart v. Drake*, 9 N. J. L. 139; *Lane v. Fury*, 31 Ohio St. 574; *Tuite v. Miller* (Ohio), 5 West. L. Jour. 416; *Skinner v. Baughman*, 12 Pa. St. 106; *Brown v. Dickerson*, 12 Pa. St. 372; *Haffey v. Birchetts*, 11 Leigh (Va.) 88.

The cases of *Hannah v. Henderson*, 4 Ind. 174; *Reasoner v. Edmundson*, 5 Ind. 393, and *Mason v. Cooksey*, 51 Ind. 519, are not in conflict with this doctrine, as in none of them had the plaintiff purchased the paramount title.

In *Mississippi*, constructive eviction of this sort is not held to sustain an action of the covenant of warranty. *Dyer v. Britton*, 53 Miss. 270; but the grantee who buys in a paramount title may sue the covenantor in assumpsit for money paid to his use. *Kirkpatrick v. Miller*, 50 Miss. 521.

In *Nebraska*, it has been held in *Anderson v. Buchanan*, 20 Neb. 272, that a grantee who compromises an action brought against him by the claimant of a paramount title cannot recover on his covenant for quiet enjoyment the amount paid to compromise the action. Whether he could have recovered had he brought in the paramount title after a judgment against him, in a suit of which his grantor had been notified, was not decided, but perhaps the language in *Real v. Hollister*, 20 Neb. 112, was intended to forbid recovery even in such a case.

The cases of *Van Meter v. Griffith*, 4 Dana (Ky.) 92, and *Morgan v. Boone*, 4 T. B. Mon. (Ky.) 297; 16 Am. Dec. 153, which hold that the covenantee who buys in the paramount title cannot sue on the covenant, but only as for money paid to the covenantor's use, rest upon a misconception of the measure of damages in such cases of constructive eviction, and cannot be regarded as authorities against the doctrine stated in the text. See Rawle, *Covenants* (5th ed.) § 147.

1. Mr. Rawle (*Covenants*, 5th ed., § 145) considers that the constructive eviction is as complete when the covenantee remains in possession by taking a lease under the paramount title as when he buys it in, and as all connection with his former title is as thoroughly dissolved if he take such a lease as if he were actually evicted, the view is a reasonable one. It must be observed, however, that the case cited in support of this view was one in which the change of title was not relied upon as an eviction, and in which the court said that in case of a breach of the covenant of warranty the covenantee "must actually go out of possession," though this latter doctrine was afterwards abandoned in *Pennsylvania*. See cases cited in last note.

2. Hence if the covenantee yield to or purchase the paramount title, he must assume the burden of proof in any proceeding against his covenantor, setting up in his pleadings and sustaining by evidence the validity of the adverse title. *Moore v. Vail*, 17 Ill. 190; *Thomas v. Stickle*, 32 Iowa 76; *Richards v. Iowa Homestead Co.*, 44

of a judgment or decree against him in a suit of which his covenantor has been duly notified.¹

"Constructive eviction" also arises when the purchaser is unable to obtain possession by reason of a paramount title;² or, if the land be unoccupied and remain so after the purchase, when the paramount title is hostilely asserted in some public manner, so as to disturb the constructive possession. A sale of the

Iowa 304; 24 Am. Rep. 745; Cassidy's Succession, 40 La. Ann. 827; Hamilton v. Cutts, 4 Mass. 350; 3 Am. Dec. 222; George v. Putney, 4 Cush. (Mass.) 355; Witty v. Hightower, 12 Smed. & M. (Miss.) 481; Lambert v. Estes, 99 Mo. 604; Snyder v. Jennings, 15 Neb. 372; Stone v. Hooker, 9 Cow. (N. Y.) 157; Greenvault v. Davis, 4 Hill (N. Y.) 643; Beyer v. Schultze, 54 N. Y. Super. Ct. 212; Callis v. Coghill, 9 Lea (Tenn.) 137; Peck v. Hensley, 20 Tex. 678; Westrope v. Chambers, 51 Tex. 178.

Where the covenantor held by a tax-title, and the owner of the fee-simple title brought suit to have the tax-deed canceled, and obtained a decree in his favor conditioned on his repaying to the covenantor, within a certain time, the amount paid out by him in taxes on the property, in default of which the tax-title was to be quieted, it was held, in a subsequent action on the covenant, by one claiming under the covenantee, and who had bought in the fee simple title, that this was not a paramount title (the money not having yet been paid as decreed) and that the plaintiff could not recover. Eversole v. Early, 80 Iowa 601.

1. See *infra*, this title, *Notice to Defend Title*.

2. Thus in the leading case of Cloake v. Hooper, Freem. 122, the declaration in an action on a covenant for quiet enjoyment stated that the lands had belonged to the king, whose patentee held them at the time of the conveyance to the plaintiff. On demurrer because the plaintiff did not allege an entry, and therefore could not have been disturbed, the court said: "The declaration is good enough; for having set forth a title in the patentee of the king, the plaintiff shall not be enforced to enter and subject himself to an action by a tortious act."

Similarly in Ludwell v. Newman, 6 T. R. 458, where the declaration stated that the plaintiff who held a lease for years, had never been in pos-

session, the tenant having refused to attorn to him, and having defeated him in an ejectment, on account of a prior lease from the defendant, and it was pleaded that the plaintiff might have entered and enjoyed, it was held upon demurrer that the covenant for quiet enjoyment meant a legal entry and enjoyment without the permission of any other person, which entry and enjoyment were prevented by the prior lease granted. See also Hawkes v. Orton, 5 A. & E. 367.

In America the decisions were at first the other way, to the effect that if the covenantee had never had possession, no action would lie on the covenant for quiet enjoyment. Kortz v. Carpenter, 5 Johns. (N. Y.) 120; St. John v. Palmer, 5 Hill (N. Y.) 601; Day v. Chism, 10 Wheat. (U. S.) 452. Apparently the only authority for this view was the *dictum* in Holder v. Taylor, Hob. 12, that although in the case of an implied covenant for power to lease it was unreasonable to make the lessee enter upon the land, if in the possession of another, and so commit a trespass, yet "if it were an express covenant for quiet enjoying, then perhaps it were otherwise."

In Grist v. Hodges, 3 Dev. (N. Car.) 200, however, the decision was in accordance with the English doctrine above stated, and for the same reasons. The court by Ruffin, J., said: "The existence of a better title, with an actual possession under it in another, is of itself a breach of the covenant [of warranty]. It is manifestly just that it should be so considered; for otherwise the covenantee would have no redress but by making himself a trespasser by an actual entry, which the law requires of nobody, or by bringing an unnecessary suit, for the event of that suit proves nothing in the action on the covenant." This doctrine is now thoroughly established in America, the possession by a third party under a paramount title is itself the most complete assertion of that

premises does not constitute such an assertion of title,¹ unless made by the original vendor under a title subsequently acquired,² or by a State,³ or in the course of adverse legal proceedings,⁴ or perhaps any public sale by order of court.⁵

title, and such possession at the time the conveyance (which, under the Statute of Uses, itself confers possession) is executed, is regarded as amounting to an eviction *eo instanti*. *Caldwell v. Kirkpatrick*, 6 Ala. 60; 41 Am. Dec. 36; *Banks v. Whitehead*, 7 Ala. 83; *Playter v. Cunningham*, 21 Cal. 229; *Moore v. Vail*, 17 Ill. 185; *Small v. Reeves*, 14 Ind. 164; *Cummins v. Kennedy*, 3 Litt. (Ky.) 123; 14 Am. Dec. 45; *Barnett v. Montgomery*, 6 T. B. Mon. (Ky.) 323; *Curtis v. Deering*, 12 Me. 501; *Blanchard v. Blanchard*, 48 Me. 174; *Matteson v. Vaughn*, 38 Mich. 373; *Fritz v. Pusey*, 31 Minn. 368; *Dennis v. Heath*, 11 Smed. & M. (Miss.) 206; 49 Am. Dec. 51; *Witty v. Hightower*, 12 Smed. & M. (Miss.) 478; *Green v. Irving*, 54 Miss. 450; *Murphy v. Price*, 48 Mo. 250; *Blondeau v. Sheridan*, 81 Mo. 545; *Loomis v. Bedel*, 11 N. H. 74; *Chandler v. Brown*, 59 N. H. 370; *Miller v. Halsey*, 14 N. J. L. 48; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330; 38 Am. Dec. 637; *Rea v. Minkler*, 5 Lans. (N. Y.) 196; *Shattuck v. Lamb*, 65 N. Y. 499; *Mills v. Rice*, 3 Neb. 76; *Wilder v. Ireland*, 8 Jones (N. Car.) 87; *Randolph v. Meeks*, Mart. & Y. (Tenn.) 58; *Phelps v. Sawyer*, 1 Aik. (Vt.) 158; *Park v. Bates*, 12 Vt. 381; *University of Vt. v. Joslyn*, 21 Vt. 52; *Clark v. Conroe*, 38 Vt. 475; *Russ v. Steele*, 40 Vt. 315; *Sheffey v. Gardiner*, 79 Va. 313; *Rex v. Creel*, 22 W. Va. 373; *Moreland v. Metz*, 24 W. Va. 119; 49 Am. Rep. 246.

A misdescription, whereby the deed purports to convey more than the grantor really has, may occasion such a constructive eviction as to be a breach of the covenant of warranty; *e. g.*, where the premises were described as bounded by a line through the center of a wall which was, in point of fact entirely upon the adjoining property. *Cecconi v. Rodden*, 147 Mass. 164.

1. *Matteson v. Vaughn*, 38 Mich. 373; *Green v. Irving*, 54 Miss. 450; *Loomis v. Bedel*, 11 N. H. 74.

2. In such case the covenantor would not be allowed to say that there had been no hostile assertion of the

true title, because his act would amount to a disaffirmance and annulment of the only title the vendee had." *Green v. Irving*, 54 Miss. 450.

3. "A sale by the State must be regarded as a hostile assertion against all possession of its lands, because ordinarily it is the only way in which the State can make it. Its impersonal character renders it impossible for the State to make demand of possession, nor could it be surrendered to it save by leaving the land unoccupied . . . In making a sale, the State declares in the most authentic and public manner that it claims title and by the act conveys it to a person other than the one in possession. *Green v. Irving*, 54 Miss. 450.

In *Brown v. Allen*, 57 Hun (N. Y.) 219, the appropriation by the forest commission of unoccupied land, which had been sold for taxes and bought in by the State, to be held as part of the "forest preserve," under an act of the legislature, was held to be a constructive eviction and to entitle the party thereby evicted to proceed on his covenant.

4. Thus where a vacant lot, subject to a mortgage, was sold by the mortgagor, and the mortgagee foreclosed by proceedings to which the vendees were made parties, obtained a decree of sale and delivery of possession, and bought the property in at the master's sale, this was held, in an action on the covenant, to be an eviction. *St. John v. Palmer*, 5 Hill (N. Y.) 599.

In *Wood v. Forncrook*, 3 N. Y. Super. Ct. 303, however, a foreclosure sale of wild land was held not to constitute an eviction.

5. *Loomis v. Bedel*, 11 N. H. 74, which sustained the right of a grantee to sue on his covenant after buying in the premises was a case involving unoccupied land, and the sale was a public one, made by the administrator of the true owner under order of court. No distinction was taken between such a case and that of the purchase of an outstanding title by one who was actually, and not merely constructively, in possession of the land, and it would seem that the public character of the

The covenant of warranty is also regarded as broken by the loss of any incorporeal right annexed or incident to the land conveyed.¹

In actions upon the covenants for quiet enjoyment and of general warranty² the burden of proof is upon the plaintiff,³ and hence it is not enough to negative the words of the covenant, but the breach must be set forth particularly,⁴ with an averment that the disturbance was under a lawful title existing before and at the time of the conveyance to the covenantee,⁵ but the title need not itself be set forth.⁶

sale was necessary in order to give it the effect of a constructive eviction.

1. Thus where a furnace and grist-mill near a canal were leased with a covenant of general warranty, and the agents of the commonwealth cut off the water supply, it was held that, under the circumstances, this constituted a breach of the covenant. *Peters v. Grubb*, 21 Pa. St. 455.

So if the description of the land conveyed is such as to import a warranty that the streets which bound the land exist, a failure to open them is a breach of the covenant. *Trutt v. Spotts*, 87 Pa. St. 339.

So as to the breach of the covenant for quiet enjoyment by the interruption of a way. *Andrews v. Paradise*, 8 Mod. 318; *Morris v. Edgington*, 3 Taunt. 24.

So as to other rights, *West v. Stewart*, 7 Pa. St. 123; *Wilson v. Cochran*, 46 Pa. St. 233; *Adams v. Conover*, 87 N. Y. 422; *Parker v. Fairbanks*, 1 Russ. & Ches. 215.

There are a few cases in which the contrary has been held.

Thus in *Connecticut* the diversion under paramount title, of a stream of water flowing through the land conveyed was held not to constitute a breach of the covenant of warranty contained in the deed for the land. *Mitchell v. Warner*, 5 Conn. 497. And in *Pennsylvania* the taking of land by the commonwealth for a canal, under a prior grant from the covenantor with release of damages, has been held not to be a breach of the covenant of warranty of the lots through which the canal was laid out. *Dobbins v. Brown*, 12 Pa. St. 75. In this case, had the commonwealth taken the land by eminent domain, the decision would have been manifestly correct, but the injury to the covenantee arose from the fact that the land was

taken under the release, as a private citizen might have taken it.

2. In the case of a breach of the covenant of special warranty it is sufficient to allege any entry by the covenantor or other person specially named, or any of their heirs, executors or other persons claiming under them as the case may be, without showing the entry to be lawful or setting forth the title to enter. *Fitz. Nat. Brev.* 342 k; *Forté v. Vines*, 2 Rol. 21; *Core's Case*, Cro. El. 544; *Penning v. Plat*, Cro. Jac. 383; *Lloyd v. Tomkies*, 1 T. R. 671.

The particular act, constituting the breach of covenant, must, however, be shown. *Anonymous*, Comb. 228; *Frances' Case*, 8 Co. 91 a, b.

3. The burden of proof may, of course, be shifted, as by a plea that the paramount title was not outstanding, but in the defendant himself and properly conveyed to the plaintiff. *Owen v. Thomas*, 33 Ill. 320.

4. *Blanchard v. Hoxie*, 34 Me. 378; *Wait v. Maxwell*, 4 Pick. (Mass.) 87; 16 Am. Dec. 391; *Mills v. Rice*, 3 Neb. 76; *Morgan v. Henderson*, 2 Wash. Ter. 367.

5. *Kirby v. Hansaker*, Cro. Jac. 315; *Skinner v. Kilbys*, 1 Snow. 70; *Jordan v. Twells*, Cas. temp. Hard. 171; *Hays v. Bickerstaff*, Vaugh. 118; *Wotton v. Hele*, 2 Saund. 181 & n.; *Norman v. Foster*, 1 Mod. 101; *Crisfield v. Storr*, 36 Md. 129; 11 Am. Rep. 480; *Peck v. Houghtaling*, 35 Mich. 127; *Kelly v. Dutch Church*, 2 Hill (N. Y.) 105; *Frost v. Earnest*, 4 Whart. (Pa.) 86; *Naglee v. Ingersoll*, 7 Pa. St. 205; *Knapp v. Marlboro*, 34 Vt. 235. Otherwise, as shown by these cases, there would be nothing to show that the eviction was not a mere trespass or under an unsubstantial claim of title.

6. *Proctor v. Newton*, 2 Lev. 37; *Buckley v. Williams*, 3 Lev. 345; *Jor-*

3. Covenants Between Landlord and Tenant.¹

III. RUNNING WITH THE LAND.—Until breach,² every real covenant runs with the land, *i. e.*, either the liability imposed by it or the right to take advantage of it passes to any transferee of the land, or of that interest therein to which the covenant relates, by virtue of the transfer, and though such covenant be not mentioned in the instrument of transfer.³ Real covenants run, with incorporeal hereditaments in the same manner as with the land itself.⁴

To constitute a real covenant, its capacity to run with the land must be manifested either by the fact that it concerns a thing *in esse* parcel of the real estate granted or demised, or by the fact that the assignees are expressly referred to in the covenant.⁵

dan v. Twells, Cas. temp. Hard. 171; *Foster v. Pierson*, 4 T. R. 617; *Hodgson v. East India Co.*, 8 T. R. 278; *Evans v. Vaughan*, 4 B. & C. 261; *Dexter v. Manley*, 4 Cush. (Mass.) 14.

1. As to these, see *LEASE*, vol. 12, p. 974.

2. After breach a covenant is a mere claim, a chose in action incapable of transmission or descent, and to be sued upon by the executor or administrator if the breach occurred in the covenantee's lifetime. Com. Dig. Covt. B. 1; *Lucy v. Lexington*, 2 Lev. 26; *Morley v. Polhill*, 2 Vent. 56; *Smith v. Simonds*, Comb. 64; *Raymond v. Fitch*, 2 C. M. & R. 588; *Ricketts v. Weaver*, 12 M. & W. 718; *Young v. Raincock*, 7 C. B. 310.

3. Hence "real covenants" and "covenants running with the land" are practically interchangeable terms, and Sheppard's definition of a real covenant is that it so runs.

A covenant, being a chose in action, was, at common law, incapable of assignment, and the capacity of certain covenants to run with the land is an exception to the common law rule. *Rawle Covenant*, (5th ed.), § 203. This exception is necessarily confined to cases where the rights or liabilities under the covenant are practically part and parcel of the estate in the land, *i. e.*, to real covenants.

Covenants Running with the Reversion.—At common law, covenants did not run with the reversion. *Thursby v. Plant*, 1 Wms. Saund. 240, n. 3, and n. o.

But this was changed by statute 32 Hen. VIII, ch. 34 in the case "covenants which touch or concern the thing demised," but not collateral covenants. *Spencer's Case*, 5 Coke 16.

Temporary Covenants.—A temporary covenant may run with the land as well as a permanent one. Where a grantee covenanted for himself, his heirs and assigns, to keep a fence in repair, until a new fence should be built upon the true line this covenant was held so to run. *Hartung v. Witte*, 59 Wis. 285.

4. *Bally v. Wells*, 3 Wils. 26; *Earle of Egremont v. Keene*, 2 Jones (Ir.) 307; *Martyn v. Williams*, 1 H. & N. 817; *St. Louis etc. R. Co. v. O'Baugh*, 49 Ark. 418; *Howard Co. v. Water Lot Co.*, 53 Ga. 689; *Fitch v. Johnson*, 104 Ill. 111; *Hazlett v. Sinclair*, 76 Ind. 488; *Morse v. Aldrich*, 19 Pick. (Mass.) 449; *Van Rensselaer v. Smith*, 27 Barb. (N. Y.) 147; *Willard v. Tillman*, 2 Hill (N. Y.) 274; *Van Rensselaer v. Read*, 26 N. Y. 558; *Carr v. Lowry*, 27 Pa. St. 257; *Scott v. Lunt*, 7 Pet. (U. S.) 596.

In *Wheelock v. Thayer*, 16 Pick. (Mass.) 68, it was held that a covenant concerning a privilege of drawing water from a pond "could not run with the land, for no land was granted, and to make a covenant run with the land it is not sufficient that it is of and concerning land;" but this was stated with some doubt and was not the only ground of the decision. To the same effect, *Mitchell v. Warner*, 5 Conn. 497.

5. *Spencer's Case*, 5 Coke 16; 1 Sm. Lead. Cas. (9th Am. ed.) 174; *Bally v. Wells*, 3 Wils. 28; *Mayor of Congleton v. Pattison*, 10 East 135; *Easterly v. Sampson*, 6 Bing. 652; *Jourdain v. Wilson*, 9 B. & Ald. 266; *Sharp v. Waterhouse*, 7 E. & B. 823; *Thompson v. Rose*, 8 Cow. (N. Y.) 269; *Tallman v. Coffin*, 4 N. Y. 134; *Easter v. Little Miami R. Co.*, 14 Ohio St. 48; *Hartung v. Witte*, 59 Wis. 285;

Covenants which confer a benefit upon the land, *i. e.*, those made with the owner of the land to which they relate, run with the land, and may be sued upon by any transferee of the estate held by the original covenantee,¹ whether such covenants be made by the person conveying the land to the covenantee or by a stranger,² but the right of action passes from the original covenantee only by the conveyance of some estate to which the covenant is incident.³ Hence if no estate really passes to him by the

and see *Cook v. Milwaukee etc. R. Co.*, 36 Wis. 45.

Thus where the owner of oil lands, to whom they had been released by the lessees, covenanted for himself to pay and deliver to the lessees a sixth-part of the oil produced during the unexpired term of the leases, it was held that the covenant did not concern any "thing *in esse*, parcel of the demise" or "annexed and appurtenant" thereto, so as to bring it within the first part of the rule in *Spencer's Case*, and that the grantor having covenanted for himself only, the covenant could not run with the land. *Newburg Petroleum Co. v. Weare*, 44 Ohio St. 604.

And where the covenant was that when any portion of the land adjoining the right of way granted should be inclosed and used for pasturage the railroad company should fence the right of way, and the grantor's assigns were not mentioned, this was held not to run with the land. *Gulf etc. R. Co. v. Smith*, 72 Tex. 122.

But where the covenant to build such a fence is expressly stated to bind the covenantor, his heirs and assigns, it runs with the land. *Bronson v. Coffin*, 108 Mass. 175; 11 Am. Rep. 335. See further the cases cited in the following notes.

1. Thus a covenant in a deed of a right of way, that the grantee shall make the water run in a particular way and place, passes to a purchaser of the property through which the right of way lies. *Peden v. Chicago etc. R. Co.*, 73 Iowa 328, 78 Iowa 131.

So of a stipulation that the grantee shall maintain fences along the right of way. *Kentucky Cent. Co. v. Kenney*, 82 Ky. 154.

So of a covenant to build the track above the overflow of a river. *St. Louis etc. R. Co. v. O'Baugh*, 49 Ark. 418.

So of a covenant to build and forever maintain a siding from the railroad to a mill on the grantor's land. *Lydick*

v. Baltimore etc. R. Co., 17 W. Va. 427; *S. P. Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 489.

So of a covenant in a conveyance of land to a railroad company, to maintain all switch connections "heretofore existing" between the railroad and the grantor's land, and to operate them free of charge, the language used clearly referring to a perpetual maintenance and operation though the words "heirs and assigns" were not employed. *Pittsburgh etc. R. Co. v. Reno*, 22 Ill. App. 470; *aff'd*. 123 Ill. 273.

A covenant by the grantor of a mill, that he has a right to maintain the dam at the height at which it stood at the time of the grant, runs with the land, the right being part of the grant. But this does not prevent the defense, as against subsequent grantees, that the original grantees fraudulently destroyed the marks of the height at the time of the grant, and raised the dam without any right to do so. *Scott v. Stetler*, (Ind. 1891), 27 N. E. Rep. 721.

A covenant by the grantor, to leave an open space between the river and the street on which the lots conveyed front, runs with the land. *Delogny v. Mercer* (La. 1891), 8 So. Rep. 903.

2. The Prior's Case, cited in *Spencer's Case*, 5 Co. 16; Co. Litt. 384 b; *Sharp v. Waterhouse*, 7 E. & B. 823; *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 489.

The usual covenants for title belong, of course, to the class of covenants which confer a benefit, but as to how far they run with the land see *infra*, this title, p. 1006.

3. In former times, when conveyances were made by livery of seisin, an actual estate was transferred by right or wrong to the feoffee in all cases, and might pass from him to any subsequent assignee. *Dickson v. Desire*, 23 Mo. 157. In such a case there could be no question but that all warranties

and covenants made by the original feoffor passed with the conveyance, whether the title were valid or not. See 1 Sm. L. Cas. (8th Am. ed.), 201.

The modern form of deed, however, can pass no greater estate than the grantor has, and it is important to ascertain what will constitute a sufficient estate to carry the covenants with it as incidental to the conveyance.

Where the doctrine of "actual seisin" prevails (*supra* this title, *Covenant for Seisin*), a conveyance by one in possession under claim of title passes an estate, and hence such a conveyance suffices to make the covenants run with the land. *Slater v. Rawson*, 1 Met. (Mass.) 450; *Wilson v. Widenham*, 51 Me. 566.

And, even apart from this doctrine, it was held in *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120, and has since been maintained both in *New York* and other States, that if the grantor be in full possession of the premises under claim of title, and by his deed transfers that possession to his grantee, the latter takes a sufficient estate to carry with it the benefit of those covenants for title which run with the land, so that they will pass to his assignee. *Dickson v. Desire*, 23 Mo. 151; *Fowler v. Poling*, 6 Barb. (N. Y.) 166 (*overruling*, 2 Barb. (N. Y.) 306); *Lewis v. Cook*, 13 Ired. (N. Car.) 194; *Dickinson v. Hoomes*, 8 Gratt. (Va.) 353; *Fields v. Squires, Deady* (U. S.) 389.

In *Wead v. Larkin*, 54 Ill. 489, and *Tillotson v. Prichard*, 60 Vt. 94, it was held that where vacant land was conveyed, and the grantee took possession, the same result followed, and the assignee could sue on the covenants. In the latter case the court, by Taft, J., said: "Tillotson and Dame took actual possession of the premises under their deed from Prichard. The covenant of warranty was of force in their hands by privity of contract, and when they sold the land, having taken possession of it under their deed, the covenant attached to the land and passed with it to the grantee."

The doctrine that where possession is acquired under a grant it carries the covenants with it, is not only necessary to the utility of covenants for title, but is founded on a true principle. Possession is "an imperfect degree of title," "an inchoate ownership or estate," "which may ripen into a fee by neglect of the real owner." Besides, as far as the covenants of warranty and for quiet

enjoyment are concerned, they are not broken until the possession is disturbed. Rawle, *Covenants* (5th ed.), § 233.

In *England*, in reliance on what was supposed to be decided in *Noke v. Awder*, Cro. Eliz. 373, it was held for a long time that possession alone did not suffice to make the covenants in a conveyance of an invalid title run with the land (*Andrew v. Pearce*, 4 B. & P. 162), but in *Cuthbertson v. Irving*, 4 Hurl. & N. 755, it was held that the decision in *Noke v. Awder* turned upon the insufficiency of the breach of covenant as pleaded, so that that case is not to be regarded as an authority against the efficacy of possession to pass the covenants.

Where a chattel interest passes, this is sufficient to enable covenants to run with the land. *Williams v. Burrell*, 1 C. B. 401.

In *England*, the transfer of an equity of redemption was held insufficient to carry covenants with it. *Mayor of Carlisle v. Blamire*, 8 East 487; *Pargeter v. Harris*, 7 A. & E., N. S. 709; *Thornton v. Court*, 3 De G. M. & G. 293; and see *McGoodwin v. Stephenson*, 11 B. Mon. (Ky.) 22.

But the status of a mortgagor has been changed by the judicature act of 1873, 36 & 37 Vict., ch. 66.

In *America* the rule has been almost uniformly the other way. *Brown v. Metz*, 33 Ill. 339; 85 Am. Dec. 277; *Harper v. Perry*, 28 Iowa, 58; *Devin v. Hendershott*, 32 Iowa, 192; *Rose v. Schaffner*, 50 Iowa 483; *Wilson v. Widenham*, 51 Me. 566; *White v. Whitney*, 3 Met. (Mass.) 81; *Ely v. Hergesell*, 46 Mich. 325; *Davidson v. Cox*, 11 Neb. 250; *Andrews v. Wolcott*, 16 Barb. (N. Y.) 21; *Wright v. Sperry*, 21 Wis. 334.

At common law covenants did not run with an estate claimed only by estoppel. *Noke v. Awder*, Cro. Eliz. 436; *Lyn v. Wyn*, Bridg. 122, 131; *Whitton v. Peacock*, 2 Bing. N. Cas. 411; except where the estoppel worked an actual transfer of the estate. *Webb v. Austin*, 7 M. & G. 700; *Sturgeon v. Wingfield*, 13 M. & W. 224.

And they do so run where the estoppel results from a lease. *Cuthbertson v. Irving*, 4 H. & N. 742; and see *LEASE* vol. 12, p. 974.

In *Willard v. Tillman*, 2 Hill (N. Y.) 276, it was held that a covenant for the payment of rent will run with a bare assignment of the rent, severed from the reversion, but the propriety

deed conveying the covenants, no subsequent conveyance by him can transfer them to his assignee.¹

Covenants which impose a burden on the land, *i. e.*, those made by the owner of the land to which they relate, run with the land only where a privity of estate exists between the parties to the covenant in regard to the land so burdened; which privity may result either from a relation of tenure between them² or from the possession, by the covenantee, of an easement or other interest in the land, partaking of the nature of real estate and capable of being granted,³ to which interest or estate

of this decision is questioned in 1 Sm. Lead. Cas. (8th Am. ed.) 209.

1. *Noke v. Awder*, Cro. Eliz. 436; *Andrews v. Pierce*, 4 B. & P. 162; *Mayor of Carlisle v. Blamire*, 8 East 487; *Nesbit v. Montgomery*, 1 Tay. 84; *Pargeter v. Harris, A. & E.*, N. S. 708; *Whitton v. Peacock*, 2 Bing. N. Cas. 411; *Green v. James*, 6 M. & W. 654; *Martin v. Gordon*, 24 Ga. 533; *Allen v. Wooley*, 1 Blackf. (Ind.) 148; *Bartholomew v. Candee*, 14 Pick. (Mass.) 167; *Wheelock v. Thayer*, 16 Pick. (Mass.) 68; *Slater v. Rawson*, 1 Met. (Mass.) 450; *Nesbit v. Brown*, 1 Dev. Eq. (N. Car.) 30; *Randolph v. Kinney*, 3 Rand. (Va.) 396; *Beardsley v. Knight*, 4 Vt. 471.

But in such a case the assignee has a remedy in equity. *Nesbit v. Brown*, 1 Dev. Eq. (N. Car.) 30; *Dickinson v. Hoome*, 8 Gratt. (Va.) 353.

2. *Spencer's Case*, 5 Coke 16, *Sampson v. Easterly*, 9 B. & C. 505; 6 Bing. 644; *Dunbar v. Jumper*, 2 Yeates (Pa.) 74; *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337. See LEASE, vol. 12, p. 974.

3. It is not easy to formulate any exact rule as to what covenants can permanently impose a burden on land. In *England* it is now well settled that one who takes land with notice, whether actual or constructive, of a restrictive covenant, is bound by it. *Clements v. Welles*, L. R., 1 Eq. 200; *Wilson v. Hart*, L. R., 1 Ch. App. 463. Yet owing to the absence of any system of registration of deeds, mortgages, or other instruments affecting real estate, there is a very natural tendency to restrict these covenants to such matters as a purchaser might reasonably be expected to inquire into; whereas in the *United States*, while no covenant, unless contained in a "common lease," would affect a subsequent purchaser without notice, if it were not so recorded as to bring it in "the line of title," *i. e.*, to

turn up on the usual examination of the records, yet a purchaser would have notice, actual or constructive, of every properly recorded covenant, and hence the reason for the narrow range allowed to covenants in *England* does not exist. It is probable, therefore, that the English and American courts may differ in their application of the general principles which are recognized equally by both, and that some covenants at least which run with the land in *America* would not be permitted to do so in *England*, and that the English cases do not furnish infallible precedents for adaptation to American conditions.

Two general principles seem to be well established: first, that a covenant cannot run with land as a burden unless the covenantee has an estate or interest in the land bound, capable of transfer; and second that a covenant, which is merely in restraint of trade, or partakes of that character, does not grant such an estate or interest as is required to support a real covenant.

The leading modern case is *Keppell v. Bailey*, 2 Myl. & K. 517. The owners of the Beaufort Iron Works covenanted with the Trevil railroad company that they and their assigns would procure all the limestone used in their works from the Trevil quarry, and carry it and the product of their works over the railroad, paying a certain toll; and in reliance upon this covenant the road was constructed. The assignees of the works afterwards constructed another road to other quarries, and an injunction was applied for by the railroad company, but refused. *Brougham, Ld. Chan.*, said: "There are certain known incidents to property and its enjoyment; among others, certain burdens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner, all which inci-

dents are recognized by the law. . . . But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner.

. . . . There can be no harm in allowing the fullest latitude to men in finding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations; . . . but great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote." Only a privity of estate between the parties could in any case be held to support a real covenant, and in this case there was no privity whatever and the covenant was unquestionably personal.

In the American notes to Spencer's Case, 1 Sm. Lead. Cas. (8th Am. ed.), 198, it is suggested that "The covenant in *Keppel v. Bailey* (2 M. & K. 517), failed to run with the land, not so much because it imposed a burden, or from the want of privity of estate, as because the rights and restrictions which is imposed on the one hand or conferred on the other, went beyond the limits of any estate or interest in land known to the law, or which it will permit to be invested with the capacity for assignment or transfer, and sound policy will not allow an end to be attained by a covenant, which cannot be directly affected by a grant. Had the covenantors in that case agreed, not that they and those who lived after them on the same tract of land, should use a particular way and no other, but that a railway might be laid out across the land by the covenantees, the agreement would in all probability have been held to run with the land and be capable of passing, by descent or transfer in equity, if not at law. Every covenant in a grant which qualifies or enlarges its extent and operation enters into and forms part of estate or right granted, and should consequently accompany it into the hands of every one to whom it may subsequently be transferred."

Where a landowner for a valuable consideration granted an oil transportation company and their assigns the exclusive right of way and privilege to construct and maintain one or more pipe lines through and under his land, this ran with the land so far as the

right of way was concerned, but the exclusive privilege did not run with the land. *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 626; 46 Am. Rep. 527.

A similar decision in regard to an exclusive right of way of a railroad was made in *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461.

This doctrine is enlarged upon in *Norcross v. James*, 140 Mass. 193. Where the grantor of a quarry covenanted "for myself, my heirs, executors and administrators . . . with the said [grantee], his heirs and assigns, that I will not open or work any quarry or quarries on my farm or premises" adjoining the quarry granted, and a bill to enforce this covenant having been filed by the assignee of the quarry against the assignee of the adjoining premises, it was held that it could not be maintained. The court, by HOLMES, J., said, after reviewing the authorities: "The covenant under consideration falls outside the limits of this rule (of *Spencer's Case* and those following it), even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked what is the difference in principle between an easement to have land unbuilt upon, such as was recognized in *Brooks v. Reynolds*, 106 Mass. 311, and an easement to have a quarry left unopened, the answer is, that, whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land.

"Again, this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly—an easement not to be competed with—and in that interest alone a right to prohibit an owner from exercising the usual incidents of property. It is true that a man could accomplish the same results by buying the whole land,

and regulating production. But it does not follow, because you can do a thing in one way, that you can do it in all; and we think that if this covenant were regarded as one which bound all subsequent owners of the land to keep its products out of commerce, there would be much greater difficulty in sustaining its validity than if it should be treated as merely personal in its burden."

Hence a covenant in a deed that the grantee shall, in consideration of the conveyance, support the grantor or some other person, is a purely personal covenant. *Martin v. Martin*, 44 Kan. 295; *Harkins v. Doran* (Pa. 1888), 15 Atl. Rep. 928; *Bresnahan v. Bresnahan*, 46 Wis. 385; *Divan v. Loomis*, 68 Wis. 150. But see *Goudy v. Goudy*, *Wright* (Ohio) 410.

The right to have such a conveyance rescinded in equity on account of a breach of the covenant is based on the failure of consideration only, not on any effect of the covenant to bind the land. See *Bogle v. Bogle*, 41 Wis. 209.

Similarly a covenant to pay, as part of the consideration for a grant of real estate, certain judgments recovered against the grantor, is a personal covenant merely, and does not run with the land. *Wells v. Benton*, 108 Ind. 585.

A contract to furnish water to the owner of certain land and his successors, though expressly declared by the instrument itself to be a real covenant, has been held not to be so, though, under *California* Civ. Code, § 2884, it gave rise to a lien on the land. *Fresno Canal etc. Co. v. Rowell*, 80 Cal. 114; *Fresno Canal etc. Co. v. Dunbar*, 80 Cal. 530.

A mutual covenant by several owners of mills to erect and use wheels of a certain construction and limited power, does not run with the land of any of them, because there is no privity of estate between them. *Hurd v. Curtis*, 19 Pick. (Mass.) 457.

An agreement by the owner of land through which a levee has been built, to maintain his part and to release the water company from liability for damages from high water, does not run with the land as the company have no estate or interest therein, and hence a judicial sale of their property does not operate as an assignment of the agreement. *Indianapolis Water Co. v. Nulte*, 126 Ind. 373. See also *Thomas v. Haywood*, L. R., 4 Ex. 311; *Taylor v. Owen*, 2 Blackf. (Ind.) 301; *Glenn v. Canby*, 24 Md. 127; *Brewer v. Mar-*

shall, 19 N. J. Eq. 537; 97 Am. Dec. 679; *Nesbit v. Nesbit*, Cam. & N. (N. Car.) 324; *Nesbit v. Brown*, 1 Dev. Eq. (N. Car.) 30; *Morse v. Garner*, 1 Strobh. (S. Car.) 514; 47 Am. Dec. 565.

Building Restrictions.—These, and agreements as to the use of property, may, if properly expressed, be servitudes or incumbrances on the property bound, and easements appurtenant to the property benefited, running with the land in both cases.

Thus a covenant in a deed of real estate, that no improvement inferior to certain specified requirements shall be built on certain other lots retained by the grantors, if expressed to bind their heirs and assigns, is binding on those lots. *Halle v. Newbold*, 69 Md. 265.

So of a restrictive covenant (expressed in words of condition), that no part of the land or buildings conveyed shall ever be used as a tavern. *Clement v. Burtis*, 121 N. Y. 708.

A change in the conditions of a neighborhood, making it unprofitable to use the property except in violation of such restrictions, does not affect the binding character of such a covenant. *Amerman v. Deane*, 57 N. Y. Super. Ct. 175.

So a provision in a deed for a lot of ground and a right of way, that the lane is not to be incumbered or built upon by either party, is a covenant with both parties, running with the land and the fact that certain owners of the premises for which the right of way was reserved may have violated the covenant does not relieve their successors from keeping it. *Dexter v. Beard*, 53 Hun (N. Y.) 638.

A restrictive covenant, not to erect any building or carry on any trade or business which may be dangerous, injurious, or offensive to the neighboring inhabitants, runs with the land and is broken by the maintaining a hospital where cases of contagious disease may exist. *Tod-Heatly v. Benham*, L. R., 40 Ch. D. 80; *Gilford v. Babies' Hospital*, 21 Abb., N. Cts. (N. Y.) 159.

Restrictive covenants have been held to bind the lands retained by the covenantor, when sold to other parties, even though the deeds to such parties do not themselves contain any restrictive covenants. *Nottingham Patent Brick etc. Co. v. Butler*, L. R., 15 Q. B. Div. 261; 16 Q. B. D. 778.

And the benefit of such covenants has also been held to pass to a purchaser of the land benefited, even

though his own deed contains no such restrictive covenant. *Collins v. Castle*, L. R., 36 Ch. Div. 243.

Where the owner of land, bound by a building-restriction covenant, mortgages a part without imposing any express restriction, and the premises are sold on foreclosure, he cannot himself, in behalf of his remaining property, enforce the covenant against the purchasers, though they bought with notice. *King v. Dickeson*, L. R., 40 Ch. D. 596.

If a sale by auction of property described as "business premises" be made without notice of restrictive covenants as to the business to be carried on, the bidder cannot be required to accept the property. *In re Davis v. Cavey*, L. R., 40 Ch. D. 601.

The same doctrine was applied to contracts of sale in *Nottingham Patent Brick etc. Co. v. Butler*, L. R., 16 Q. B. D. 778; *In re Ebsworth*, L. R., 42 Ch. D. 23; *Mackenzie v. Childers*, L. R., 43 Ch. D. 265.

But if the purchaser obtains substantially what he bargained for, the contract will be enforced, notwithstanding a restrictive covenant. *In re Fawcett & Holmes*, L. R., 42 Ch. D. 150.

Where the covenant was "not to use, exercise, carry on, or permit, or suffer [the premises] to be occupied by any person who shall carry on a noisome or offensive trade," it was held that specific performance of the latter part could not be enforced. The premises having been sublet, with a similar covenant, the under-tenant exhibited two lions and a black man on the premises, and an injunction was granted against both tenant and sub-tenant on the ground of the use of the word "suffer," and that the tenant, having the power to restrain the under-tenant and not having done so, had broken the covenant. On appeal, however, the injunction was dismissed as against the tenant, because he could not be enjoined for failing to bring an injunction against the under-tenant. *Hall v. Erwin*, L. R., 37 Ch. D. 74.

Effect of Restriction Without Express Covenant.—Even where building restrictions are not the subject of what can strictly be called a covenant, compliance with them may be enforced in equity in order to carry out the full intent of the original conveyance. *Duke of Bedford v. Trustees of British Museum*, 2 My. & K. 552; *Renals v. Cowlishaw*, L. R., 9 Ch. D.

125; 11 Ch. D. 886; *Spicer v. Martin*, L. R., 14 App. Cas. 23.

In *Mackenzie v. Childers*, L. R., 43 Ch. Div. 265, an estate was laid out in building lots, and the deed executed by the vendors and each of the purchasers of the lots sold contained a recital that it was intended that all future purchasers of lots should execute the deed and be bound by its stipulations, and it was expressed in the same deed that each purchaser covenanted with the vendors and the other purchasers to conform to certain building restrictions, but there was no express covenant to the like effect by the vendors. After some years the portion of the estate remaining unsold was put up for sale in lots other than those originally laid out, and under conditions not in accord with the stipulations of the deed. An injunction from selling except upon the stipulations of the deed was granted, on the ground that the deed operated as a covenant by the vendors not to authorize the use of any unsold lots in a manner inconsistent with the deed, and that, even were this otherwise, the vendors were bound by a contract implied from the whole transaction, restricting them from dealing with the land in violation of the original building scheme.

Party Walls.—A recorded agreement between owners of adjacent lots that a party wall should be erected by one of them creates a mutual or cross-easement in favor of each in the lot of the other, and hence a covenant that if one of the parties, his heirs, executors, administrators, or assigns should at any time make use of the wall, he or they should pay to the other party one-half the cost of the wall, runs with the former's land because it concerns the easement in that land acquired by the owner of the adjacent property in the shape of the right to erect and use the party wall. *Conduitt v. Ross*, 102 Ind. 166; *Savage v. Mason*, 3 Cush. (Mass.) 500; *Keteltas v. Penfold*, 4 E. D. Smith (N. Y.) 122; *Guentzer v. Juch*, 51 Hun (N. Y.) 397. (In this case the agreement was expressly stated to be a covenant running with the land.)

In *Bloch v. Isham*, 28 Ind. 37, and *Conduitt v. Ross*, 102 Ind. 166, the right to receive payment for a party-wall when used was held to be personal only, the agreement being for payment to the covenantee, without mention of his assigns, but the contrary seems to have been held in *Burlock v. Peck*, 2 Duer (N. Y.) 90. In *Weyman v.*

of the covenantee the covenant must itself have some relation.¹

Ringold, 1 Bradf. (N. Y.) 52, the assigns were mentioned, but the covenant was held to run with the land in any event. *Nalle v. Paggi* (Tex. 1888), 9 S. W. Rep. 205, involved a parol promise only, incapable of running with the land.

Thus a covenant by a grantor to maintain a sufficient line fence between the premises granted and adjoining property of his own, imposed an easement in favor of the grantee upon such adjoining property, and ran with the land. *Hazlett v. Sinclair*, 76 Ind. 489.

Streets and Ways.—A description of land conveyed, as "bounded by a way or street now staked out," is a covenant to open the street, binding subsequent purchasers from the grantor. *Thomas v. Pool*, 7 Gray (Mass.) 83.

Where a wagon road is forever excepted from a grant, this imposes a servitude on the land through which it passes, in favor of adjoining land, and is regarded as a real covenant, running with the land, that such road shall always remain open. *Gibson v. Porter*, (Ky. 1891), 15 S. W. Rep. 871.

A covenant in a deed, that the amount of the consideration money for a strip of land adjoining the lot conveyed should go to the grantee in the deed whenever such strip should be condemned in order to widen a street, has been held to run with the lot conveyed, the grantee having also the use of the strip for street purposes. *Cincinnati v. Springer* (Ohio), 23 Wkly. Law Bul. 250.

Water Rights.—Where a riparian owner contributed so much of his lands, dam, ditch, etc., as was necessary for the erection and enjoyment of a new water privilege, to be owned jointly by himself and two others, his covenant for himself, his heirs and assigns to keep in repair and to rebuild, if necessary, the dam and ditch at his and their sole expense, runs with the land as it is connected with the subject of the grant (*i. e.*, the interest in the lands, dam, etc., essential to the enjoyment of the water privilege) and enters into its value. *Nye v. Hoyle*, 120 N. Y. 195.

To the same effect, *Wooliscroft v. Norton*, 15 Wis. 198.

And where land was conveyed upon condition that one-nineteenth part of the expense of repairing a certain dam and canal should be a permanent charge upon it, and the grantee covenanted to the same effect, such covenant was held to run with the land. *Howard Mfg. Co. v. Water Lot Co.*, 53 Ga. 689.

Rights of Way, etc.—The various covenants made by railroad companies, in regard to the use of land or rights of way granted to them, run not only with the land, if any, which they benefit, but also with the land or incorporeal real estate upon which their burden is imposed.

Of such sort are covenants to erect buildings on the land conveyed; to permit the grantor to cultivate so much of the ground covered by the right of way as is not used by the grantee; to prohibit the sale of liquor on the premises; to establish a flag-station on the land, and to stop trains there. These bind the successor of the railroad company making it. *Gilmer v. Mobile etc. R. Co.*, 79 Ala. 569; *Mobile etc. R. Co. v. Gilmer*, 85 Ala. 422; 58 Am. Rep. 623.

So of a covenant to keep the right of way fenced, or to maintain a ditch along it. *Midland R. Co. v. Fisher*, 125 Ind. 19; *Poage v. Wabash etc. R. Co.*, 24 Mo. App. 199.

This is true even though the language used is not that of a covenant by the grantee, but of a stipulation by the grantor, provided an intention to charge the land be shown. *Kentucky Cent. R. Co. v. Kenney*, 82 Ky. 154.

A condition in a deed of land to be used as a railroad station, that an opening should always be maintained into the land conveyed, for the convenient access of passengers and baggage, opposite a certain hotel, is a covenant running with the land conveyed. *Avery v. New York Cent. etc. R. Co.*, 106 N. Y. 142. But the performance of such a covenant does not require the permanent maintenance of the same opening, and the company can impose reasonable regulations on the use of the way reserved, this being provided in the deed. *Avery v. New York Cent. etc. R. Co.*, 121 N. Y. 31.

1. *Wells v. Benton*, 108 Ind. 585.

One entitled to the benefit of covenants running with the land can sue simultaneously all his covenantors, mediate and immediate,¹ but, as he can have but one satisfaction of his claim, a covenantor may plead a judgment recovered against and paid by him in bar of an action by a subsequent covenantor who has himself also paid a judgment recovered against him on a covenant for the same matter, even if the latter judgment be for a larger amount.² One who has parted with all his interest in the land, however, cannot sue any of his covenantors unless a judgment has been paid by him for a breach for which they are also liable on their covenants.³

If the land with which covenants run be divided, the owners of the different portions may sue separately on the covenants, the benefit being apportioned;⁴ and the same rule holds as to the liability of the assignees of part interest in a lease.⁵

1. *King v. Kerr*, 5 Ohio 154; 22 Am. Dec. 777; *Foot v. Burnet*, 10 Ohio 317.

2. *Wilson v. Taylor*, 9 Ohio St. 595; 75 Am. Dec. 488.

3. *Booth v. Starr*, 1 Conn. 244; 6 Am. Dec. 233, and *Withy v. Mumford*, 5 Cow. (N. Y.) 137, where it was held, in opposition to the prior case of *Kane v. Sanger*, 14 Johns. (N. Y.) 89, that though the right of action of an intermediate covenantee existed independently of his liability to subsequent purchasers, yet the former could not be enforced till the latter had been established, and further that a purchaser's acceptance of covenants from his own vendor did not affect his rights against prior covenantors.

These cases have been followed in *Redwine v. Brown*, 10 Ga. 311; *Thompson v. Shattuck*, 2 Met. (Mass.) 615; *Wheeler v. Sohler*, 3 Cush. Mass. 222; *Chase v. Weston*, 12 N. H. 413; *Suydam v. Jones*, 10 Wend. (N. Y.) 184; 25 Am. Dec. 552; *Baxter v. Ryerss*, 13 Barb. (N. Y.) 283; *Herrin v. McIntyre*, 1 Hawks (N. Car.) 410; *Markland v. Crump*, 1 Dev. & B. (N. Car.) 94; 27 Am. Dec. 230; *Wilson v. Taylor*, 9 Ohio St. 595; 75 Am. Dec. 488; *De Chaumont v. Forsythe*, 2 P. & W. (Pa.) 507; *Jones v. Richmond* (Va. 1891), 13 S. E. Rep. 414; *Williams v. Wetherbee*, 1 Aik. (Vt.) 239.

An action by an intermediate covenantee who has not himself paid a judgment cannot be brought even for the benefit of his grantee. *Fairbrother v. Griffin*, 10 Me. 91.

4. Sugd. Vend. (14th ed.) 486; *Twynam v. Pickard*, 2 B. & Ald. 105; *Schofield v. Iowa Homestead Co.*, 32 Iowa 317; 7 Am. Rep. 197; *Dougherty v. Duvall*, 9 B. Mon. (Ky.) 58; *White v. Whitney*, 3 Met. (Mass.) 87; *Hunt v. Amidon*, 4 Hill (N. Y.) 345; 40 Am. Dec. 283; *Van Horne v. Crain*, 1 Paige (N. Y.) 455; *Astor v. Miller*, 2 Paige (N. Y.) 68; *McClure v. Gamble*, 27 Pa. St. 288; *Dickenson v. Hoomes*, 8 Gratt. (Va.) 353; *Fields v. Squires*, Deady (U. S.) 366.

The different owners may, however, join in one action. *Paul v. Witman*, 3 W. & S. (Pa.) 409.

Where the estate is divided, as where a term of years is carved out of it, it was held in *West London R. Co. v. London etc. R. Co.*, 11 C. B. 354, to be unsettled whether an assignee of the estate for a term of years could sue on a covenant running with the land or not. Where the division is into an estate for life with remainder in fee, and the breach affects the whole inheritance, it would seem that in *England* the owner of each portion can sue. *Noble v. Cass*, 2 Sim. 343. But the contrary was held in *McClure v. Gamble*, 27 Pa. St. 288.

In *Badeley v. Vigurs*, 4 E. & B. 81, it was held that the owners of the reversion of two-thirds of an estate could sue for their proportionate share of the damage caused by a breach of covenant, the other third having coalesced with a part interest in an existing term of years.

5. *Hare v. Cator*, Cowp. 766; *Stevenson v. Lambard*, 2 East 575;

In *England*, all covenants for title are regarded as covenants *in futuro*, not finally broken until a substantial breach occurs;¹ whereas in most of the *United States* the covenants for seisin and for right to convey are held to be *in præsenti* merely—covenants that a particular state of facts exists at the time they are made—and hence broken then, if broken at all.² This doctrine

Merceron v. Dowson, 5 B. & C. 479; *Curtis v. Spitty*, 1 Bing. N. Cas. 756.

1. *Lougher v. Williams*, 2 Lev. 92; *Sachervell v. Froggatt*, 2 Saund. 367; *Kingdom v. Nottle*, 1 M. & S. 355; *King v. Jones*, 5 Taunt. 418. The latter case involved a covenant for further assurance, but practically the same question was presented, the technical breach and the real damage not occurring simultaneously.

These cases have been followed in *Platt v. Grand Trunk R. Co.*, 11 Ont. 246.

The various reasons suggested as a basis for the English doctrine are discussed in Rawle, *Covenants* (5th ed.), §§ 202-204, 207-209. It is enough to state here that it is the only doctrine which carries out the object which the covenants were intended to fulfill, and that the Conveyancing and Law of Property Act, 1881, 44 and 45 Vict., ch. 14, which introduced short forms of deeds with implied covenants for title, provided that the latter should run with the land under all circumstances.

2. Covenants Broken as Soon as Made.—

The leading case on the doctrine stated in the text is *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, decided in 1806. The defendant had conveyed land with covenants for seisin, for good right to convey, and of warranty, to one under whom the plaintiff claimed by mesne conveyances, and the latter, being evicted by title paramount, sued in covenant. The declaration was defective as to the covenant of warranty, the eviction not being alleged to be under lawful title (see *supra*, this title, *Covenant of Warranty*); and as to the other covenants, the majority held that, the declaration having averred that there was a total defect of title when the deed was made, these covenants were then broken, and incapable of assignment by the covenantee, there being no difference after the breach between them and ordinary choses in action.

In *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61, also the court by Parsons C. J., said: "When the breaches as-

signed to the first and third covenants [for seisin and for right to convey] are found for the plaintiff, it then appears that those covenants were broken as soon as the deed was executed; that no estate or interest passed by the conveyance; and that the plaintiff's entry, although under color of it, was tortious, and a trespass or disseisin to the owner. Hence it is clear that an action for the breach of these covenants cannot be maintained by an assignee of the purchaser, because no estate passed, to which these covenants could be annexed, and because, being in fact broken before any assignment could be made, they were choses in action and not assignable."

The doctrine laid down in these cases has been generally followed in the *United States*. *Logan v. Moulder*, 1 Ark. 313; 33 Am. Dec. 338; *Ross v. Turner*, 7 Ark. 132; 44 Am. Dec. 531; *Pate v. Mitchell*, 23 Ark. 590; 79 Am. Dec. 114; *Hendricks v. Keesse*, 32 Ark. 714; *Lawrence v. Montgomery*, 37 Cal. 188; *Salmon v. Vallejo*, 41 Cal. 481; *Mitchell v. Warner*, 5 Conn. 497; *Davis v. Lyman*, 6 Conn. 249; *Hartford etc. Ore Co. v. Miller*, 41 Conn. 112; *Brady v. Spurck*, 27 Ill. 482; *Jones v. Warner*, 81 Ill. 343; *Dale v. Shively*, 8 Kan. 276; *Scoffins v. Grandstaff*, 12 Kan. 467; *South v. Hoy*, 3 T. B. Mon. (Ky.) 94; *Rice v. Spottswood*, 6 T. B. Mon. (Ky.) 40; 17 Am. Dec. 115; *Pence v. Duvall*, 9 B. Mon. (Ky.) 48; *Bickford v. Page*, 2 Mass. 455; *Prescott v. Trueman*, 4 Mass. 627; 3 Am. Dec. 249; *Wheelock v. Thayer*, 16 Pick. (Mass.) 68; *Thayer v. Clemence*, 22 Pick. (Mass.) 490; *Clark v. Swift*, 3 Met. (Mass.) 390; *Smith v. Lloyd*, 29 Mich. 382; *Sherwood v. Landon*, 57 Mich. 219; *Chapman v. Kimball*, 7 Neb. 399; *Davidson v. Cox*, 10 Neb. 150; *Real v. Hollister*, 20 Neb. 112; *Parker v. Brown*, 15 N. H. 176; *Morrison v. Underwood*, 20 N. H. 369; *Smith v. Jeffs*, 44 N. H. 482; *Dickey v. Weston*, 61 N. H. 23; *Lot v. Thomas*, 2 N. J. L. 386; *Chapman v. Holmes*, 10 N. J. L. 20; *Garrison v. Sanford*, 12 N. J. L. 261; *Carter v. Denman*, 23 N. J. L.

does not prevail in *Indiana, Iowa, Missouri, Ohio* and *Wisconsin*,¹

260; *Hamilton v. Wilson*, 4 Johns. (N. Y.) 72; 4 Am. Dec. 253; *Townsend v. Morris*, 6 Cow. (N. Y.) 123; *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120; *M'Carty v. Leggett*, 3 Hill (N. Y.) 134; *Blydenburgh v. Cotheal*, 1 Duer (N. Y.) 197; *Coit v. McReynolds*, 2 Robt. (N. Y.) 655; *Mygatt v. Coe*, 124 N. Y. 212; *Wilson v. Forbes*, 2 Dev. (N. Car.) 30; *Grist v. Hodges*, 3 Dev. (N. Car.) 200; *Kenney v. Norton*, 10 Heisk. (Tenn.) 384; *Westrope v. Chambers*, 51 Tex. 178; *Williams v. Wetherbee*, 1 Aik. (Vt.) 233; *Garfield v. Williams*, 2 Vt. 327; *Pierce v. Johnson*, 4 Vt. 253; *Richardson v. Dorr*, 5 Vt. 9; *Potter v. Taylor*, 6 Vt. 676; *Clement v. Bank of Rutland*, 61 Vt. 298.

This doctrine, which worked great hardship in many cases, was adhered to in obedience to what was supposed to be the common law rule as enforced in *Lucy v. Levington*, 2 Lev. 26; 1 Vent. 175; 2 Keb. 831; and *Lewes v. Ridge*, Cro. Eliz. 863. But as pointed out by Mr. Rawle (Covenants, 5th ed., § 205), these two cases merely decided that covenants when broken ceased to run with the land.

In *California* (Dering's Civ. Code, §§ 1460-1463) and *North Dakota* (Comp. Laws, §§ 3344-6) it is provided by statute that "every covenant . . . which is made for the direct benefit of the property, or some part of it then in existence," runs with the land; and this section is further stated to include "covenants of warranty, for quiet enjoyment, and for further assurances, and for the payment of rent and taxes or assessments." As the covenant for seisin is not mentioned it has been held to be broken as soon as made. *Bowne v. Wolcott* (N. Dak. 1891), 48 N. W. Rep. 426. In *California*, as already stated, this is the rule irrespective of the statute.

The doctrine of covenants "broken as soon as made" involves some practical difficulties in the enforcement of the liability on such covenants. They clearly do not come within the general rule, stated *supra* in the text, p. 1005, that one who has parted with all his interest cannot sue unless he has himself paid a judgment on account of the breach, as that rule applies only to covenants running with the land.

In *Davis v. Lyman*, 6 Conn. 249,

one who had parted with all his interest was allowed substantial damages on the covenant against incumbrances, though he had paid nothing in extinguishment of the incumbrance; and in *Cornell v. Jackson*, 3 Cush. (Mass.) 506, a similar recovery was had upon a covenant for seisin. In *Wyman v. Ballard*, 12 Mass. 304, nominal damages only were allowed on a covenant against incumbrances, both because the covenantee had as yet paid nothing on account of the incumbrance and because the covenantor would be still liable to the ultimate grantee on the covenant of warranty, which did run with the land.

This doctrine has sometimes been applied to other covenants. Thus it was said in *Salmon v. Vallejo*, 41 Cal. 481, that a covenant that the tract conveyed included a specified quantity of land was of that sort, because the land "either did or did not contain the stipulated quantity, and the fact could not be changed by anything which subsequently transpired . . . If the deficiency could not be ascertained except by an official survey under the degree of confirmation, that fact might possibly prevent the Statute of Limitations from running . . . but the nature of the covenant remains the same."

Where the doctrine of "covenants broken as soon as made" prevails, these covenants are sometimes said to be not real, but personal. This is not accurate. A real covenant is such on account of the relation of the parties to the land which it concerns; the fact that after breach it ceases to run with the land does not take away its character as a real covenant; and the time when the breach occurs is immaterial. *Kellogg v. Malin*, 62 Mo. 429; *Lot v. Thomas*, 2 N. J. L. 297; *Carter v. Denman*, 23 N. J. L. 260; *Pittsburg v. Mitchell*, 5 Wis. 17.

1. *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Coleman v. Lyman*, 42 Ind. 289; *Wilson v. Peelle*, 78 Ind. 384; *Wright v. Nipple*, 92 Ind. 310 (*Bottomf v. Smith*, 7 Ind. 673, and *Bethell v. Bethell*, 54 Ind. 428; 23 Am. Rep. 650, are not really in conflict with these cases, and must be distinguished); *Schofield v. Iowa Homestead Co.*, 32 Iowa 317; 7 Am. Rep. 197; *Knadler v. Sharp*, 36 Iowa 232; *Boon v. McHenry*, 55 Iowa

nor practically in *Minnesota*,¹ while it has been set aside by statute in *Colorado* and *Maine*,² and indirectly in *Minnesota* and *Ohio*.³ In many States the same doctrine has been also applied to covenants against incumbrances,⁴ but is not as generally accepted

202; *Dickson v. Desire*, 23 Mo. 162; *Magwire v. Riffin*, 44 Mo. 512; *Allen v. Kennedy*, 91 Mo. 324; *Walker v. Deaver*, 5 Mo. App. 147; *White v. Stevens*, 13 Mo. App. 240; *Hall v. Scott Co.*, 2 McCrary (U. S.) 356; *Schnelle Lumber Co. v. Barlow*, 34 Fed. Rep. 853; *Backus v. McCoy*, 3 Ohio 216; 17 Am. Dec. 585; *Foot v. Barnett*, 10 Ohio 327; *Devore v. Sunderland*, 17 Ohio 60; *Stites v. Hobbs*, 2 Disney (Ohio) 573; *Mecklem v. Blake*, 22 Wis. 495; 82 Am. Dec. 707 (*overruling* *Pittsburg v. Mitchell*, 5 Wis. 17); *Eaton v. Lyman*, 24 Wis. 438; 26 Wis. 61; 28 Wis. 324; 30 Wis. 41; 33 Wis. 34.

In *Chambers v. Smith*, 23 Mo. 179, it was held that if there be a total defect of title, and no possession accompanies the deed, the covenant for seisin is broken as soon as made, but not if the title be defeasible merely, "an estate in fact although not in law," and the grantee takes possession. This was followed in *Bethell v. Bethell*, 54 Ind. 428; 23 Am. Rep. 650, on the ground of *lex loci contractus*.

1. In *Minnesota* all choses in action in the nature of property may be assigned. Hence a conveyance is held to pass the right of action on a covenant for seisin, though broken as soon as made, to an assignee of the grantee, and such assignment being always implied, unless a contrary intention appear. *Kimball v. Bryant*, 25 Minn. 496. If there be no conveyance, the right of action passes to the covenantor's personal representatives at his death. *Lowry v. Tilly*, 31 Minn. 509.

2. *Colorado* Rev. Stats. 1883, § 207; *Maine* Rev. Stats. 1884, ch. 82, § 15. See *Wilson v. Widenham*, 51 Me. 566; *Littlefield v. Pinkham*, 72 Me. 369. In *Hacker v. Storer*, 8 Me. 228, and *Heath v. Whidden*, 24 Me. 383, the covenant for seisin had been held to be broken as soon as made.

3. In *Ohio* a purchaser of real estate is entitled to sue upon a covenant for seisin given to any predecessor in the chain of title, under the provision in the code requiring actions to be brought in the name of the real party in interest. *Hall v. Plaine*, 14 Ohio St. 417.

4. See the cases (other than those of *Illinois*, *New York* and *Vermont*) cited *supra* in regard to the covenant for seisin, to which list may be added *Tuffs v. Adams*, 8 Pick. (Mass.) 549; *Whitney v. Dinsmore*, 6 Cush. (Mass.) 128; *Osborne v. Atkins*, 6 Gray (Mass.) 424; (in *Stinson v. Sumner*, 9 Mass. 143, and some other early cases, the ruling was the other way;) *Davenport v. Davenport*, 52 Mich. 587.

In *Clark v. Swift*, 3 Met. (Mass.) 390, the court by Wilde, J., said *obiter* that a covenant against incumbrances was assignable as a chose in action, and could be sued upon by an assignee in the name of his covenantor unless all right of action were barred by the Statute of Limitations. Mr. Rawle suggests, however (Covenants, 5th ed., § 227), that the damage not having been incurred by the assignor, could not be properly set forth as required in pleading on this covenant.

In *Post v. Campau*, 42 Mich. 97, *Cooley, J.*, suggested a distinction between such an incumbrance as an easement, which immediately affects the title and causes a present damage, and an incumbrance of the nature of a money charge, stating that in the former case the covenant against incumbrances did not run with the land, while in the latter case it "must attach itself to the title conveyed and accompany it, not only for the protection of the covenantor, but for the protection of any of his assigns whom the incumbrance may eventually damnify." The decision actually reached was that the covenant before the court was not the ordinary covenant against incumbrances, but (being made so the grantee, his heirs and assigns, to the effect that the grantors had not done etc. any act etc. "whereby the premises hereby granted or any part thereof is, are, or shall or may be charged or encumbered in title or estate or otherwise") "looks to the future and promises indemnity for damages that may at any time in the future result from the breach."

In *Post v. Jillette*, 9 Biss. (U. S.) 296, it was held in the circuit court for Northern *Illinois* that a covenant against incumbrances did not run with

as in the case of the covenant for seisin.¹ In the case of the other covenants the doctrine is necessarily inapplicable.²

IV. RELEASE OF REAL COVENANTS.—The covenantor may, at any time before breach, be released by the covenantee or his assignee from liability on the covenant, which release, if properly made, will be valid against assignees.³ But one who has parted with

the land as a burden, *i. e.* that where the covenant occurred in a mortgage it did not bind the assignee of the equity of redemption. As the estate taken by this assignee was already bound by the incumbrance, and the mortgagee was not called upon to pay it off in the first instance, the decision may have been a fair one, but it seems to rest on the doctrine that the covenant against incumbrances is broken as soon as made, which doctrine does not prevail in *Illinois*. See next note.

1. Covenants against incumbrances have been held to run with the land in *Richard v. Bent*, 59 Ill. 38; 14 Am. Rep. 1; *Knadler v. Sharp*, 36 Iowa 232; *Footo v. Burnet*, 10 Ohio 332; *M'Crady v. Brisbane*, 1 Nott & M. (S. Car.) 104; 9 Am. Dec. 676; *Cole v. Kimball*, 52 Va. 639.

In *New York* it is held to do so under *New York Rev. Code*, § 449, providing for the bringing of all actions in the name of the real party in interest. *Colby v. Osgood*, 29 Barb. (N. Y.) 339; *Roberts v. Levy*, 3 Abb. Pr. N. S. (N. Y.) 311; *Ernst v. Parsons*, 54 How. Pr. (N. Y.) 163; *Andrews v. Appel*, 22 Hun (N. Y.) 429.

In *Georgia* (Rev. Stats. 1882, § 2702), covenants against incumbrances run with the land by statute.

In one sense the covenant against incumbrances may truly be said to be broken as soon as made, for the very existence of an incumbrance is a breach (*INCUMBRANCES*, vol. 10, p. 361; *Rawle, Covenants*, 5th ed., § 77); but until actual loss, eviction, or its equivalent, occurs, only nominal damages are recoverable, and the covenant is therefore reasonably held to run with the land. *Dickson v. Desire*, 23 Mo. 163; *Walker v. Deaver*, 79 Mo. 675; *Taylor v. Priest*, 21 Mo. App. 685.

2. *Butler v. Barnes* (Conn. 1891), 21 Atl. Rep. 41; *Fairbrother v. Griffin*, 10 Me. 91; *Wyman v. Ballard*, 12 Mass. 304; *Flaniken v. Neal*, 67 Tex. 629; *Williams v. Wetherbee*, 1 Aik. (Vt.) 233; *Tillotson v. Prichard*, 60 Vt. 94.

One who takes a deed without covenants can sue on the covenant of warranty in the deed to his grantor. *Thomas v. Bland* (Ky.), 14 S. W. Rep. 955.

These covenants pass with the estate in cases of involuntary alienation, as by a sheriff's sale. *Redwine v. Brown*, 10 Ga. 311; *White v. Whitney*, 3 Met. (Mass.) 81; *White v. Presly*, 54 Miss. 313; *Fletcher v. Chamberlin*, 61 N. H. 438; *Carter v. Denman*, 23 N. J. L. 270; *Town v. Needham*, 3 Paige (N. Y.) 546; *Lewis v. Cook*, 13 Ired. (N. Car.) 196; *Markland v. Crump*, 1 Dev. & B. (N. Car.) 94; 27 Am. Dec. 230; *M'Crady v. Brisbane*, 1 Nott & M. (S. Car.) 104; 9 Am. Dec. 676.

3. *White v. Furtzwangler*, 81 Ga. 66.

In *England* such release can only be effected by an instrument of equal solemnity with that creating it, on the principle of *quo modo ligatur eodem modo dissolvitur*. *Rogers v. Payne*, 2 Wils. 376; *Kaye v. Waghorne*, 1 Taunt. 428; *Cordwint v. Hunt*, 8 Taunt. 596; *Harris v. Goodwind*, 2 M. & G. 405; *West v. Blakeway*, 2 M. & G. 729; *May v. Taylor*, 6 M. & G. 262, n. (a).

But in *America* it is held that though the covenant itself cannot be dissolved by matter *in pais* or by parol the rights under it can be released or varied by these means. *Jenks v. Robertson*, 2 Thomp. & C. (N. Y.) 255; *affd.* 58 N. Y. 621. Hence another deed between the parties, though not a technical release of covenants in a former deed, may operate as such. *Drury v. Tremont Imp. Co.*, 13 Allen (Mass.) 168.

Hence where notes and a mortgage were given in payment for a conveyance, with covenant of warranty, of land bound by the lien of a judgment, and the notes and mortgage were afterward surrendered and cancelled, on the covenantee's assuming the judgment, this was held to operate as a release of the covenant *pro tanto*, the covenantee's assignee having notice of the transaction. *Hardin v. Clark* (S. Car. 1890), 11 S. E. Rep. 304.

Where the grantee in a deed cove-

all his interest in the land cannot make such a release as against his own grantee or those claiming under him.¹ If the identical estate conveyed by a covenantor reverts in him, this operates to extinguish his covenants.²

As a real covenant ceases to run with the land after breach, it follows that the release of a covenant which is held to be broken as soon as made, must bind all assignees even without notice.³

V. LIMITATION OF REAL COVENANTS.—Where the first of several distinct covenants contained in the same instrument, and having the same object, is restricted, the restriction is held to apply to all.⁴ But where the first covenant is general it is not limited by a subsequent restricted covenant,⁵ unless an intention to restrain

nanted to pay the incumbrances on the premises conveyed, and afterward united with his grantor in a quit-claim deed to a third person, with a condition for the payment of incumbrances by him, the first grantee was released from his covenant. *Duraherr v. Rau* (Supreme Ct.), 15 N. Y. Supp. 344.

A covenant of warranty or against incumbrances may be released *pro tanto* by a parol agreement of the covenantee to discharge a particular incumbrance. *Bolles v. Beach*, 22 N. J. L. 680; 53 Am. Dec. 263.

1. The vested rights of an owner of property, under a covenant against certain erections by his neighbor, cannot be waived or impaired by the acts of their common grantor. *Dubois v. Darling*, 44 N. Y. Super. Ct. 436.

In *America* a release of covenants must be recorded in order to bind subsequent purchasers without notice. *Field v. Snell*, 4 Cush. (Mass.) 50; *Susquehanna Coal Co. v. Quick*, 61 Pa. St. 339. Article in 11 Am. L. Reg. 265, 266.

There is a *dictum* to the contrary in *Littlefield v. Getchell*, 32 Me. 392.

A subsequent purchaser is not affected by secret equities between the parties to a covenant running with the land. *Illinois Land etc. Co. v. Bonner*, 91 Ill. 114; *Sage v. Jones*, 47 Ind. 122; *Hunt v. Orwig*, 17 B. Mon. (Ky.) 84; 66 Am. Dec. 144; *Brown v. Staples*, 28 Me. 497; 48 Am. Dec. 504; *Alexander v. Schreiber*, 13 Mo. 271; *Suydam v. Jones*, 10 Wend. (N.Y.) 180; 25 Am. Dec. 552; *Greenvault v. Davis*, 4 Hill (N.Y.) 643; *Kellogg v. Wood*, 4 Paige (N.Y.) 616.

2. *Brown v. Metz*, 33 Ill. 339; 85 Am. Dec. 277; *Silverman v. Loomis*, 104 Ill. 137; *Birney v. Haun*, 3 A. K. Marsh. (Ky.) 322; 13 Am. Dec. 167; *Hobbs v. King*, 2 Metc. (Ky.) 139.

3. Rawle, Covenants (5th ed.), § 228.

4. In such a case the covenantor is held to have clearly indicated in the first covenant an intention to restrict his liability in regard to the matter to which the covenants refer and that he cannot have intended in the subsequent covenants to establish an unrestricted liability. *Browning v. Wright*, 2 B. & P. 13; *Food v. Wilson*, 8 Taunt. 543; *Stennard v. Forbes*, 6 Ad. & E. 572; *Nind v. Marshall*, 1 Brod. & Bing. 319; *Davis v. Lyman*, 6 Conn. 252; *Whallon v. Kauffman*, 19 Johns. (N. Y.) 98; *Bricker v. Bricker*, 11 Ohio St. 240.

But if the covenants be not so connected together as to necessarily refer to the same general object, as where one covenant refers to seisin exclusively, and another only to quiet enjoyment or incumbrances, the restriction of the first has no effect on those that follow it. *Howell v. Richards*, 11 East 633; *Young v. Raincock*, 7 C. B. 310; *Duvall v. Craig*, 2 Wheat. (U. S.) 45.

Thus where, on the assignment of a lease, the assignee covenanted to pay the original lessors the rent reserved as long as he should be in possession, and to indemnify the assignor as to such rent, the assignee was held bound by the covenant of indemnity after he had himself assigned the lease and had ceased to be in possession. *Crossfield v. Morrison*, 7 C. B. 286.

Where a mortgage was excepted from the covenant against incumbrances in a deed, but not from the covenant of warranty, the effect of the exception was confined to the former covenant only. *Estabrook v. Smith*, 6 Gray (Mass.) 572; 66 Am. Dec. 445. But see *Jackson v. Hoffman*, 9 Cow. (N. Y.) 271; *Bricker v. Bricker*, 11 Ohio St. 240.

5. *Gainsford v. Griffith*, 1 Saund. 58;

it be clearly indicated by the language used, or by the inconsistent nature of the covenants unless restricted,¹ nor does such general covenant enlarge the subsequent covenant.²

Where the objects of the various covenants are not the same, even though they concern the same land, they do not restrict each other's operation.³

The operation of a general covenant is always restricted to the estate or interest intended to be conveyed.⁴

VI. PARTIES LIABLE UPON REAL COVENANTS.—An action at law on a real covenant is local, and must be brought in a court having jurisdiction over the land with which the covenant runs,⁵ except where the distinction between local and transitory actions has been modified by statute.⁶ The liability upon an express covenant (as also the benefit of it) is joint or several according as the language used may indicate.⁷

Smith v. Compton, 3 B. & Ad. 189; Morrison v. Morrison, 38 Iowa 73; Phelps v. Decker, 10 Mass. 267; Cornell v. Jackson, 3 Cush. (Mass.) 506; Attorney Gen'l v. Parmort, 5 Paige (N. Y.) 620; Bender v. Fromberger, 4 Dall. (Pa.) 440; Peters v. Grubb, 21 Pa. St. 460; Rowe v. Heath, 23 Tex. 619.

1. Dunn v. Dunn, 3 Colo. 510; Cole v. Hawes, 2 Johns. Cas. (N. Y.) 203.

2. Sugd. Vendors (14th ed.) 605, where four propositions in regard to the effect of general and limited covenants upon each other, when contained in the same instrument, are laid down as deduced from the authorities.

3. Hughes v. Bennet, Cro. Car. 495; Kean v. Strong, 9 Ir. L. 74.

4. Clairickard v. Sidney, Hob. 273; Delmer v. McCabe, 14 Ir. L. (N. S.) 377; Corbin v. Healy, 20 Pick. (Mass.) 514; Knickerbocker v. Killmore, 9 Johns. (N. Y.) 106.

If the grant be of a life estate a covenant of warranty to the grantee and his heirs is restricted to the life estate. Adams v. Ross, 30 N. J. L. 505; 82 Am. Dec. 237; Roberts v. Forsythe, 3 Dev. (N. Car.) 26; Snell v. Young, 3 Ired. (N. Car.) 379.

Where a conveyance is expressed to be of the grantor's right, title and interest only, or other restrictive language is used, less restricted or general covenants for title apply only to the right or estate conveyed and cannot enlarge it. Kimball v. Semple, 25 Cal. 440; McNear v. McComber, 18 Iowa 14; Young v. Clippinger, 14 Kan. 148; Ballard v. Child, 46 Me. 153; Bates v. Foster, 59 Me. 158; 8 Am. Rep. 406; Hard v. Cushing, 7 Pick.

(Mass.) 169; Blanchard v. Brooks, 12 Pick. (Mass.) 47; Allen v. Holton, 20 Pick. (Mass.) 458; Sweet v. Brown, 12 Met. (Mass.) 175; 45 Am. Dec. 243; Stockwell v. Couillard, 129 Mass. 231; Wynn v. Harman, 5 Gratt. (Va.) 157; Hull v. Hull (W. Va. 1891), 13 S. E. Rep. 49.

But in Lull v. Stone, 37 Ill. 224, it was observed *obiter* that this doctrine would render the covenants deceptive and valueless. But where an intention to convey the land may be gathered from the deed, a further reference to the grantor's right, title and interest as being intended to be conveyed, is held not to restrict the covenants. Hubbard v. Apthorp, 3 Cush. (Mass.) 419; Mills v. Catlin, 22 Vt. 98. See also Whiting v. Dewey, 15 Pick. (Mass.) 434.

And where a quit-claim deed contained a covenant for further assurance when the grantor should obtain title from the United States, this was given its full effect. Hope v. Stone, 10 Minn. 141.

5. Birney v. Haim, 2 Litt. (Ky.) 262; Lienon v. Ellis, 6 Mass. 331; Clark v. Scudder, 6 Gray (Mass.) 122; White v. Sanborn, 6 N. H. 220. See ACTIONS, vol. 1, p. 184 f.

6. Oliver v. Loye, 59 Miss. 320; 21 Am. Law Register 600, with note.

7. Where an obligation is created by two or more, it is usually presumed to be joint. Shep. Touch. 375; Bardill v. Trustees of Schools, 4 Ill. App. 94; Carleton v. Tyler, 16 Me. 392; Comings v. Little, 24 Pick. (Mass.) 266; Donahoe v. Emery, 9 Metc. (Mass.) 67; Fields v. Squires, Deady (U. S.) 366.

The right of covenantees to sue

The character of an implied covenant in this respect depends upon the interest granted.¹

In *America* the authorities differ as to the effect of a discharge in bankruptcy upon covenants, no substantial breach of which has yet occurred.² The liability of an heir upon his ancestor's covenants is the same as that upon other special contracts, and both heir and devisee are affected as to such covenants by the statutes making real estate liable for a decedent's debts.³ The liability of an executor or administrator, to the extent of the assets in his hands, is the same whether the covenants are broken before or after the decedent's death.⁴ The assignee of a reversion after a leasehold estate is liable upon his assignor's covenants.⁵ For the liabilities of married women, see *MARRIED WOMEN*.⁶

VII. NOTICE TO DEFEND TITLE.—If the covenantor, or other person bound by any of the covenants for title, be notified, by the person entitled to their benefit, that suit has been brought on a paramount title, and be required to defend such suit, he cannot afterwards, if suit be brought against him on the covenants, dispute the validity of the paramount title,⁷ except in cases of

severally depends on their interest, but they must sue jointly if they can. *James v. Emery*, 8 Taunt. 245; *Poole v. Hill*, 6 M. & W. 835; *Harrold v. Whitaker*, 11 Ad. & E. (N. S.) 161; *Sharp v. Conkling*, 16 Vt. 355.

1. *Coleman v. Sherwin*, 1 Show. 79; 1 Salk. 137.

2. On the one hand it has been held that the object of the bankruptcy law was to bar all claims, even if contingent. *Bates v. West*, 19 Ill. 135; *Bailey v. Moore*, 21 Ill. 169; *Jemison v. Blowers*, 5 Barb. (N. Y.) 686; and see the *dictum* in *Shelton v. Pease*, 10 Mo. 473, as to a covenant against incumbrances.

On the other hand, it has been held that a discharge in bankruptcy cannot affect a claim which may not actually arise till long afterwards. *Bennett v. Bartlett*, 6 Cush. (Mass.) 225; *Bush v. Cooper*, 26 Miss. 599; 59 Am. Dec. 270 (*affd.* 18 How. (U. S.) 82); *Burrus v. Wilkinson*, 31 Miss. 537; *Magwire v. Riggan*, 44 Mo. 514.

3. Rawle, *Covenants* (5th ed.), § 309-311.

4. Hence damages accruing both before and after the covenantor's death can be recovered in the same action against his executor or administrator. *Hovey v. Newton*, 11 Pick. (Mass.) 421.

5. *Thursby v. Plant*, 1 Wms. Saund. 237 and notes.

6. Vol. 14, p. 589.

7. *Graham v. Tankersley*, 15 Ala. 634; *Boyd v. Whitfield*, 19 Ark. 469; *Hinds v. Allen*, 34 Conn. 195; *Wimberly v. Collier*, 32 Ga. 13; *Morgan v. Muldoon*, 82 Ind. 347; *Bever v. North*, 107 Ind. 544; *Booker v. Bell*, 3 Bibb (Ky.) 173; *Prewitt v. Kenton*, 3 Bibb (Ky.) 282; *Cox v. Strode*, 4 Bibb (Ky.) 4; 5 Am. Dec. 603; *Jones v. Waggoner*, 7 J. J. Marsh. (Ky.) 144; *Williamson v. Williamson*, 71 Me. 442; *Hamilton v. Cutts*, 4 Mass. 353; 3 Am. Dec. 222; *Merritt v. Morse*, 108 Mass. 270; *Mason v. Kellogg*, 38 Mich. 132; *Cummings v. Harrison*, 57 Miss. 275; *St. Louis v. Bissell*, 46 Mo. 157; *Chapman v. Holmes*, 10 N. J. L. 20; *Morris v. Rowan*, 17 N. J. L. 307; *Cooper v. Watson*, 10 Wend. (N. Y.) 205; *Miner v. Clark*, 15 Wend. (N. Y.) 427; *Kelly v. Dutch Church*, 2 Hill (N. Y.) 105; *Adams v. Conover*, 22 Hun (N. Y.) 424; *Dalton v. Bowker*, 8 Nev. 190; *King v. Kerr*, 5 Ohio 158; 29 Am. Dec. 777; *Smith v. Dixon*, 27 Ohio St. 471; *Bender v. Fromberger*, 4 Dall (Pa.) 436; *Swenk v. Stout*, 2 Yeates (Pa.) 470; *Leather v. Poultney*, 4 Binn. (Pa.) 356; *Collingwood v. Irwin*, 3 Watts (Pa.) 310; *Ives v. Niles*, 5 Watts (Pa.) 323; *Paul v. Wittman*, 3 W. & S. (Pa.) 409; *Terry v. Drabenstadt*, 68 Pa. St. 400; *Wilson v. McElwee*, 1 Strobb. (S. Car.) 65; *Davis v. Wilbourne*, 1 Hill (S. Car.) 28; 26 Am. Dec. 154; *Middleton v. Thompson*, 1 Spears. (S. Car.) 67;

Williams v. Burg, 9 Lea (Tenn.) 455; Williams v. Wetherbee, 2 Aik. (Vt.) 337; Park v. Bates, 12 Vt. 381; Pitkin v. Leavitt, 13 Vt. 279; Brown v. Taylor, 13 Vt. 631; Turner v. Goodrich, 26 Vt. 708; Swasey v. Brooks, 30 Vt. 692; Wendel v. North, 24 Wis. 223; Somers v. Schmidt, 24 Wis. 419; 1 Am. Rep. 191; Eaton v. Lyman, 24 Wis. 438.

The notice being for the covenantee's benefit, the covenantor has no right to insist on being made a party to the adverse suit. Boyle v. Edwards, 114 Mass. 373; Linderman v. Berg, 12 Pa. St. 301. But if he be notified, and neglect or refuse to become a party to the suit, then the judgment will be conclusive against him, and it is immaterial whether valid defences might have been made or not, since he did not choose to make them. Elliott v. Sanfley (Ky. 1889), 11 S. W. Rep. 200; Chamberlain v. Preble, 11 Allen (Mass.) 370; Jackson v. Marsh, 5 Wend. (N. Y.) 44.

Where notice was given to the covenantor's agent, who persuaded the defendant to discharge his counsel and retain another, and who practically carried on and controlled the litigation, the covenantor, though not made a party, was held bound by the result of the suit and responsible for the manner in which it was conducted. Bellows v. Litchfield (Iowa 1891), 48 N. W. Rep. 1062.

In *North Carolina* notice does not preclude the covenantor from disputing the validity of the paramount title, he being apparently regarded not being properly a party to the adverse suit. Martin v. Cowles, 2 Dev. & B. (N. Car.) 101; Wilder v. Ireland, 8 Jones (N. Car.) 88.

Even where notice is duly given, the covenantee must show, besides the fact of eviction, that the title under which the adverse judgment was obtained was not one derived subsequent to the execution of the deed to himself. Booker v. Bell, 3 Bibb (Ky.) 173; Adams v. Conover, 22 Hun (N. Y.) 424; Wilson v. McElwee, 1 Strobh. (S. Car.) 66; Pitkin v. Leavitt, 13 Vt. 384; Swasey v. Brooks, 30 Vt. 692.

Notice Not Essential.—The giving of such notice, though a practice as old as the covenants themselves, and adopted in analogy to the ancient practice of vouching to warranty, is not, as that practice was, essential to the success

of the covenantee in his subsequent action. Duffield v. Scott, 3 T. R. 370; Smith v. Compton, 3 B. & Ad. 408; Claycomb v. Munger, 51 Ill. 378; Rhode v. Green, 26 Ind. 83; King v. Kerr, 5 Ohio 158; 22 Am. Dec. 777.

Without such notice, although the record of the adverse proceeding may perhaps be evidence of eviction, yet by the weight of authority it is not even *prima facie* evidence, as against the covenantor, that the eviction was by title paramount. The reason is found in the familiar principle that a man ought not to be bound by a judgment pronounced in a proceeding to which he is not, actually or constructively, a party. King v. Norman, 4 C. B. 883; Graham v. Tankersley, 15 Ala. 634; Clements v. Collins, 59 Ga. 124; Sisk v. Woodruff, 15 Ill. 15; Rhode v. Green, 26 Ind. 83; Walton v. Cox, 67 Ind. 164; Booker v. Bell, 3 Bibb (Ky.) 175; Prewitt v. Kenton, 3 Bibb (Ky.) 282; Devour v. Johnson, 3 Bibb (Ky.) 410; Cox v. Strode, 4 Bibb (Ky.) 4; 5 Am. Dec. 603; Hanson v. Buckner, 4 Dana (Ky.) 254; 29 Am. Dec. 401; Ryerson v. Chapman, 66 Me. 557; Fields v. Hunter, 8 Mo. 128; Wilder v. Ireland, 8 Jones (N. Car.) 87; Stevens v. Jack, 3 Yerg. (Tenn.) 403.

The record of the judgment has been held to be not even evidence of an eviction unless accompanied by proof of an actual or constructive change of possession. McDowell v. Hunter, Dudley (Ga.) 4; Hoy v. Taliaferro, 8 Smed. & M. (Miss.) 741; Dennis v. Heath, 11 Smed. & M. (Miss.) 218; 49 Am. Dec. 51; Webb v. Alexander, 7 Wend. (N. Y.) 286; Miller v. Avery, 2 Barb. Ch. (N. Y.) 582; Paul v. Witman, 3 W. & S. (Pa.) 407; Feriss v. Harshea, Mart. & Y. (Tenn.) 55.

The view that such record is evidence of an eviction is, however, taken in some States. Rhode v. Green, 26 Ind. 83; Booker v. Bell, 3 Bibb (Ky.) 173; Hanson v. Buckner, 4 Dana (Ky.) 254; 29 Am. Dec. 401.

The evidence of the execution of the writ of possession may, of course, appear upon the record of this adverse suit, in which case no other evidence would be needed. Sisk v. Woodruff, 15 Ill. 15; Fields v. Hunter, 8 Mo. 128.

For notice in connection with the measure of damages, see *infra*, this title, *Measure of Damages for Breach*.

negligence, fraud or collusion¹ on the part of the defendant in the prior suit. In some States notice of a suit brought by the covenantee himself to obtain possession has a like effect.² Such notice must be timely, unequivocal, certain, and explicit,³ but the rule as to whether or not it should be in writing differs in different States.⁴

VIII. MEASURE OF DAMAGES FOR BREACH.—As a general rule the measure of damages for breach of the covenants for seisin, for right to convey, for quiet enjoyment, and of warranty is the value of the land when the covenant sued on⁵ was made (which value is estimated by the consideration money named in the deed), with interest, but without any allowance for a rise or fall in value since the sale, or for improvements made,⁶ except where

1. *McConnell v. Downs*, 48 Ill. 271; *Willson v. McElwee*, 1 Strobb. (S. Car.) 66.

2. *Gragg v. Richardson*, 25 Ga. 570; *White v. Williams*, 13 Tex. 258; *Pitkin v. Leavitt*, 13 Vt. 379; *Brown v. Taylor*, 13 Vt. 637; 37 Am. Rep. 618.

In *Ferrell v. Alder*, 8 Humph. (Tenn.) 44, it was held a covenantor was not bound by notice in such a proceeding.

In *Louisiana*, the Code, art. 2495, provides for notice in such cases.

3. The covenantee must do more than merely notify his covenantor; the latter must be required to defend the title. *Boyd v. Whitfield*, 19 Ark. 470; *Collins v. Baker*, 6 Mo. App. 588; *Paul v. Witman*, 3 W. & S. (Pa.) 410. And he must be given sufficient time in which to prepare to do so. *Somers v. Schmidt*, 24 Wis. 421; 1 Am. Rep. 191.

Unless the covenantor be a party to the record of the adverse suit, his reception of the notice is a question of fact. *Collingwood v. Irwin*, 3 Watts (Pa.) 310.

But unless the defendant disputes the propriety of the notice given or the fact of its having been served upon him, it will be treated as proper and as having been actually served. *Cook v. Curtis*, 68 Mich. 671.

4. Notice in writing was required in *Mason v. Kellogg*, 38 Mich. 132; *Dalton v. Bowker*, 8 Nev. 200. And the propriety of such notice, in view of the fact that if the covenantor died after receiving the notice, his representatives would be bound by it, was pointed out in *Somers v. Schmidt*, 24 Wis. 417.

Verbal notice was held sufficient in *Cummings v. Harrison*, 57 Miss. 275; *Miner v. Clark*, 15 Wend. (N. Y.) 427.

5. The purchase money which measures the value is always that received by the covenantor who made the covenant sued upon, not the money paid by the plaintiff if there have been mesne conveyances, whether the latter amount be less or greater than the former. *Brooks v. Black*, 68 Miss. 161.

6. The leading American cases are *Staats v. Ten Eyck*, 3 Cal. (N. Y.) 111, which decided that a subsequent rise in value could not be allowed to increase the damages. *Bender v. Fromberger*, 4 Dall. (Pa.) 442, where a similar decision was made as to improvements; and *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1; 4 Am. Dec. 229, where the rule was laid down as to both points. The reason for this doctrine is obvious. What the parties had in view when the covenants were made was the land and its price at that time, and the operation of the contract is properly confined to its subject-matter.

These cases have been followed in *Logan v. Moulder*, 1 Ark. 323; 33 Am. Dec. 338; *Carvill v. Jacks*, 43 Ark. 439; *Barnett v. Hughey* (Ark.), 15 S. W. Rep. 464; *McGary v. Hastings*, 39 Cal. 360; 2 Am. Rep. 456; *Weber v. Anderson*, 73 Ill. 439; *Frazer v. Peoria Co.*, 74 Ill. 282; *Reese v. McQuilkin*, 7 Ind. 450; *Lacey v. Marnan*, 37 Ind. 168; *Stewart v. Noble*, 1 Greene (Iowa) 28; *Swafford v. Whipple*, 3 Greene (Iowa) 264; 54 Am. Dec. 498; *Wilhelm v. Fimple*, 31 Iowa 137; 7 Am. Rep. 117; *Jones v. Sharp*, 72 Iowa 237; *Stebbins v. Wolf*, 33 Kan. 765; *Cummins v. Kennedy*, 3 Litt. (Ky.) 118; 14 Am. Dec. 45; *Cox v. Strode*, 2 Bibb (Ky.) 279; 5 Am. Dec. 603; *Booker v. Bell*, 3 Bibb (Ky.) 175; *Hanson v. Buckner*, 4 Dana (Ky.) 253; 29 Am. Dec. 401;

the covenants are in a lease,¹ and where the improvements form a part of the consideration itself.² In a few States this rule is established by statute.³ Where the covenant is broken as to a part of the land only, or the land has been divided, and suit is brought by the owner of a part of the original grant, damages are recoverable in proportionate measure.⁴ If the covenantee has in point of fact lost less than the consideration money and interest, his recovery is limited to the amount of

Pence v. Duvall, 9 B. Mon. (Ky.) 49; Boyer v. Amet, 41 La. Ann. 721; Crisfield v. Storr, 36 Md. 129; 11 Am. Rep. 480; Cook v. Curtis, 68 Mich. 611; Brooks v. Black, 68 Miss. 161; Tapley v. Lebeaume, 1 Mo. 550; Martin v. Long, 3 Mo. 391; Dickson v. Desire, 23 Mo. 166; Long v. Matthews, 23 Mo. 437; Taylor v. Holter, 1 Mont. 688; Dalton v. Bowker, 3 Nev. 190; Hoffman v. Bosch, 18 Nev. 360; Willson v. Willson, 25 N. H. 236; Foster v. Thompson, 41 N. H. 379; Stewart v. Drake, 9 N. J. L. 142; Holmes v. Sinnickson, 14 N. J. L. 313; Morris v. Rowan, 17 N. J. L. 304; Bennett v. Jenkins, 13 Johns. (N. Y.) 50; Kelly v. Dutch Church, 2 Hill (N. Y.) 116; Kinney v. Watts, 14 Wend. (N. Y.) 38; Peters v. McKeon, 4 Den. (N. Y.) 550; Bowne v. Wolcott, (N. Dak. 1891), 48 N. W. Rep. 426; Phillips v. Smith, 1 Car. Law Repos. (N. Car.) 475; 6 Am. Dec. 542; Wilson v. Forbes, 2 Dev. (N. Car.) 30; Williams v. Beeman, 2 Dev. (N. Car.) 483; Nesbit v. Brown, 1 Dev. Eq. (N. Car.) 30; West v. West, 76 N. Car. 45; Bacchus v. McCoy, 3 Ohio 211; 17 Am. Dec. 585; King v. Kerr, 5 Ohio 154; 22 Am. Dec. 777; Foote v. Burnet, 10 Ohio 317; Clark v. Parr, 14 Ohio 118; 45 Am. Dec. 529; Wade v. Comstock, 11 Ohio St. 71; Vail v. Junction R. Co., 1 Cin. Sup. Ct. (Ohio) 573; King v. Pyle, 8 S. & R. (Pa.) 166; McClowry v. Croghan, 1 Grant's Cas. (Pa.) 307; Brown v. Dickerson, 12 Pa. St. 372; Weiting v. Nissley, 13 Pa. St. 355; McClure v. Gamble, 27 Pa. St. 288; Cox v. Henry, 32 Pa. St. 12; Hood's Appeal (Pa. 1886), 7 Atl. Rep. 137; Furman v. Elmore, 2 Nott. & M. (S. Car.) 189 n.; Henning v. Withers, 3 Brev. (S. Car.) 458; Wallace v. Talbot, 1 McCord (S. Car.) 468; Ware v. Weatherall, 2 McCord (S. Car.) 413; Earle v. Middleton, Cheves (S. Car.) 127; Pearson v. Davis, 1 McMull. (S. Car.) 37; Elliott v. Thompson, 4 Humph. (Tenn.) 101; 40 Am. Dec. 630; Shaw v. Wilkins, 8 Humph. (Tenn.) 647; 49

Am. Dec. 692; Aiken v. Suttle, 4 Lea (Tenn.) 134; Moses v. Wallace, 7 Lea (Tenn.) 413; Mette v. Dow, 9 Lea (Tenn.) 93; Simpson v. Belvin, 37 Tex. 674; Nelson v. Matthews, 2 Hen. & M. (Va.) 164; 3 Am. Dec. 620; Stout v. Jackson, 2 Rand (Va.) 132; Threlkeld v. Fitzhugh, 2 Leigh (Va.) 451; Jackson v. Turner, 5 Leigh (Va.) 119; Haffey v. Birchetts, 11 Leigh (Va.) 188; Click v. Green, 77 Va. 827; Moreland v. Metz, 24 W. Va. 119; 49 Am. Rep. 246; Butcher v. Peterson, 26 W. Va. 447; 53 Am. Rep. 89; Blossom v. Knox, 3 Chand. (Wis.) 295; Lawton v. Howe, 14 Wis. 241; Messer v. Oestreich, 52 Wis. 684; McInnis v. Lyman, 62 Wis. 191; Conrad v. Trustees etc., 64 Wis. 258; Hopkins v. Lee, 6 Wheat. (U. S.) 118; Patrick v. Leach, 1 McCrary (U. S.) 250.

Taxes paid by the covenantee are not recoverable. Daggett v. Reas (Wis. 1891), 48 N. W. Rep. 127.

1. Here the measure of damages is the value of the unexpired term to the lessee, together with the costs of the action of ejectment and the mesne profits recovered therein. Williams v. Burrell, 1 C. B. 402; Lock v. Furze, 19 C. B., N. S. 96; L. R., 1 C. P. 441; Rolph v. Crouch, L. R., 3 Ex. 44; Dexter v. Manley, 4 Cush. (Mass.) 14.

The value of the term here taken, is the value over and above the rent reserved. Mack v. Patchin, 42 N. Y. 167; 1 Am. Rep. 506.

In Lanigan v. Kille, 97 Pa. St. 120; 39 Am. Rep. 797, no allowance was made for improvements, though their loss was very serious.

2. See Rawle, Covenants (5th ed.), § 170.

3. California, Code 1885, § 3304; Georgia, Rev. Code, § 2948; North Dakota, Comp. Laws, § 4854.

4. Breach as to Part of Land.—Here the damages must be assessed according to a valuation of the price of the part as to which title has failed, and the proportion which it bears to the

injury sustained.¹ The recital of the consideration is not conclusive as to the amount,² and where no amount is named, the

price of the whole estate conveyed. *Rolph v. Crouch*, L. R., 3 Ex. 44; *Major v. Dunnivant*, 25 Ill. 256; *Wadhams v. Innes*, 4 Ill. App. 642; *McNear v. McComber*, 18 Iowa 12; *Mischke v. Baughn*, 52 Iowa 528; *Blanchard v. Hoxie*, 34 Me. 376; *Blanchard v. Blanchard*, 48 Me. 177; *Leland v. Stone*, 10 Mass. 463; *Cornell v. Jackson*, 3 Cush. (Mass.) 510; *Partridge v. Hatch*, 18 N. H. 494; *Winnepiseogee Paper Co. v. Eaton*, 65 N. H. 13; *Morris v. Phelps*, 5 Johns. (N. Y.) 49; 4 Am. Dec. 323; *Giles v. Dugro*, 1 Duer (N. Y.) 331; *Hunt v. Raplee*, 44 Hun (N. Y.) 149; *Hymes v. Van Cleef*, (Supreme Ct.), 15 N. Y. Supp. 341; *Dickens v. Sheppard*, 3 Murph. (N. Car.) 526; *Lee v. Dean*, 3 Whart. (Pa.) 316; *Beaupland v. McKeen*, 28 Pa. St. 134; 70 Am. Dec. 115; *Wallace v. Talbot*, 1 McCord (S. Car.) 467; *Raines v. Calloway*, 27 Tex. 685; *Beverley v. Lawson*, 3 Munf. (Va.) 317; *Butcher v. Peterson*, 26 W. Va. 447; 53 Am. Rep. 89; *Griffin v. Reynolds*, 17 How. (U. S.) 611.

Or if the premises were sold at a gross price of so much per acre, then that amount will be allowed for each acre lost, with interest. *Flynn v. White Breast Coal etc. Co.*, 72 Iowa 738; *Nelson v. Matthews*, 2 Hen. & M. (Va.) 164; 3 Am. Dec. 620.

But if the land is not of equal value all over, though sold at a uniform rate per acre, then the proportion of price recoverable for the land lost must be determined from the actual proportionate value of such land. *Semple v. Wharton*, 68 Wis. 626.

Where no evidence is given of the value or price of that part of the land as to which the title has failed, nominal damages only can be recovered. *Lawless v. Evans* (Tex. 1889), 14 S.W. Rep. 1017.

If the plaintiff owns only a portion of the land as to which the covenant is broken, his right to recover his proportionate share of the consideration originally received by the defendant is not affected by the fact that the rights of action of the owners of other parts of the land against the defendant may have been barred by the Statute of Limitations. *Whitzman v. Hirsh*, 87 Tenn. 513.

1. *Caswell v. Wendall*, 4 Mass. 108;

Spring v. Chase, 22 Me. 502; 39 Am. Dec. 595; *Tanner v. Livingston*, 12 Wend. (N. Y.) 82; *Farmers' Bank v. Glenn*, 68 N. Car. 35.

Hence if the plaintiff has bought in the paramount title, he can recover only the sum paid to secure it, and that only if it do not exceed in amount the original purchase money and interest. *Anderson v. Knox*, 2 Ala. 156; *Doremus v. Bond*, 8 Blackf. (Ind.) 368; *Brandt v. Foster*, 5 Iowa 290; *Kimball v. Bryant*, 25 Mo. 496; *Petrie v. Folz*, 54 N. Y. Super. Ct. 225; *Loomis v. Bedel*, 11 N. H. 74.

If he has agreed to pay a certain sum for the paramount title, that sum is recoverable as if had to be actually paid. *Hooper v. Sac Co. Bank*, 72 Iowa 280.

Cases may arise where the covenantee, though evicted, sustains no real damage. Thus where he had had the use of the land for two years, and was repaid by the evictor all taxes paid by the covenantor (which exceeded the purchase money of the land) as well as by himself, no damages were held to be recoverable, but the covenantee was not required to account to the covenantor for the money received from the evictor. *Danforth v. Smith*, 41 Kan. 146.

2. Parol evidence is admissible to show that the consideration was greater than that expressed. *Belden v. Seymour*, 8 Conn. 304; 21 Am. Dec. 661; *Dexter v. Manley*, 4 Cush. (Mass.) 26; *Guinotte v. Chouteau*, 34 Mo. 154.

Or that it was less. *Martin v. Gordon*, 24 Ga. 535; *Fields v. Willingham*, 49 Ga. 344; *Swafford v. Whipple*, 3 Greene (Iowa) 267; 54 Am. Dec. 498; *Williamson v. Test*, 24 Iowa 139; *Blood v. Wilkins*, 43 Iowa 567; *Wachendorf v. Lancaster*, 66 Iowa 458; *Harlow v. Thomas*, 15 Pick. (Mass.) 70; *Cook v. Curtis*, 68 Mich. 611; *Moore v. McKee*, 5 Smed. & M. (Miss.) 238; *Morse v. Shattuck*, 4 N. H. 229; 17 Am. Dec. 419; *Bingham v. Weiderwax*, 1 N. Y. 514; *Vail v. Junction R. Co.*, 1 Cin. Super. Ct. (Ohio) 571; *Cox v. Henry*, 32 Pa. St. 19; *Patrick v. Leach*, 1 McCrary (U. S.) 250; but see *Yelton v. Hawkins*, 2 J. J. Marsh. (Ky.) 2.

Or that no consideration was paid for the part as to which title failed, it having been included in the deed by

measure of damages must be obtained from other evidence as to the value of the land.¹

In *Connecticut, Maine, Massachusetts, and Vermont* the value of the land at the time of eviction is recoverable in an action for breach of the covenant for quiet enjoyment or for that of warranty.²

The interest allowed as above stated, over and above that which has accrued since eviction or surrender,³ is intended to counterbalance the amount paid or payable by the plaintiff to the real owner as mesne profits.⁴ Costs incurred in defending

mistake. *Leland v. Stone*, 10 Mass. 463; *Barus v. Learned*, 5 N. H. 264; *Nutting v. Herbert*, 35 N. H. 127.

But where a trustee was held personally liable on his covenants, he was not allowed to show that the consideration was not, wholly or in part, received by him or for his use. *Bloom v. Wolfe*, 50 Iowa 286.

Where payments have been made under an antecedent contract in pursuance of which the deed was executed, the grantee is not concluded by the amount of consideration recited in the deed, but may recover the actual consideration including previous payments of principal and interest under such contract. *Devine v. Lewis*, 38 Minn. 24.

And where a note was given for part of the purchase money, the interest paid on such note is recoverable as part of the consideration. *Bellows v. Litchfield* (Iowa 1891), 48 N. W. Rep. 1062.

1. *Smith v. Strong*, 14 Pick. (Mass.) 128.

The same rule holds where matters in which other parties were concerned enter into the consideration. *Byrnes v. Rich*, 5 Gray (Mass.) 518.

Where the defendant received part of the consideration only, it was held that the plaintiff could recover, at his election, either that part or the value of the land when conveyed. *Staples v. Dean*, 114 Mass. 125.

Rule as to Exchanges.—In such cases, there being no consideration money, the measure of damages is the value, at the time of the exchange, of the land conveyed by the covenantor, with interest, and if the parties agreed on any value at that time, this may be deemed the true value. *White v. Street*, 67 Tex. 177.

2. These States follow the prevailing doctrine as to the covenants for seisin and for right to convey. *Mitchell v.*

Hazen, 4 Conn. 495; 10 Am. Dec. 169; *Hartford etc. Ore Co. v. Miller*, 41 Conn. 112; *Stubbs v. Page*, 2 Me. 278; *Montgomery v. Reed*, 69 Me. 510; *Marston v. Hobbs*, 2 Mass. 433; 3 Am. Dec. 61; *Sumner v. Williams*, 8 Mass. 221; *Nichols v. Walter*, 8 Mass. 243; *Smith v. Strong*, 14 Pick. (Mass.) 128.

But in the case of the other covenants, their courts hold that there should be compensation for improvements, apparently as a matter of public policy. *Horsford v. Wright, Kirby* (Conn.) 3; 1 Am. Dec. 8; *Sterling v. Peet*, 14 Conn. 245; *Cushman v. Blanchard*, 2 Me. 268; 21 Am. Dec. 76; *Swett v. Patrick*, 12 Me. 1; *Hardy v. Nelson*, 27 Me. 525; *Gore v. Brazier*, 3 Mass. 523; 3 Am. Dec. 182; *Caswell v. Wendell*, 4 Mass. 108; *Bigelow v. Jones*, 4 Mass. 512; *Norton v. Babcock*, 2 Met. (Mass.) 516; *White v. Whitney*, 3 Met. (Mass.) 89; *Cecconi v. Rodden*, 147 Mass. 64; *Drury v. Shumway*, 1 D. Chip. (Vt.) 111; *Park v. Bates*, 12 Vt. 387.

For a criticism of this view, see *Rawle, Covenants* (5th ed.), §§ 165-167.

3. The amount of interest recoverable since the use of the land was lost depends on the Statutes of Limitation. Six years' interest only is allowed in *Wisconsin*. *Messer v. Oestreich*, 52 Wis. 684; *Daggett v. Reas* (Wis. 1891), 48 N. W. Rep. 127.

4. There can be no doubt of the plaintiff's right to recover interest for such time as he has been held liable to the real owner for mesne profits. *Devine v. Lewis*, 38 Minn. 24; *Brooks v. Black*, 68 Miss. 161; *Brown v. Hearon*, 66 Tex. 63.

The general rule is, that there can be recovery of interest further back than the eviction or surrender, unless mesne profits have been recovered. *Collier v. Cowger*, 52 Ark. 322; *Burton v. Reeds*, 20 Ind. 91; *Kyle v. Fauntleroy*,

an action of ejectment are also recoverable,¹ and so in some States are counsel fees and other expenses of suit.²

9 B. Mon. (Ky.) 620; *White v. Tucker*, 52 Miss. 145; *Hutchins v. Rountree*, 77 Mo. 500; *Staats v. Ten Eyck*, 3 Cal. (N. Y.) 111; *Guthrie v. Pugsley*, 12 Johns. (N. Y.) 126; *Williams v. Beeman*, 2 Dev. (N. Car.) 483; *Patterson v. Stewart*, 6 W. & S. (Pa.) 527; 40 Am. Dec. 586; *Wacker v. Straub*, 88 Pa. St. 32; *McGuffey v. Humes*, 85 Tenn. 26; *Flint v. Steadman*, 36 Vt. 210; *Rich v. Johnson*, 1 Chand. (Wis.) 19; 52 Am. Dec. 144.

Hence, where no claim appears to be made for mesne profits, interest is recoverable from the date of eviction or surrender only. *Lambert v. Estes*, 99 Mo. 604.

And where the period for which mesne profits are recoverable is restricted by the Statute of Limitations, interest is not recoverable for any longer period. *Lawless v. Collier*, 19 Mo. 486; *Ela v. Card*, 2 N. H. 175; 9 Am. Dec. 46; *Caulkins v. Harris*, 9 Johns. (N. Y.) 324; *Bennet v. Jenkins*, 13 Johns. (N. Y.) 50; *Clark v. Parr*, 14 Ohio 118; 45 Am. Dec. 529.

In the absence of evidence showing that interest ought to be recovered from the date of eviction only, a judgment for interest from the date of the purchase will not be reversed. *Reese v. McQuilkin*, 7 Ind. 450.

It has been held that the plaintiff can recover interest wherever he may be compelled to account for mesne profits, though he has not actually done so. *Sumner v. Williams*, 8 Mass. 222; *Foster v. Thompson*, 41 N. H. 373.

1. The taxed costs of an action of ejectment are usually allowed as damages for breach of covenant, even though the covenantor has not had notice of the ejectment. *Cox v. Strode*, 2 Bibb (Ky.) 273; 5 Am. Dec. 603; *Barnett v. Montgomery*, 6 T. B. Mon. (Ky.) 332; *Kyle v. Fauntleroy*, 9 B. Mon. (Ky.) 622; *Robertson v. Lemon*, 2 Bush (Ky.) 302; *Sumner v. Williams*, 8 Mass. 162; *Leffingwell v. Elliott*, 8 Pick. (Mass.) 457; 19 Am. Dec. 343; *Stewart v. Drake*, 9 N. J. L. 141; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Morris v. Rowan*, 17 N. J. L. 306; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1; 4 Am. Dec. 229; *Waldo v. Long*, 7 Johns. (N. Y.) 174; *Bennett v. Jenkins*, 13 Johns. (N. Y.) 51; *Richert v. Snyder*, 9 Wend. (N. Y.) 423;

Pitkin v. Leavitt, 13 Vt. 379; *Keeler v. Wood*, 30 Vt. 242.

In *England*, the same rule prevails, although as the costs include attorney's fees, they are much higher. *Smith v. Compton*, 3 B. & Ad. 189; *Rolph v. Crouch*, L. R., 3 Ex. 44. So in Ontario Trust etc. Co. v. Covert, 39 U. C., Q. B. 327.

In *Swett v. Patrick*, 12 Me. 10, the recovery of costs seems to have been thought dependent on the giving of notice.

In *Terry v. Drabenstadt*, 68 Pa. St. 400, the plaintiff was not allowed to recover costs on the ground that the covenantor having been notified and failed to appear, they had incurred on the former's responsibility. The costs recoverable are those of actions of ejectment only, not those incurred in defending an action for mesne profits. *Staats v. Ten Eyck*, 3 Cal. (N. Y.) 111.

2. Counsel fees and other necessary expenses incurred in the ejectment suit are, in some States, not recoverable as damages, because fixed by no certain standard. *Gragg v. Richardson*, 25 Ga. 566; *Brooks v. Black*, 68 Miss. 161; *Jeter v. Glenn*, 9 Rich. (S. Car.) 380; *Williams v. Burg*, 9 Lea (Tenn.) 455; *Turner v. Miller*, 42 Tex. 418; 19 Am. Rep. 47.

In some cases this rule has been applied as to fees and expenses incurred after the covenantor had assumed the defense. *Wimberly v. Collier*, 32 Ga. 13; *Kennison v. Taylor*, 18 N. H. 220.

In *Swartz v. Ballou*, 47 Iowa 188; 29 Am. Rep. 470, it was held that only reasonable counsel fees, which the plaintiff had actually paid or was under obligation to pay, could be recovered.

In *Dale v. Shively*, 8 Kan. 276, it was said that costs and counsel fees only could be recovered.

Counsel fees and expenses have in some cases been refused unless the covenantor had notice of the ejectment. *Yokum v. Thomas*, 15 Iowa 69; *Crisfield v. Storr*, 36 Md. 129; 11 Am. Rep. 480; *Hood's Appeal* (Pa. 1889), 7 Atl. Rep. 137.

In other cases they have been allowed because notice had been given. *Harding v. Larkin*, 41 Ill. 420; *McKee v. Bain*, 11 Kan. 569;

Where the covenants for seisin and for right to convey are held to be broken as soon as made, the right of action upon them accrues at once, if at all, and the better rule would seem to be that but nominal damages only are recoverable, if no actual loss has been sustained,¹ and such recovery is no bar to a subsequent action for substantial damages for breach of the covenant, for quiet enjoyment or of warranty.² If there be a partial breach only, as where the grantor has an estate less than a fee in the entire premises granted, then substantial damages may be recovered for the title lost, over and above the value of that actually acquired.³

Where the title covenanted for is a tax title, and the covenantee subsequently buys in the paramount title, taxes paid by the covenantor cannot be set off.⁴

The remedy on the covenant for further assurance is usually in equity, and apparently only nominal damages can be recovered unless substantial loss has actually resulted from the breach.⁵ As to the covenant against incumbrances, see INCUM-

Williamson v. Williamson, 71 Me. 442; *Haynes v. Stevens*, 11 N. H. 28; *Kingsbury v. Smith*, 13 N. H. 125; *Winnepiseogee Paper Co. v. Eaton*, 65 N. H. 13; (where interest on such expenses was allowed); *Lane v. Fury*, 32 Ohio St. 574; *Rowe v. Heath*, 23 Tex. 620.

In other cases they have been allowed without regard to notice. *Robertson v. Lemon*, 2 Bush (Ky.) 303; *Ryerson v. Chapman*, 66 Me. 557; *Sumner v. Williams*, 8 Mass. 162; *Drew v. Towle*, 30 N. H. 531; 64 Am. Dec. 309; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416; *McAlpin v. Woodruff*, 11 Ohio 130; *Pitkin v. Leavitt*, 13 Vt. 279; *Turner v. Goodrich*, 26 Vt. 709; *Keeler v. Wood*, 30 Vt. 242. So in *Holmes v. Sinnickson*, 15 N. J. L. 313, as to "counsel fees taxed in the fee bill."

If the plaintiff has himself prosecuted a suit to obtain the possession covenanted for but never given, he can apparently recover his costs and counsel fees as part of the damages for breach of covenant. *Dale v. Shively*, 8 Kan. 276.

But he cannot recover expenses incurred in an action brought by him to set aside a tax sale, he not having notified his grantor, and the tax title having never been actually established. *Winnepiseogee Paper Co. v. Marsh*, 64 N. H. 531.

Covenants to indemnify from all loss, damage, etc., consequent on a defective title cover all damages. See

Robinson v. Bakewell, 25 Pa. St. 426; *Cox v. Henry*, 32 Pa. St. 21; *Anderson v. Washabaugh*, 43 Pa. St. 115.

1. *Ogden v. Ball*, 38 Minn. 237. In *Dickey v. Weston*, 61 N. H. 23, it was said that the assessment of damages would be deferred until actual loss was sustained.

2. *Ogden v. Ball*, 40 Minn. 94.

3. *Tierney v. Whiting*, 2 Colo. 620; *Lockwood v. Sturdevant*, 6 Conn. 373; *Hubbard v. Norton*, 10 Conn. 435; *Phillips v. Reichert*, 17 Ind. 120; 79 Am. Dec. 463; *Hoot v. Spade*, 20 Ind. 326; *Wright v. Nipple*, 92 Ind. 310; *Dale v. Shively*, 8 Kan. 276; *Blanchard v. Hoxie*, 34 Me. 376; *Morrison v. McArthur*, 43 Me. 567; *Bryan v. Smallwood*, 4 Har. & M. (Md.) 483; *Lucas v. Wilcox*, 135 Mass. 77; *Ela v. Card*, 2 N. H. 175; 9 Am. Dec. 46; *Guthrie v. Pugsley*, 12 Johns. (N. Y.) 126; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416; *Tanner v. Livingston*, 12 Wend. (N. Y.) 83; *Furniss v. Ferguson*, 15 N. Y. 443; *Adams v. Conover*, 22 Hun (N. Y.) 424; *Nyce v. Obertz*, 17 Ohio 76; *Recohs v. Younglove*, 8 Baxt. (Tenn.) 385; *Mills v. Catlin*, 22 Vt. 98.

4. The covenantor acquires no interest in the land by the payment of such taxes, and while he might in equity recover the amount paid from the then owner of the land, he has no such equity as against his covenantee. *Hooper v. Sac Co. Bank*, 72 Iowa 280; *Pierce v. Herrold*, 75 Iowa 504.

5. Rawle, *Covenants* (5th ed.), § 194.

BRANCES.¹ The damages on all other covenants are measured by the pecuniary loss sustained.²

IX. OPERATION OF REAL COVENANTS BY WAY OF ESTOPPEL.—It is familiar doctrine that if a man undertakes to convey or mortgage premises to which his title is invalid or imperfect, and afterwards acquires a good title, he is so far estopped by his former act that the purchaser or mortgagee has an equitable right to have such after acquired estate conveyed or mortgaged to him, as the case may be.³ If the original conveyance or mortgage contain covenants for title, these operate (by way, it is usually said, of avoiding the circuitry of action which would result, were the vendor required to eject the vendee before the latter could call for a conveyance) as a personal rebutter on the grantor and his heirs preventing them from setting up the after acquired title,⁴ and the covenants may also be regarded as equivalent to a recital or averment of title, estopping the grantor from denying the

1. Vol. 10, p. 361.

2. *Clark v. Zeigler*, 79 Ala. 350; 85 Ala. 154; *Stoudenmire v. De Bardeleben*, 85 Ala. 85; *Mobile etc. R. Co. v. Gilmer*, 85 Ala. 422; *Bronson v. Coffin*, 108 Mass. 175; 11 Am. Rep. 335; *Watterson v. Alleghany Val. R. Co.*, 74 Pa. St. 208.

But where no evidence was given as to the actual damage sustained or that the plaintiff wished or had wished to sell her property, it was held error to charge that she was entitled to recover the difference in value of her house as it was effected by the erection of the tenement house (which was the breach of covenant) and the value it would have possessed if the defendant's lot had remained vacant. *Amerman v. Deane*, 57 N. Y. Super. Ct. 175.

See DAMAGES, vol. 5, p. 1.

3. *Wright v. Wright*, 1 Ves. Sr. 409; *Massie v. Sebastian*, 4 Bibb (Ky.) 433; *McWilliams v. Nisly*, 2 S. & R. (Pa.) 515; 7 Am. Rep. 654; *Root v. Crock*, 7 Pa. St. 380.

Thus in *Heath v. Crealock*, L. R., 18 Eq. 215; affirmed 10 Ch. App. 30, where a mortgagor sold part of the mortgage premises without notice of mortgage and subsequently obtained a reconveyance from the mortgagees, *Bacon, V. C.*, said: "If (the mortgagor) having sold and conveyed to the defendants, the purchasers, without a title, had afterwards obtained a perfect title, then, as between him and them, his subsequent title would no doubt have fed the estoppel, and would entitle them to have their originally de-

fective title made perfect by him. But the principle of estoppel applies only between parties and privies, and if the estate supposed to be acquired by the mortgagor under the reconveyance is destroyed by the cancellation of that conveyance, and before any estate can have passed from him to them, there can exist no food for the supposed estoppel, and the purchasers are reduced to the position in which they would have been if no reconveyance had been executed." It was held, accordingly, that no new conveyance to the purchasers having been made since the reconveyance, their equity was insufficient to prevent a decree that the reconveyance be canceled on account of fraud.

4. *Reese v. Smith*, 12 Mo. 351; *Potter v. Potter*, 1 R. I. 43; *Henderson v. Overton*, 2 Yerg. (Tenn.) 394; 24 Am. Dec. 492; *Lewis v. Baird*, 3 McLean (U. S.) 80; *French v. Spencer*, 21 How. (U. S.) 240.

Such rebutter will affect a third party, claiming by purchase from the covenantor, if the condition of the latter's title at the time of the purchase was such as to affect the former with notice of the covenantee's rights. *Chew v. Barnet*, 11 S. & R. (Pa.) 389.

And one who conveys land to a railroad company who has mortgaged, with covenants, all the property then held by it or afterwards to be acquired, cannot set up his vendor's lien as against the lien of the mortgage. *Pierce v. Milwaukee etc. R. Co.*, 24 Wis. 551; 1 Am. Rep. 203.

intention to pass the title covenanted for.¹ Apparently, however, the estoppel created by the deed or mortgage is the same, even if there be no covenants, provided the intention of the instrument is made sufficiently clear by other means.²

In the *United States*, however, though not in *England*,³ a doctrine has grown up which gives another and much greater effect to the estoppel than that just referred to, provided the original deed or mortgage contain certain covenants for title, in which case the after acquired estate⁴ is held to inure, by virtue of the covenants,⁵ to the grantee, his heirs and assigns, or to the mortgagee

1. *Goodson v. Beacham*, 24 Ga. 150.

2. In *Taylor v. Debar*, 1 Ch. Cas. 274; 2 Ch. Cas. 212, and *Noel v. Bewley*, 3 Sim. 103, the defective conveyances contained covenants for further assurance, but in the latter case *Shadwell, V. C.*, said: "I do not place much reliance upon the covenant for further assurance; because I take the law to be this: that if a person has conveyed a defective title, and he afterwards acquires a good title, this court will make that good title available to make the conveyance effectual."

In *Smith v. Baker*, 1 Y. & Col. Ch. 223, there had been also covenants for seisin and for good right to convey, and the equitable interest of the grantees under the defective conveyance, was upheld without any mention of these covenants.

In *Heath v. Crealock* (see preced'g note), the operation of an estoppel is described, but without reference to the covenants, which were merely referred to by the court in denying that they gave the purchasers any rights whatever as against the mortgagees.

So in *America* the same estoppel has been held to result from any deed purporting to convey an estate of a particular description or quality, "although it may not contain any covenants of title in the technical sense of the term." *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297.

So also *Stoddard v. Chambers*, 2 How. (U. S.) 316; *Landes v. Brant*, 10 How. (U. S.) 348; *Clark v. Baker*, 14 Cal. 612; 76 Am. Dec. 449; *Nixon v. Carco*, 28 Miss. 426.

3. *General Finance Co. v. Liberator Bldg. Soc.*, L. R., 10 Ch. Div. 15; *Heath v. Crealock*, L. R., 21 Eq. 218; affd. 10 Ch. App. 30; *Loyd v. Loyd*, 4 Dr. & War. 369; *Right v. Bucknell*, 2 B. & Ad. 273 (denying the authority of *Bensley v. Burdon*, 2 Sim. & S. 524,

which gave greater effect to the estoppel.

4. This must be an estate in the same right as that in which the conveyance was made. Hence where one conveys in his own right, and afterwards acquires title in trust, express or implied, there is no estoppel. *Kelley v. Jenness*, 50 Me. 455; 79 Am. Dec. 623.

Hence where the after acquired title was subject to the paramount equitable title of a third party, the latter was not affected by any estoppel resulting from the covenants in the conveyance made by the holder of the legal title before he acquired the same. *Buckingham v. Hanna*, 2 Ohio St. 551.

5. Hence if there be no covenants, as in a mere release, or none which give rise to an estoppel, there is no estoppel. *Shumaker v. Johnson*, 35 Ind. 33; *Nicholson v. Caress*, 45 Ind. 479; *Doane v. Wilcutt*, 5 Gray (Mass.) 328; 66 Am. Dec. 369; *Kimball v. Blaisdell*, 5 N. H. 533; 22 Am. Dec. 476; *Jackson v. Wright*, 14 Johns. (N. Y.) 193; *Jackson v. Hubble*, 1 Cow. (N. Y.) 613. Except that the grantor cannot deny or contradict any fact alleged in his conveyance. *Pike v. Galvin*, 29 Me. 183.

The same rule holds where any claims are excepted from a covenant. Thus where claims under a first mortgage are expressly excepted from the covenant of warranty in a second mortgage, and the title reverts in the mortgagor after a sale under the first mortgage, there is no estoppel in favor of the second mortgagee. *Huzzey v. Hefernan*, 143 Mass. 232.

It must be admitted that many of the cases which sustain the doctrine of an estoppel that actually passes the after acquired estate do not, if carefully examined, rest so much on the necessity of avoiding circuitry of action and giv-

as the case may be, by direct operation of law, with the same effect, to all intents and purposes, as if such estate had originally passed by the deed or mortgage.¹ Such estoppel should not,

ing to the covenantee immediately and to the fullest extent the relief which his covenants would entitle him to demand, as on the necessity of giving effect to the intention of the parties, of which intention the covenants are important but not indispensable evidence. Thus an estoppel is held to operate against several classes of persons who are not personally liable on the covenants at all. See *infra*, this title, pp. 1025, 1026, n. 5, 1-5. The logical result of this reasoning is that if an estate can actually pass by the operation of an estoppel which the law raises in order to carry out the intention of the parties, it is immaterial whether this intention be evidenced by covenants for title or not. Hence in *McGill v. Jordan*, 4 Leg. Int. (Pa.) 420, where it was held that a covenant of special warranty sufficed to pass the after acquired estate, as against one claiming under the covenantor, the court by Butler, J., said: "The fair result of the more recent cases would seem to be that whenever the terms of the deed, or of the covenants it contains, show that it was meant to convey an absolute and indefeasible title, and not merely the interest which the grantor had at the time, it will pass every estate and interest which may vest in him subsequently, whether the warranty be general or, special, or though it may contain no warranty at all. . . . That the warranty is special is not important."

Statutory Estoppel.—Of late years, however, it has come to pass that, by the statutes of many States, if a deed purporting to convey an estate in fee simple (or even, in some States, a less estate) be made by one who has not the estate which he undertakes to convey, and he afterwards acquire such estate, it immediately passes to the grantee as if it had been in the grantor at the time of the conveyance, while in other States (*e. g.*, *Georgia*) the grantor is merely estopped from claiming adversely to his deed. This statutory estoppel must, of course, in the conveyances where it is made applicable, take the place of the estoppel referred to in the text, which is raised from the covenants, by construction of law, but the former is something wholly apart from the subject of the present article.

1. *Tillotson v. Kennedy*, 5 Ala. 413; 39 Am. Dec. 330; *Bean v. Welsh*, 17 Ala. 772; *Blakeslee v. Mobile L. Ins. Co.*, 57 Ala. 205; *Watkins v. Wassell*, 15 Ark. 73; *Sherwood v. Barlow*, 19 Conn. 476; *DeWolf v. Haydn*, 24 Ill. 525; *King v. Gilson*, 32 Ill. 348; 83 Am. Dec. 269; *Hitchcock v. Fortier*, 65 Ill. 239; *Pratt v. Pratt*, 96 Ill. 184; *Hoppin v. Hoppin*, 96 Ill. 265; *Hannah v. Collins*, 94 Ind. 201; *Logan v. Moore*, 7 Dana (Ky.) 76; *Read v. Fogg*, 60 Me. 479; *Funk v. Newcomer*, 10 Md. 316; *Wade v. Lindsay*, 6 Met. (Mass.) 413; *Gibbs v. Thayer*, 6 Cush. (Mass.) 30; *Farnum v. Peterson*, 111 Mass. 148; *Lee v. Clary*, 38 Mich. 223; *Hooper v. Henry*, 31 Minn. 264; *Thorndike v. Norris*, 24 N. H. 454; *Jewell v. Porter*, 31 N. H. 30; *Hayes v. Tabor*, 41 N. H. 521; *Gough v. Bell*, 21 N. J. L. 156; *Brundred v. Walker*, 12 N. J. Eq. 140; *Vreeland v. Blanvelt*, 23 N. J. Eq. 483; *Kellogg v. Wood*, 4 Paige (N. Y.) 578; *Mickles v. Dillayo*, 15 Hun (N. Y.) 206; *Bell v. Adams*, 81 N. Car. 118; *Patterson v. Pease*, 5 Ohio 190; *Scott v. Douglass*, 7 Ohio 227; *Barton v. Morris*, 15 Ohio 408; *Pollock v. Speidel*, 27 Ohio St. 86; *Broadwell v. Phillips*, 30 Ohio St. 255; *Hart v. Gregg*, 32 Ohio St. 502; *Taggart v. Risley*, 3 Oregon 306; 4 Oregon 235; *Wilson v. McEwan*, 7 Oregon 87; *Potter v. Potter*, 1 R. I. 44; *Bailey v. Hoppin*, 12 R. I. 560; *Wingo v. Parker*, 19 S. Car. 9; *Robertson v. Gaines*, 2 Humph. (Tenn.) 383; *Coal Creek Min. etc. Co. v. Ross*, 12 Lea (Tenn.) 1; *Ackerman v. Smiley*, 37 Tex. 211; *Cross v. Martin*, 46 Vt. 14; *Goodenough v. Fellows*, 53 Vt. 102; *Raines v. Walker*, 77 Va. 92; *Mann v. Young*, 1 Wash. Ter. 454; *Mitchell v. Petty*, 2 W. Va. 470; 98 Am. Dec. 777; *Pierce v. Milwaukee etc. R. Co.*, 24 Wis. 553; 1 Am. Rep. 203; *Wilsner v. Zaun*, 39 Wis. 188.

What Covenants Work an Estoppel—General Warranty.—In most States the covenant of general warranty is held not only to estop the grantor and his heirs from setting up an after acquired title but also actually to transfer the estate subsequently acquired, as if it had passed by the deed in the first instance. *Kennedy v. McCartney*, 4 Port. (Ala.) 141; *Hoyt v. Dimon*, 5 Day (Conn.) 479; *Dudley v. Cadwell*, 19 Conn. 226;

Ragg v. Cook, 9 Ill. 348; Jones v. King, 25 Ill. 334; Gochenour v. Mowry, 33 Ill. 333; Thomas v. Stickle, 32 Iowa 72; Massie v. Sebastian, 4 Bibb (Ky.) 436; Logan v. Steele, 4 T. B. Mon. (Ky.) 433; Dickerson v. Talbot, 14 B. Mon. (Ky.) 49; Lawry v. Williams, 13 Me. 281; Baxter v. Bradbury, 20 Me. 260; 37 Am. Dec. 49; Pike v. Galvin, 29 Me. 183; Williams v. Thurlow, 31 Me. 395; Somes v. Skinner, 3 Pick. (Mass.) 52; Comstock v. Smith, 13 Pick. (Mass.) 116; 23 Am. Dec. 670; Ruggles v. Barton, 13 Gray (Mass.) 506; Knight v. Thayer, 125 Mass. 25; Huzzey v. Heffernan, 143 Mass. 232; Thorndike v. Norris, 24 N. H. 454; Jewell v. Porter, 31 N. H. 39; Kimball v. Blaisdell, 5 N. H. 533; 22 Am. Dec. 476; Wark v. Willard, 13 N. H. 389; Kimball v. Schoff, 40 N. H. 190; Moore v. Rake, 26 N. J. L. 574; Jackson v. Wright, 14 Johns. (N. Y.) 193; Jackson v. Winslow, 9 Cow. (N. Y.) 18; Jackson v. Bradford, 4 Wend. (N. Y.) 622; Sparrow v. Kingman, 1 N. Y. 246; Rathbun v. Rathbun, 6 Barb. (N. Y.) 107; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 567; 49 Am. Dec. 189; Wellborn v. Finley, 7 Jones (N. Car.) 238; Brown v. McCormick, 6 Watts (Pa.) 60; 31 Am. Dec. 450; Davis v. Keller, 5 Rich. Eq. (S. Car.) 434; Harrison v. Boring, 44 Tex. 255; Middlebury College v. Cheney, 1 Vt. 349; Blake v. Tucker, 12 Vt. 44.

A special warranty is held to have the same effect as to this as a general warranty. Kimball v. Blaisdell, 5 N. H. 533; 22 Am. Dec. 476.

Special Warranty.—Where the conveyance is by way of release or quitclaim, or merely of the "right, title, and interest" of the grantor, it is clear that a covenant of special warranty will work no estoppel as regards an after acquired title, for such covenant concerns only the title the grantor then had, which alone was intended to pass by the deed. Tillotson v. Kennedy, 5 Ala. 413; 39 Am. Dec. 330; Loomis v. Pingree, 43 Me. 299, 313; Comstock v. Smith, 13 Pick. (Mass.) 116; Trull v. Eastman, 3 Met. (Mass.) 121; Chauvin v. Wagner, 18 Mo. 553; Bell v. Twilight, 26 N. H. 401; Western Min. etc. Co. v. Peytona Cannel Coal Co., 8 W. Va. 450; Lamb v. Kamm, 1 Sawy. (U. S.) 238.

But if the deed purports to convey the premises described, and not merely the grantor's interest therein, then, although there be no general warranty

against claims of third parties, it may be argued that the retention of an after acquired title by the grantor would be inconsistent with his covenant of special warranty against the claims of himself, or others claiming under him, to the premises intended to be conveyed, and that in such a case a covenant of special warranty ought to work an estoppel. Such appears to be the decision in Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476.

If the covenant of warranty be against the claims of a particular person only, the covenantor is not estopped from setting up a title afterwards acquired from any other source. Quirey v. Baker, 37 Cal. 471.

And if the claim of a particular person be excepted from the covenant of warranty, the covenantor is not estopped from setting up a title afterwards acquired from such person or others claiming under him. Fields v. Squires, Deady (U. S.) 380; Lamb v. Wakefield, 1 Sawy. (U. S.) 251.

Further Assurance.—In Bennett v. Waller, 23 Ill. 97, and Pierce v. Milwaukee etc. R. Co., 24 Wis. 543, 1 Am. Rep. 203, the same effect was given to a covenant for further assurance, but in Hope v. Stone, 10 Minn. 141, and Chauvin v. Wagner, 18 Mo. 531, it was held to create an equitable right only.

Seisin, Right to Convey, Quiet Enjoyment.—It has been held that the covenants for seisin, right to convey, and quiet enjoyment give rise to no estoppel. Allen v. Sayward, 5 Me. 227; 17 Am. Dec. 221; Doane v. Willcutt, 5 Gray (Mass.) 333.

But in Wightman v. Reynolds, 24 Miss. 675, covenants for good right to convey and for quiet enjoyment were held to pass an after acquired title.

And in Irvine v. Irvine, 9 Wall. (U. S.) 618, where the subsequent confirmation by patent, of the title originally conveyed, inured to the grantee's benefit, the court by Strong, J., said *obiter*: "It is a general rule that when one makes a deed of land, covenanting therein that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition inures to the benefit of the grantee, on the principle of estoppel. As the deed to the plaintiff in this case contained an assertion that he was well seised in fee, and had good right to sell and convey in fee, it would not be difficult, were it necessary, to show that in taking the

however, be allowed to affect the rights of subsequent purchasers or mortgagees for value of the after acquired estate, who have no notice of the prior conveyance or mortgage

patent he was in law acting for the grantee."

In *Ontario*, the covenant for seisin is held to work an estoppel merely as to an after acquired title. *Doe v. Myer*, 2 U. Can., Q. B. 424; *Doe v. Webster*, 2 U. Can., Q. B. 224; *McLain v. Laidlaw*, 2 U. Can., Q. B. 222; *Trust Co. v. Ruttan*, 1 Duval 564.

Non-claim.—In *Maine* the covenant of non-claim is held to create no estoppel. *Pike v. Galvin*, 29 Me. 185; *Loomis v. Pingree*, 43 Me. 314; *Harriman v. Gray*, 49 Me. 538. Even when joined with a covenant against incumbrances. *Sweetser v. Dowell*, 33 Me. 452; *Partridge v. Patten*, 33 Me. 483; 54 Am. Dec. 633.

But in *Massachusetts* it does not differ as to this from a covenant of warranty. *Trull v. Eastman*, 3 Met. (Mass.) 121; 37 Am. Dec. 126; *Miller v. Ewing*, 6 Cush. (Mass.) 34.

Other Covenants.—A covenant that "any further or additional title" shall inure to the grantee, passes the after acquired title. *Phelps v. Kellogg*, 15 Ill. 132.

The covenant of an heir-at-law, being sole devisee, that the property shall pass as if by intestacy, has been held to vest the title in the heirs generally. *Bean v. Walsh*, 17 Ala. 771.

In *Wright v. Shumway*, 1 Biss. (U.S.) 23, an agreement (in a deed for a pre-emption right) to mortgage the premises when title was obtained, was held to create an equitable lien.

Estoppel by Implied Covenants.—The statutory covenants implied in *Illinois* are held to pass an after acquired title. *D'Wolf v. Haydn*, 24 Ill. 525; *King v. Gilson*, 32 Ill. 352; 83 Am. Dec. 269; *Pratt v. Pratt*, 96 Ga. 184.

But in *Missouri* they do not have this effect. *Chauvin v. Wagner*, 18 Mo. 531. *A fortiori* when the right, title, and interest only is conveyed. *Gibson v. Chouteau*, 39 Mo. 566; *Butcher v. Rogers*, 60 Mo. 138.

Where a widow, falsely claiming to be the guardian of her minor children and authorized to sell their interest (a remainder after her life estate) in certain property, sold the same by virtue of her own right and as a guardian, the statutory covenants did not estop the children, but they were liable

thereon to the extent of the property inherited from her. *Foote v. Clark*, 102 Mo. 394.

1. Ordinarily, the absence of record notice of the prior conveyance or mortgage will prevent its operation by way of estoppel, as against third parties. It is universally admitted that a purchaser is not required to search the record for conveyance by his vendor before the latter's title began, but a strict application of the doctrine of estoppel as stated in the text would necessitate a search against every prior owner of the premises, for an indefinite period before he took title, if reasonable certainty as to the state of the title is to be attained. Such a search is practically an impossibility, and will not be required. Hence it is held that the record of a conveyance or mortgage made before the grantor or mortgagor had a valid title to the premises is not constructive notice to a purchaser or mortgagee of the after acquired estate. *Dodd v. Williams*, 3 Mo. App. 278.

The same doctrine holds in favor of a purchaser at a sheriff's sale of the after acquired estate under a judgment. *Calder v. Chapman*, 52 Pa. St. 359; 91 Am. Dec. 163. In this case, it must be observed, the defendants seem to have relied on an estoppel resulting from a mortgage of the premises, and not an estoppel by force of the covenants therein.

A fortiori this doctrine holds where the defective deed or mortgage has not even been recorded. *Burke v. Beveridge*, 15 Minn. 206; *Smith v. Williams*, 44 Mich. 240, *dictum* of Cooley, C. J.

In *Potts v. Dowdall*, 3 Houst. (Del.) 369; 11 Am. Rep. 757, a purchaser of an invalid title was in possession, and this fact was held to be actual notice of the conveyance to him, sufficient to make the estoppel effectual against a purchaser of the after acquired estate.

It is contended by Mr. Rawle (Covenants, 5th ed., § 261) that the transference of estates by estoppel, whether by virtue of the covenants or under the statutes referred to *supra*, p. 1021, n. 5, tends to make titles less secure than they should be, and that no purchaser or mortgagee should be bound by a

This extreme doctrine of estoppel results in preventing the covenantee from proceeding on his covenants,¹ unless he has been actually evicted,² or has never been given possession,³ but it is not held to force him to take the property *volens volens*.⁴

An after acquired estate will not inure to the benefit of the original grantee or mortgagee when the latter has no right of action on the covenants;⁵ except in the case of covenants by persons

state of facts not appearing of record in his line of title, notice from possession being often inadequate especially as against mortgagees.

If title by estoppel be allowed to prevail over title by matter of record, then "it necessarily tends to give to a vendee who has been careless enough to buy what the grantor has not got to sell, a preference over subsequent purchasers who have expended their money, in good faith and without being guilty of negligence." Note to *Duchess of Kingston's Case*, 2 Sm. Lead. Cas. (8th Am. ed.) 848.

In *Way v. Arnold*, 18 Ga. 181, the court said: "We are strongly inclined to the opinion that our registry acts, under the modern form of conveyancing, are a virtual repeal of the doctrine of estoppel," but this extreme doctrine of estoppel never seems to have been held in *Georgia*. *O'Bannon v. Paramour*, 24 Ga. 493, does not state that the title passed by estoppel.

1. Hence if the grantor has acquired title subsequently to his grant, even after suit brought, nominal damages only can be recovered in an action on the covenants; and even though the action be on the covenant for seisin, which does not operate by way of estoppel, and the estoppel result from the covenant of warranty. *King v. Gilson*, 32 Ill. 348; 83 Am. Dec. 269; *Baxter v. Bradbury*, 20 Me. 260; 37 Am. Dec. 49; *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *Reese v. Smith*, 12 Mo. 344; *M'Carty v. Leggett*, 3 Hill (N. Y.) 134; *Knowles v. Kennedy*, 82 Pa. St. 445.

2. *Burton v. Reed*, 20 Ind. 87; *Blanchard v. Ellis*, 1 Gray (Mass.) 195; 61 Am. Dec. 417; *Tucker v. Clarke*, 2 Sandf. Ch. (N. Y.) 96; *Bingham v. Weiderwax*, 1 N. Y. 513.

3. *Noonan v. Ilsley*, 21 Wis. 139.

4. On the theory that this estoppel is designed to prevent circuity of action and to avoid the necessity of requiring an actual new conveyance to the covenantee, it follows that as his right to call

for a conveyance is purely equitable, and equity would not require him to take the estate in case it had depreciated in value since the original grant was made (in which case he might prefer to recover full damages on the covenants), so the estoppel itself should not be allowed to operate to the covenantee's disadvantage against his will. *Tucker v. Clarke*, 2 Sandf. Ch. (N. Y.) 96; *Woods v. North*, 6 Humph. (Tenn.) 310; 44 Am. Dec. 312.

It should not be overlooked, however, that if the theory of avoiding circuity of action be given up, and the estoppel be based on the intention of the parties, which is the latest view (see *supra*, this title, p. 1021, note 5,) then, as the intention was to convey the estate granted at the time of the grant, this intention must be carried out as of that time, whether the property has actually depreciated in value since that time or not.

5. Thus if right of action on the covenants never existed, or has been released or extinguished, or has otherwise ceased, it has been held that there will be no estoppel. *Smiley v. Fries*, 104 Ill. 416; *Goodell v. Bennett*, 22 Wis. 565.

Similarly, if the covenant be made to assure a grant of "the right, title, and interest" of the grantor merely, and not of the land itself or any particular estate therein. *Gee v. Moore*, 14 Cal. 474; *Kimball v. Semple*, 25 Cal. 452; *Holbrook v. Debo*, 99 Ill. 372; *Shumaker v. Johnson*, 35 Ind. 33; *Locke v. White*, 89 Ind. 492; *Derby v. Jones*, 27 Me. 361; *Coe v. Persons Unknown*, 43 Me. 436; *Blanchard v. Brooks*, 12 Pick. (Mass.) 67; *Comstock v. Smith*, 13 Pick. (Mass.) 116; 23 Am. Dec. 670; *Wright v. Shaw*, 5 Cush. (Mass.) 56; *Miller v. Ewing*, 6 Cush. (Mass.) 34; *Hoxie v. Finney*, 16 Gray (Mass.) 332; *Sanford v. Sanford*, 135 Mass. 314; *Hope v. Stone*, 10 Minn. 149; *Bogy v. Shoat*, 13 Mo. 365; *Valle v. Clemens*, 18 Mo. 486; *Hall v. Chaffee*, 14 N. H. 215; *Adams v. Ross*,

adjudged bankrupts before they acquire the title,¹ and (in a few States) by married women,² as also where the after acquired title has been assigned,³ and apparently where all right of action on the covenants is barred by the Statute of Limitations.⁴ These exceptions seem to indicate that this extreme doctrine of estoppel is not really based on the avoidance of circuity of action.⁵

30 N. J. L. 509; 82 Am. Dec. 237 (reversing 28 N. J. L. 160); *White v. Brockaw*, 14 Ohio St. 339; *Wynn v. Harman*, 5 Gratt. (Va.) 162; *Lewis v. Baird*, 3 McLean (U. S.) 78; *Hanrick v. Patrick*, 119 U. S. 156.

So in the case of express or implied exceptions from the grant. *Gill v. Grand Tower Min. etc. Co.*, 92 Ill. 249; *Brigham v. Smith*, 4 Gray (Mass.) 297.

So where the deed is defectively executed. *Kercheval v. Triplett*, 1 A. K. Marsh. (Ky.) 494; *Connor v. McMurray*, 2 Allen (Mass.) 204; *Patterson v. Pease*, 5 Ohio 191; *Wallace v. Miner*, 6 Ohio 370.

So where the after acquired title be founded on a disseisin of the covenantee or those claiming under him followed by adverse possession until the Statute of Limitations has run. *Franklin v. Dorland*, 28 Cal. 180; 87 Am. Dec. 111; *Hines v. Robinson*, 57 Me. 330; 99 Am. Dec. 772; *Stearns v. Hendersass*, 9 Cush. (Mass.) 497; 57 Am. Dec. 65; *Tilton v. Emery*, 17 N. H. 536; *Sherman v. Kane*, 46 N. Y. Super. Ct. 310; *Johnson v. Farlow*, 13 Ired. (N. Car.) 84; *Reynolds v. Cathens*, 5 Jones (N. Car.) 437.

1. A discharge in bankruptcy does not prevent a covenant made before bankruptcy from operating by way of estoppel upon a title acquired afterwards. *Stewart v. Anderson*, 10 Ala. 504; *Dorsey v. Gassaway*, 2 Harr. & J. (Md.) 411; 3 Am. Dec. 557; *Chamberlain v. Meeder*, 16 N. H. 384; *Gregory v. Peoples*, 80 Va. 355.

In *Bush v. Person*, 18 How. (U. S.) 82 (*affirming* 26 Miss. 599), it was laid down by Curtis, J., that this estoppel operates by virtue of the agreement to convey, and that the covenant is not necessary to support it.

2. In *Fowler v. Shearer*, 7 Mass. 21 and *Colcord v. Swan*, 7 Mass. 291, it was stated *obiter* that if a married woman join with her husband in the covenants for title in a conveyance of her own property (as distinguished from cases where she joins merely to bar her dower), she will be estopped

from setting up an after acquired title. Though approved (also *obiter*) in *Nash v. Spofford*, 10 Met. (Mass.) 192; 43 Am. Dec. 425, and *Doane v. Willcutt*, 5 Gray (Mass.) 332; 66 Am. Dec. 369, the correctness of this doctrine was disputed in *Wight v. Shaw*, 5 Cush. (Mass.) 65, and denied in *Knight v. Thayer*, 125 Mass. 25, though the last case held that there was such an estoppel because married women had been made liable on their contracts by statute.

Fowler v. Shearer, 7 Mass. 21, and *Colcord v. Swan*, 7 Mass. 291, have, however, been cited as authority in a few cases in other States, and the decisions in *King v. Rea*, 56 Ind. 1; *Beal v. Beall*, 79 Ind. 280, and *Hill v. West*, 8 Ohio 222; 31 Am. Dec. 442, uphold the doctrine. See also *Fletcher v. Coleman*, 2 Head (Tenn.) 384.

The contrary view, that where a married woman is not liable on her covenants she cannot be estopped by them, seems, however, to prevail. *Barker v. Circle*, 60 Mo. 263; *Wadleigh v. Glines*, 6 N. H. 18; 23 Am. Dec. 705; *Den v. Demarest*, 21 N. J. L. 525; *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167; 8 Am. Dec. 378; *Martin v. Dwelly*, 6 Wend. (N. Y.) 14; 21 Am. Dec. 245; *Carpenter v. Schermerhorn*, 2 Barb. Ch. (N. Y.) 314; *Dominick v. Michael*, 4 Sandf. (N. Y.) 424; *Grout v. Townsend*, 2 Hill (N. Y.) 557; *Edwards v. Davenport*, 4 McCrary (U. S.) 34. See also *Gonzales v. Hukil*, 49 Ala. 260; 20 Am. Rep. 282.

In some States this matter is regulated by statute. See, in general, title MARRIED WOMEN, vol. 14, p. 589.

3. *Powers v. Patten*, 71 Me. 583; *Knight v. Thayer*, 125 Mass. 25; *Tefft v. Munson*, 57 N. Y. 97; *Brown v. McCormick*, 6 Watts (Pa.) 60; 31 Am. Dec. 450. But see *supra*, p. 1024, note 1, as to the necessity of notice to assignees.

4. *Cole v. Raymond*, 9 Gray (Mass.) 217.

5. See *Bush v. Person*, 18 How. (U. S.) 82. The basis of the doctrine is

The doctrine of estoppel by covenants is sometimes applied in confirmation of a grant in other cases than those of an after-acquired title.¹

REAL EFFECTS.—See EFFECTS, vol. 6, p. 174.

REAL ESTATE BROKERS.—See BROKERS, vol. 2, p. 592.

REALIZE.—See note 2.

discussed at length in Rawle, Covenants (5th ed.), § 254.

1. Where the covenants referred to more land than was covered by the words of the grant, the grantor has been held to be estopped from denying an intention to pass the quantity covenanted for. *Long Island R. Co. v. Conklin*, 32 Barb. (N. Y.) 381; *Kilmer v. Wilson*, 49 Barb. (N. Y.) 88; *Tyson v. Passmore*, 2 Pa. St. 122; 44 Am. Dec. 181; *Steiner v. Baughman*, 12 Pa. St. 106.

And where a deed contained no words of grant whatever, the covenants were held to estop the party making it from denying that a grant was intended. *Brown v. Manter*, 21 N. H. 528; 53 Am. Dec. 223.

The same result followed as to a grant in fee where the word "heirs" was omitted from the *habendum*, but contained in the covenant of special warranty. *Shaw v. Galbraith*, 7 Pa. St. 111.

It was held in *Foss v. Strachn*, 42 N. H. 40, and *Strachn v. Foss*, 42 N. H. 43, that where a homestead had been mortgaged with covenants of warranty, though for a debt existing before the homestead right accrued, by one who had minor children, he and his children were, during his lifetime, estopped from claiming against the mortgage. In *Doyle v. Coburn*, 6 Allen (Mass.) 71, the mortgage was absolutely void, because executed by the husband alone, and hence the question of estoppel did not properly arise.

Where a State granted land with covenants of warranty to an alien, his heirs and assigns, it was held that "this deed must operate as a rebutter, as it would if an individual was the grantor; and with more reason, because the commonwealth is not liable to an action." *Com. v. Andre*, 3 Pick. (Mass.) 224.

Authorities.—Rawle, Covenants for Title (5th ed.), 1887; Platt, Covenants (Am. ed.), 1834; Hamilton, Covenants, 1888; Sugden (St. Leonards),

Vendors and Purchasers, 14th ed. (2d Am. ed.), 1873; Dart, Vendors and Purchasers (6th ed.), 1888; Notes to *Spencer's Case*, 1 Smith's Leading Cases, 8th Am. ed. (Hare & Wallace's Notes), 1885, 9th Am. ed. 1888.

2. **Realize; Realized.**—An article of association of a building and investment society provided that "no dividend shall be payable except out of the realized profits arising from the business of the company." Upon the interpretation of the word "realize" as here used, the court by Kay, J., said: "'Realized,' must have its ordinary commercial meaning, which, if not equivalent to 'reduced to actual cash in hand,' must at least be 'rendered tangible for the purpose of division.' The article is in a negative form. It is a prohibition against payment and against the payment of dividends except out of realized profits arising from the business of the company. The precise thing intended to be prohibited is the payment of dividends in respect of 'estimated' profits as distinguished from 'realized.' The meaning of the word in this article is the direct converse of the word 'estimated.'" *In re Oxford Ben. etc. Soc.*, L. R., 35 Ch. D. 502; 17 Am. & Eng. Corp. Cas. 179.

A purchaser of land agreed to pay the vendor a percentage in case he "realized" a specified sum of money for the land upon a future sale. It was held that the purchaser became bound to pay the percentage the moment a responsible person, in good faith, offered that amount for the land. *Lorillard v. Silver*, 35 Barb. (N. Y.) 132.

Where the plaintiff was to be paid "out of the first money and government scrip realized" by the defendant from the sale of certain lands, an executory contract for the sale of such lands does not make the defendant liable upon his contract. *Stanford v. Greene Co.*, 18 Iowa 218.

The payee of a draft assigned it to one who gave his promissory note;

REAL PROPERTY.¹—(See also CONVERSION, vol. 4, p. 104; CROPS, vol. 4, p. 887; EASEMENTS, vol. 6, p. 139; ESTATES, vol. 6, p. 875; FIXTURES, vol. 8, p. 41; FRAUDS, STATUTE OF, vol. 8, p. 657; INCORPoreal HEREDITAMENTS, vol. 10, p. 352; LANDLORD AND TENANT, vol. 12, p. 658, and various other specific references in the following analysis.)

- I. Definition—Real Things, 1029.
- II. Rights in Real Things, 1035.
 1. Tenures (or Modes of Exercising Rights in Real Things), 1035.
 2. Rights in Real Things Treated in Regard to the Quantity of Estates (See ESTATES, vol. 6, p. 875; LANDLORD AND TENANT, vol. 12, p. 658).
 3. Real Rights Treated with Reference to their Qualification, 1043.
 - a. Qualifications Relating to Quantity of Estate, 1043.
 - (1) Conditions at Common Law, 1043.
 - (2) Limitations at Common Law, 1047.
 - (3) Limitations Under the Statutes of Uses and Wills—Common Law Rules of Limitation, 1056.
 - b. Qualifications Relating to the Right of Enjoyment, 1056.
 - (1) Uses, 1056.
 - (a) Definition, 1056.
 - (b) Importance in Modern Law, 1057.
 - (c) Origin, 1057.
 - (d) Development and Incidents Before the Statute of Uses, 1058.
 - (e) Statute of Uses, 1060.
 - (aa) Aim and Purpose, 1060.
 - (bb) Effect of Statute, 1066.
 - (cc) Modes of Conveyancing Under the Statute, 1068.
 - (2) Trusts (See TRUSTS), 1069.
 4. Real Rights Treated with Reference to the Time of Their Enjoyment, 1069.
 - a. Estates in Possession (See REMAINDERS; REVERSIONS), 1069.
 - b. Estates in Expectancy (See REMAINDERS; REVERSIONS), 1069.
 5. Real Rights Treated with Reference to the Number and Connection of Their Owners, 1069.
 - a. Estates in Severalty (See ESTATES, vol. 6, p. 875), 1069.
 - b. Estates with a Plurality of Tenants, 1069.
 - (1) Joint Tenancy (See JOINT TENANTS AND TENANTS IN COMMON, vol. 11, p. 146), 1069.
 - (2) Tenancy in Common (See JOINT TENANTS AND TENANTS IN COMMON, vol. 11, p. 146), 1070.
 - (3) Tenancy in Coparcenary (See COPARCENARY, vol. 4, p. 146), 1070.
 6. Real Rights Treated with Reference to the Manner of Acquisition; or Title, 1070.
 - a. Nature of Title (See TITLE), 1070.
 - b. Title by Descent (See STATUTES OF DISTRIBUTION), 1070.

the payee agreeing to release the assignee from paying the note in case he should be unable to "collect or realize" on the draft. The assignee afterwards became indebted to the drawer. *Held*, that until a suit should be brought by the drawer, enabling the assignee to set off the draft against the debt, it could not be predicated that the assignee had been able to "realize" on the draft by means of the indebtedness. *Hall v. Henderson*, 84 Ill. 611.

1. Scope of Article.—It appears expe-

dient to explain briefly, in advance, the scope of the article which falls under the title *Real Property*.

The purpose has, in the main, been twofold:

1. To present an outline of the divisions into which a discussion of the law of real property naturally falls,—an outline at once logical in plan, and of practical use with reference to the arrangement of this work, in which special branches of the law of real property are treated under numerous separate titles.

- c. *Title by Purchase Other than Alienation*, 1070.
- (1) *Title by Escheat* (See ESCHEAT, vol. 6, p. 854), 1070.
 - (2) *Title by Occupancy* (See ABANDONMENT, vol. 1, p. 1; TITLE), 1070.
 - (3) *Title by Adverse Possession* (See ADVERSE POSSESSION, vol. 1, p. 225), 1070.
 - (4) *Title by Estoppel* (See ESTOPPEL, vol. 7, p. 1), 1070.
 - (5) *Title by Prescription* (See PRESCRIPTION), 1070.
 - (6) *Title by Forfeiture* (See FORFEITURE, vol. 8, p. 443), 1070.
 - (7) *Title by Accretion* (See ACCRETION, vol. 1, p. 136), 1070.
- d. *Title by Alienation Inter Vivos, or Title by Grant*, 1070.
- (1) *Title by Public Grant* (See GRANTS, vol. 9, p. 43), 1070.
 - (2) *Title by Office Grant* (See GRANTS, vol. 9, p. 43), 1070.
- (3) *Title by Private Grant* (See DEDICATION, vol. 5, p. 395), 1070.
- (a) *Persons Capable of Making and Receiving Grants* (See GRANTOR AND GRANTEE, vol. 9, p. 19), 1070.
 - (b) *Modes of Conveyance*, 1070.
 - (aa) *In General*, 1070.
 - (bb) *Bargain and Sale*, 1074.
 - (cc) *Lease and Release — Quit Claim*, 1075.
 - (dd) *Statutory Modes of Conveyance*, 1075.
 - (ee) *General Requirements — Seal*, 1076.
 - (c) *Deeds* (See DEEDS, vol. 5, p. 423; ESCROW, vol. 6, p. 857; LEASE, vol. 12, p. 974; RE-LEASE), 1076.
 - (e) *Title by Devise* (See LEGACIES AND DEVISES, vol. 13, p. 7; WILLS), 1076.

I. DEFINITION—REAL THINGS.—Are such as can be comprehended under the terms lands, tenements, and hereditaments; an accurate definition is: such things as are held in frank tenement or descend to the heir.¹

2. To discuss, in addition to the precise subject of Real Property, or real things in the strict sense, those sections of the law of real property whose special importance lies in their introductory and expository relation to the whole system, the particular branches of which under the titles by which they are commonly associated in the mind of the practitioner, are treated in their respective alphabetical positions in the various branches of this work.

The introductory sections which are included in this article are the subjects of *Tenures*; of *Conditions and Limitations*, and of *Uses*.

Finally, as being naturally appended to the subject of *Uses*, there is added a review of *Modes of Conveyancing* in use in the *United States*.

In the preparation of the outline, the plan of Professor Minor (*Institutes of the Common and Statute Law*, vol. 2) has been consulted more particularly than that of any other authority.

1. The term "lands, tenements and

hereditaments" is a series of names of which each succeeding one is broader than the preceding; yet the last is not inclusive even of the first.

The first and second seem to be most closely connected.

The plan of the phrase apparently is: that the first gives the physical object which lies at the foundation of all real property, all the rights in which, however, are not included in real property; the second term mentions the class of things by a name which refers not to their physical nature, but to the peculiar manner in which they are held, viz.: tenements; the term being, however, not coincident with the first, but (1) inclusive of "lands" in so far as the interests therein are "real property" and (2) larger than "lands," including certain other rights capable of tenure, such as offices.

Finally "hereditaments" is the largest term of all. Yet it does not include all the former, since there are certain estates in tenements which are, in their

In this country, both by statute and common law, the term "real estate" is generally used for the phrase "lands, tenements and hereditaments."¹

nature, not capable of inheritance, such as an estate for life, yet have all the incidents of real property.

Hereditaments alone would not, therefore, cover the ground. But all estates which constitute real property beside hereditaments are of freehold.

Hence one arrives naturally at the definition of real things, viz.: things which are held in frank tenement, or descend to the heir. See, generally Challis, R. P. 36; 2 Bl. Com. 17; Washb. R. P. *2.

1. The term "estate" is here used in a sense other than the technically correct one, which is a denomination of the measure of interest. In some of the States, the terms "land" and "real estate" are said to include lands, tenements, and hereditaments and all rights thereto or interests therein. See Mass. Gen. Sts., ch. 3, § 70; Iowa Code, subd. 8, § 45. In others, the term "real estate" includes chattels real. Mo. Rev. Sts., ch. 32, par. 49. See Boone's Real Property, § 1.

In *New York*, 1 R. S. 750, § 10, the terms "real estate" and "lands" are coextensive in meaning with lands, tenements and hereditaments. See *Pelletreau v. Smith*, 30 Barb. (N. Y.) 494. See Code Civ. Proc., § 3343, subd. 6; Penal Code, § 718, subd. 14. See *Wright v. Douglass*, 2 N. Y. 376; *Floyd v. Carew*, 88 N. Y., 560; distinguished in *Riker v. Cromwell*, 113 N. Y. 127. See *Merry v. Hallett*, 2 Conn. 497.

It must be noted that in many statutes the term is used for special purposes, or couched in a phraseology such as to limit its meaning. Thus, as to the meaning of the term, in 2 R. S. (N. Y.) 194, § 170, which allows an infant "seized of any real estate, or entitled to any terms for years in any land" to apply for sale or disposition thereof, see *Jenkins v. Fahey*, 73 N. Y., 361, where it was held to include every remainder that is vested in fee.

The term as used in regard to "Descent" is but an elaboration of the common-law definition, with a special clause of exclusive reference to estate descendible. 1 R. S. 754, § 27. See also L. 1843, § 5.

In the act relating to "Recording Deeds" the term is coextensive in meaning with lands, tenements and hereditaments, and embraces all chattels real, except leases for a term not exceeding three years. 1 R. S. 762, §

36. See *Weaver v. Edwards*, 39 Hun (N. Y.) 233.

It is also important to distinguish the term real estate as used in the statute regulating the assessment of taxes.

This statute declares that the term "land," as therein used, shall be construed to include the land itself; all buildings and other articles erected upon or affixed to the same; all trees and underwood growing thereon, and all mines, quarries, fossils in and under the same, except mines belonging to the State. The terms "land" and "real estate," wherever they occur in this chapter, shall be construed as having the same meaning as the term land as defined.

In *Burrill v. Mayor etc.*, 2 Sandf. (N. Y.) 552, it was held that incorporeal hereditaments are not land within the meaning of the statute. The court added: "We are obliged to decide that all incorporeal hereditaments whatever are, by a singular omission in the statute, exempt from contributing their just proportion to the public burdens."

As used in L. (N. Y.) 1843, ch. 87, confirming titles of aliens, "real estate" comprehends equitable as well as legal estate. L. (N. Y.) 1843, p. 63, ch. 87, § 5.

In general, when applied to an interest in lands, or other real property, the term includes all estates, or interests in such real property, which are held for life or some greater estate, but does not embrace terms for years and other chattel interests in land. *Westervelt v. People*, 20 Wend. (N. Y.) 416; aff'd 17 Wend. (N. Y.) 673. See *Jackson v. Parker*, 9 Cow. (N. Y.) 73, 81; *Jackson v. Catlin*, 2 Johns. (N. Y.) 248.

By the Civil Code of *California*, § 657, property is either (1) real or immovable; or (2) personal or movable.

Section 658. Real or immovable property consists of: (1) land; (2) that which is affixed to land; (3) that which is incidental or appurtenant to land; (4) that which is immovable by law.

Section 659. Land is the solid material of the earth, whatever may be the ingredients of which it is composed; whether soil, rock, or other substances.

Section 660. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus

permanent, as by means of cement, plaster, nails, bolts, or screws.

Section 662. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit; as in the case of a way, or water-course, or of a passage for air, light, or heat from or across the land of another.

Section 663. Every kind of property that is not real or personal.

Railroad Erections.—Under Maine Rev. Stat., ch. 6, § 4, regulating the taxation of railroad corporations, "the track of the road and the land on which it is constructed shall not, for the purposes of taxation, be deemed real estate." In *P. S. & P. R. Co. v. Saco*, it was held that "this immunity was limited to the franchise, or right of way over the strip of land prescribed in the charter of the corporation, and to the track of the railroad constructed thereon, and does not include the depots, engine-houses, turn-tables, car-houses, and other buildings or erections." See also *Providence Bank v. Billings*, 4 Pet. (U. S.) 563; *Phila. & Wjl. R. R. v. Maryland*, 10 How. (U. S.) 393.

In *Melhop v. Meinhart*, 70 Iowa 685, it was held that a leasehold interest in land is real estate within the meaning of § 45, par. 8 of the Code of Iowa. See for construction of mortgagee as an owner of real estate under Rev. (Iowa), of 1860, §§ 1314-31, *Severin v. Cole*, 38 Iowa 463. See also *White v. Butt*, 32 Iowa 335.

It has been held that under the tax laws of *Ohio* of 1876, where, in consideration of a gross sum in advance, an estate for years renewable forever is granted in realty, it is real and not personal property. *Cincinnati College v. Yeatman*, 30 Ohio St. 276.

In *Governor and Co. of the Chelsea Water Works v. Bowley*, 17 Q. B. 358, the court discussing the right of a company to lay pipes in the streets, roads, etc., as taxable property, said: "The right in question, where exercised, appears to us to be in the nature of an easement and neither land nor hereditament, . . . the mere power to lay the pipes in land cannot be considered land or hereditaments." But this decision seems to have had special reference to the Land Tax Act, 38 Geo. III., ch. 3, which, in speaking of lands and hereditaments, contemplated "property to be let by a landlord to a tenant, and property, the land tax of which might be re-

deemed." Its scope was "to throw the tax as a charge upon the landlord," the tenant, having paid the tax, being authorized to deduct it out of the rent. The decision in regard to the interest of the company in the land was based on the fact that they were not tenants of the land, and that there was no rent from which they could deduct the amount of the assessment when they had paid it.

Lord Campbell further says: "Land . . . has various meanings; it may . . . mean the ground on which the chattel is deposited in the exercise of an easement, although in other acts of Parliament, it means a legal interest in the soil." The latter meaning was construed by the court to hold for this case. See *Rex v. Corporation of Bath*, 14 East (Eng.) 609; *Rex v. Brighton Gas Light Co.*, 5 B. & C. (Eng.) 466; *Rex v. Chelsea Water Works Co.*, 5 B. & Ad. (Eng.) 156. See especially *Rex v. Shrewsbury*, 3 B. & Ad. 216, holding directly *contra*.

In General.—In *Wall v. Fairley*, 77 N. Car. 105, it was held in regard to the term "real property," that while it may include equitable as well as legal estates, although they are such as cannot be sold under execution, it cannot be construed to cover land in which the party never had any estate or right, and as to which his creditors have only a right in equity to follow a personal fund which has been converted into land.

It was decided in *Bowman v. People*, 82 Ill. 246, that the interest which a purchaser of land at a sheriff's sale acquires in the land before the expiration of the period for redemption, does not come within the term "real estate." It is neither a legal nor an equitable estate in the land but a mere inceptive interest which, being contingent, may never become a title. It is a bid for the land, which may or may not become an interest in the soil.

English Authorities.—For a definition of "real estate," see *Butler v. Butler*, 54 L. J. Ch. 197; 28 Ch. D. 66. See *Williams R. F.*, Introd. For the inclusion in a devise of "real estate," of leaseholds, by the force of the context or circumstances, see *Swift v. Swift*, 29 L. J. Ch. 121; 1 D. G. F. & J. 160; *Gully v. Davis*, 39 L. J. Ch. 684; L. R., 10 Eq. 562; *Moase v. White*, 3 Ch. D. 763; *Re Davison*, 32 L. J. 273; 58 L. T. 304.

In *Atcherley v. Vernon*, 10 Mod.

It will be noticed that the terms "lands," "tenements" and "hereditaments" are not exclusive of each other, as has been explained in the note; yet it will be convenient to treat of real things categorically under these heads.¹

Land is the surface of the earth, whatever is attached to it by nature or by the hand of man, and all that is contained within it or below it.²

Hereditaments are all things which may descend to the heir at the death of the owner. Hereditaments are commonly divided

518, it was held such a general devise included real estate contracted to be purchased by the testator, but not actually conveyed to him. But it will not include purchase money of property sold by the testator which he has not conveyed. See *Knollys v. Shepherd*, 1 Jac. & W. 499. Otherwise where the sale is demanded after his death under an option given in his lifetime. *Drant v. Vanse*, 11 L. J. Ch. 170. See also *Re Staines*, 55 L. J. Ch. 913; *Morgan v. Crawshaw*, L. R., 5 H. L. 304.

1. It would seem that to attempt an accurate generic description of the class of things which fall under the term real property, were an impracticable if not an impossible task. Even under the old English statutes the term was used with a varying meaning. To-day the term "real estate" not only applies to a different class of things in wills and in other instruments, but it has a special definition in each statutory enactment.

For such particular uses of the term, reference must be made to the special branches of the law, and to special statutes. See LEGACIES AND DEVISES, vol. 13, p. 7; CONVERSION, vol. 4, p. 104; SHARES; STATUTE OF FRAUDS; STATUTE OF DISTRIBUTION.

In general the term "personalty" has a wider meaning in the *United States* than in *England*, including shares of stock in railroad and canal companies and other evidences of value, not possessing intrinsic worth; per *Darlington*, *Personal Property*, p. 2. See *Ang. & A. Corp.*, § 557; 2 *Kent Com.* 340. n.; *Somerby v. Buntin*, 118 *Mass.* 285. See SHARES.

2. See LAND, vol. 12, p. 655. See *Washburn on Real Property*, p. 2. See also *Co. Litt.* 4 a to 6 a. "Land includes whatever is parcel of the terrestrial globe or is temporarily affixed to any such parcel."

The old maxim was "*Cujus est solum*,

cjus est usque ad cælum." See 2 *Blackstone's Com.* 17-19.

It is to be remembered that this definition of land and fixtures relates only to the things out of which real rights or estates may spring. The meaning of land as an estate is not here referred to.

There must be carefully distinguished land as the physical object, and land as the peculiar kind of property. Thus, the definition of land in the first sense includes many subjects of personal property, such as when there is an estate for years in land. So as regards fixtures, the definition describes only the physical requirements of that which may become real property according to the intention of the person who implants it.

For a definition of fixtures in the strict sense of real property, see *FIXTURES*, vol. 8, p. 41. See also the Introductory Chapter in *Washburn on Real Property*.

Quidquid plantatur in solo, solo cedit, is therefore not strictly true so far as the property in fixtures is concerned. It seems that things implanted by a person other than the owner of the soil will remain personalty where such was the agreement, express or implied, with the owner. See *Washb. Real Prop.*, pp. 2-6. See *Mathes v. Dobshuetz*, 72 *Ill.* 438; 1 *Hill Real Prop.* 1, 5.

It is easy to distinguish three meanings of the word land: 1st, the meaning of the definition given in the text; 2d, land in its fullest possible signification as a class of objects, as derivable from the context of a will (see *Challis on Real Property*, p. 36; *Westfalling v. Westfalling*, 3 *Atk.* 460; *Haslewood v. Cope*, 3 *P. Williams*, 322); 3d, land as an estate in real things. See *Washb. on Real Property*, p. 2. See *Johnson v. Richardson*, 33 *Miss.* 462, according to which land when used to describe the quantity of

into corporeal and incorporeal hereditaments. Corporeal hereditaments include land and such estates in land as are conveyed by livery of seisin.¹

Tenements properly means all things that can be held in tenure at the common law. It is a larger term than "lands," including, besides lands and rights issuing out of or concerning land, offices.² The conception of offices as tenements exists no longer in the American law, and need not be discussed.³

the estate is understood to denote a freehold estate.

1. See *Land, supra*. Mr. Challis (Real Property, p. 41) says: "The phrase includes only lands regarded as a physical object, and legal estates of inheritance in possession."

See HEREDITAMENTS, vol. 9, p. 359; INCORPOREAL HEREDITAMENTS, vol. 10, p. 352; EASEMENTS, vol. 6, p. 139; HEIR-LOOMS, vol. 9, p. 357.

In *Redburn v. Jervis*, 3 Beav. 450, it was decided that a perpetual annuity granted to one and his heirs was personalty, although descendible to the heirs—as termed by Lord Hardwicke, a personal inheritance—on the authority of the *Earl of Stafford v. Buckley*, 2 Ves. Sr. 171, and *Aubin v. Daly*, 4 B. & Ald. 59.

2. See Co. Litt. 6 a, "Wherein a man hath any frank tenement and whereof he is seised *ut de libero tenemento*." See Challis on Real Property, p. 37. See *infra*, this article, *Tenures*, II, 1.

"The meaning," says Mr. Challis, p. 37, in regard to this sentence of Lord Coke's, "which the word actually bears is wider than that strictly contained in this definition (Co. Litt. 19 b; 20 a). The definition would strictly include only lands, such incorporeal hereditaments (seignories, peerages and dignities held by grand serjeanty) as are undoubtedly subjects of common-law tenure, advowsons in gross (Co. Litt. 85a.) and perhaps chief rents. But the word 'tenement' is in practice, with less obvious propriety, extended to include all rents-charge, commons in gross, estovers and other profits *a prendre*, owing to their close connection with land; also offices annexed to or exercisable within or over any lands or tenements, as the office of steward or bailiff of a manor, or ranger of a forest. It was also extended to include tithes in the hands of lay impropriators. See *Rex v. Shingle*, 1 Eag. & Y. 738; 1 Stra. 100. *Rex v. Ellis*, 3 Eag. & Y.

776; 3 Price 323; though by the common law these could not be in the hands of a lay person. (*Sherwood v. Winchcomb*, Cro. Eliz. 293, and *Wright v. Wright*, 2 Rep. 43; Serj. Moore's Rep. 425.) And it is the general rule that all hereditaments which savor of the land or realty are so far accounted tenements in law as to be entailable by virtue of the statute *De Donis*. It is material to observe that a thing may be a tenement for one purpose and not a tenement for another purpose; for example, a rent-charge is undoubtedly a tenement for the purpose of entail, but is not a tenement for the purposes of escheat."

The term has lost all its practical value to-day, except to denote the class of objects which may be (1) the subject of entail and (2) of escheat. The statute *De Donis* creating estates-tail refers only to tenements.

So escheat was exclusively an incident of tenure. The corresponding right of the Crown in personalty was prerogative, not seignorial. See *Commonwealth v. Blanton's Ex'rs*, 1 B. Mon. (Ky.) 397; *Burgess v. Wheaton*, 1 Eden 259.

Escheat therefore did not relate to hereditaments which were not the object of tenure, such as a rent-charge, a right of common, an equity of redemption. See Whart. L. Lex. See 2 Bl. Com. 84.

In the *United States* estates-tail have been abolished in most of the States. See ESTATES, vol. 6, p. 879. See also ESCHEAT, vol. 6, p. 855.

3. See INCORPOREAL HEREDITAMENTS, vol. 10, p. 357. See also PUBLIC OFFICERS.

It is even doubtful whether there can be any proprietary interest whatever in public offices in the *United States*.

As to the common law view, see Bac. Abr. Offices, 76: "if an office be granted to a man to have and enjoy so long as he shall behave himself well in it, the grantee has

an estate of freehold in the office; for since nothing but his misbehavior can determine his interest, no man can prefix a shorter time than his life; since it must be his own act (which the law does not presume to foresee) which only can make it a state of shorter continuance than his life. So if the office be granted to a man *quamdiu se bene gesserit tantum*, the estate will not be less for the word *tantum*; for the grant is of equal extent with the former and his misbehavior in each case determines his interest." Co. Litt. 42; Roll. Abr. 844; Show. Parl. Cases 161.

There is no doubt that after services have been rendered under a law which fixed the rate of compensation, there arises an implied contract to pay for those services at that rate, whose obligation is enforceable by legal remedies. See *Butler v. Pennsylvania*, by Daniel, J., 10 How. (U. S.) 402.

The prevalent view of officers seems to be that of public agents as to whose continuance in office there can be no obligation on the part of the State. Per Sandford, J., 2 Sandf. (N.Y.) 255. And according to *Wyandotte v. Drennen*, 46 Mich. 478, the term, the mode of appointment and the compensation may be altered at pleasure, and the latter may be even taken away without abolishing the office. See *Cooley Const. Lim.* 331, note, with cases.

See also *Attorney-General v. Hawkins*, 44 Ohio St. 98; *State v. Prince*, 45 Wis. 610; *Keenan v. Perry*, 24 Tex. 253; *State v. Doherty*, 25 La. Ann. 119; *Taft v. Adams*, 3 Gray (Mass.) 126; *Ex parte Wiley*, 54 Ala. 226; *State v. Frazier*, 48 Ga. 137; *Patten v. Vaughn*, 39 Ark. 211.

In *Donohue v. County of Will*, 100 Ill. 94, it was said: "It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office." But see for a view more in the line of common law, *State v. Pritchard*, 36 N. J. L. 101; *Page v. Hardin*, 8 B. Mon. (Ky.) 632; *Commonwealth v. Slifer*, 25 Pa. St. 28; *Dullam v. Willson*, 53 Mich. 392; *King v. Hunter*, 65 N. C. 603.

In *Dullam v. Willson*, 53 Mich. 392, in which the opinion was concurred in by the whole Supreme Court of Michigan, including Cooley, J., the same protection is given to rights in an office, in cases of removal, as is given by the constitution to rights of property. There must be charges specifying the

particulars in which the officer is subjected to removal, and the officer is entitled to know the particular act or neglected duty or corrupt conduct or other act relied upon as constituting malfeasance or misfeasance in office, and he is entitled to a reasonable notice of the time and place, when and where an opportunity will be given for the hearing, and he has a right to produce proof upon such hearing. Further, the facts must be determined by some tribunal invested with judicial power, although such judicial power may exist in an executive officer; and it seems that no court can review the legal discretion of any body that is not a court. Many cases are reviewed and discussed in the opinions of this case, of which the following are the most important and support the decision: *Ramshay's Case*, 18 Ad. & El., N. S. 190; *Williams v. Baggott*, 3 B. & C. 786; *Queen v. The Archbishop of Canterbury*, 1 El. & El. 545; *Capel v. Child*, 2 Cr. & J. 558; *Willard's Appeal*, 4 R. I. 601; *Commonwealth v. Slifer*, 25 Pa. St. 23.

In *Meade v. Deputy Marshal*, 1 Brock. (U. S.) 324, Chief Justice Marshall said: "This is a matter of justice which courts are never at liberty to dispense with unless under the mandate of positive law, that no person shall be condemned unheard or without an opportunity of being heard."

In *Page v. Hardin*, 8 B. Mon. (Ky.) 672, it was said by Marshall, C. J., in deciding upon the validity of a removal of the Secretary of State or Governor: "We shall not argue to prove that in a government of laws a conviction whereby an individual may be deprived of valuable rights and interests, and may, moreover, be seriously affected in his good name and standing, implies a charge and trial and judgment and the opportunity of defense and proof."

The same view is taken in a lengthy learned review of the question of the removal from office, mainly with reference to the common law in quest of office, in *State v. Pritchard*, 36 N. J. Law 101. [Throughout the opinion the court seem to assume the common law estate in offices to be unchanged.]

See, however, *Donahue v. County of Nill*, 100 Ill. 94.

In *King v. Hunter*, 65 N. Car. 603 6 Am. Rep. 754, the court held that "nothing is better settled than that an office is property;" that the contract between officer and State "cannot be abrogated or impaired except by the

II. RIGHTS IN REAL THINGS—1. Tenures (or Modes of Exercising Rights in Real Things).—The question what systems of land tenure are in force in the United States, is one of practical importance, entirely distinct from such problems as that of the origin of property, which may be relegated to pure jurisprudence. This importance has little or no reference to tenure as such, or to its immediate incidents. It arises from the fact that a system of tenure must afford the theory on which the law of real property was developed, to which recourse must be had in any new question where decisions do not apply.¹

Conflicting theories as to the origin of law in the North American Colonies have been entertained,² but whatever be the true one, it is well settled that, speaking broadly, the law of *England*,

consent of both parties." See, however, *State v. Gales*, 77 N. Car. 283.

But the U. S. Supreme Court in *Butler v. Pennsylvania*, 10 How. (U. S.) 402, has probably settled decisively the question whether there can be a contract between the State and its officer within the meaning of the prohibition of the United States Constitution against the impairment of the obligation of a contract. The court speak of the danger of arraignment of the control of States over officers and subordinates in the regulation of their internal and exclusive policy, and over the modes and extent in which that policy should be varied to meet the exigencies of their peculiar condition; that such an abuse would prevent all action in the State government or refer the modes and details of their action to the tribunals and authorities of the Federal government. The court affirm the decisions in the case of *People v. Morris*, 13 Wend. (N. Y.) 325; *Commonwealth v. Bacon*, 6 S. & R. (Pa.) 322; *Commonwealth v. Mann*, 5 W. & S. (Pa.) 418; *Barker v. Pittsburgh*, 4 Barr. (Pa.) 51.

But the Supreme Court of Massachusetts, while admitting the authority of a legislature to shorten the term of officers, expressly deny such authority to cities and towns, except in cases of misbehavior. See *Chase v. Lowell*, 7 Gray (Mass.) 33, where it was held "the election or appointment for a definite time of a city officer or agent entitled to pay for his services (when no law prescribes a different time for duration of the office or agency), and an acceptance by him of such office or appointment constitutes, in our judgment, a contract between the city and him which cannot be dissolved or changed by the mere mode or act of the

State." See *contra*, *Primm v. City of Carondelet*, 23 Mo. 22.

1. In the following cases the question of tenure was deemed germane to the decision: *U. S. v. Repentigny*, 5 Wall. 211; *Cornell v. Lamb*, 2 Cowen (N. Y.) 652; *Matthews v. Ward*, 10 Gill & J. (Md.) 443; *Barker v. Dayton*, 28 Wis. 367; *Wallace v. Harmstad*, 1 Wh. (Pa.) 337.

In his work on the Rule against Perpetuities Professor Gray is compelled, in a preliminary investigation into future interests as affected by the Statute *Quia Emptores* to inquire "how far tenure exists in the United States?" Gray's Rule against Perp., §§ 22, *et seq.*

2. The first, the conquest theory, as it may be called, is that, as the colonization of the country was effected by conquest, the law of the conquered community remains in force until superseded by the conqueror. If this be true, then over such portions of this country as were conquered from the Indians, Indian law would remain in force until superseded by British law specifically imposed; and the same conclusion, *mutatis mutandis*, would be reached as to the Dutch law in the colonies conquered from the Dutch, the Spanish law in the colonies conquered from Spain, the French laws in the colonies ceded by France. That this is the case with the colonies conquered from the Indians is maintained in 1 Black. Com. 107; 1 Steph. Com. (8th ed.) 104. But to this may be replied, as is said by Marshall, C. J., the Indians did not possess a distinct national existence, nor did they have a system of law which could be made the basis of the law of any civilized people. There is a good deal to sustain this theory in the history of

as it existed at the time of the colonial settlements, is the basis of the law of all the States, with the single exception of *Louisiana*.¹

Louisiana, where the Roman Law remains as the basis, while so much of the English law as is in force has been imposed distinctly by statute. But the theory does not hold good with respect to *California* and *Texas*, in which the Spanish law—or Roman law, on which the Spanish rests—has left no traces except in its relation to land titles prior to the separation from Mexico. Similar questions arise in respect to New York and the settlements on the Delaware, which were conquered by the English from the Dutch—the Dutch, as to the Delaware settlements, having dispossessed the Swedes. Wharton's Comm. on Law, § 64. That the English took New York as a conquest from the Dutch is maintained by Judge Tucker (Tucker's Black. 1, 382, note), by eminent colonial counsel consulted on this point (Smith's Hist. of New York 248), and by Lord Mansfield. Hall v. Campbell, Cowp. 211. See also 21 Albany Law Journal 9. It has been held by the N. Y. court of appeals that the Dutch were during their occupancy the political sovereigns of New York. Dunham v. Williams, 37 N. Y. 251. See also argument of counsel in Jackson v. Gilchrist, 15 Johns. (N. Y.) 89. On the other hand, Chancellor Walworth expressly claims that the English title to New York is that of discoverers, bringing with them their own law. Canal Appraisers v. People, 17 Wend. (N. Y.) 570.

The second theory is that of discovery, it being held that the first discoverers of an uncivilized country bring to it their own common law. That the English were the first discoverers of the Atlantic seaboard is maintained as a matter of fact, and from this flows the conclusion that, if this theory be correct, they planted there the English common law. The difficulty as to this theory is that it rests on an arbitrary assumption. If the first discoverer of the New World stamped on it the jurisprudence of his country, that jurisprudence was certainly not the common law of England. If the first settlers on the Mississippi Valley gave to that valley their jurisprudence, then to the Roman, and not to the English common law must we look for the basis of our system. Nor, even assuming that Englishmen were the first discoverers, did

England exercise over her North American colonies that care which the planting of a systematic jurisprudence assumes. The New England colonists came to escape, not to extend English laws in the character they then assumed. The Pennsylvania colonists were most of them exiles for conscience' sake. It is true that with the more southern colonies the case was different. Wharton's Comm. on Law, § 64.

The third theory is that of popular adoption, it being assumed by this theory that the inhabitants of each province evolve a common law in harmony with their traditions and habits, and in submission to their conscience and sense of need. The process has been sometimes conducted on principles now difficult to discover. Thus the statute of 43 Eliz., ch. 4 (the statute of Charitable Uses), was held not to be in force in *New York*. Jackson v. Hammond, 2 Caines Cases in Error (N. Y.) 337; Bascom v. Albertson, 34 N. Y. 584. And so in *New Jersey*, Norris v. Thompson, 19 N. J. Eq. 307, 575; while in *North Carolina*, *Massachusetts* and *Kentucky* it was held to be in force. Burbank v. Whitney, 41 Mass. 146; Griffin v. Graham, 1 Hawk. (N. C.) 96; Gas v. Wilhite, 2 Dana (Ky.) 170. The process of acceptance or rejection, both as to the common law and English statutes, was one applied by the community itself, impelled by local necessity and local sense of right. For a full consideration of these three theories, see Wharton's Comm. on Law, § 25 and § 64; also 1 Story Const., §§ 158. See Walker's Am. Law, § 48; U. S. v. Warrall, 2 Dall. (Pa.) 384; Vankess v. Packard, 2 Pet. (U. S.) 137; Wheaton v. Peters, 8 Pet. (U. S.) 591.

1. The Plymouth colonists, before landing, agreed to adopt the English common law for their government, subject to such modifications as their circumstances required. Elliot's Debates, i, 24. The first constitution of New York after the Revolution prescribed that "such part of the common law of England and of the statute law of England and Great Britain . . . which did form the law of such colony on the nineteenth day of April, 1775, shall continue to be the law of the State." In *Virginia* the first legislative

It follows, therefore, that the system of land tenure in the several States, with the exception of *Louisiana*, is the same, unless its character has since been totally changed, as was that of *England* in the early part of the seventeenth century.¹ There is no question that the land tenure of *England* at that period is with perfect propriety described as feudal,² although in very many and material points it differed from strict feudalism.³

assembly resolved to adhere to the "customs of England as nearly as the capacity of the country would admit." *Chalmer's Annals* 245. This was the general system along the Atlantic seaboard. The English common law was accepted as the basis, but it was adapted to the needs of the community by popular spontaneous action. "The common law of England is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their condition." Story, J., in *Van Ness v. Packard*, 2 Pet. (U. S.) 144. Chief Justice Story says: "The universal principle (and the practice has confirmed it) has been that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundations of the common law." 1 Story Const., § 160. For the views of English and American statesmen on this subject, see *Works of Franklin*, by Sparks, iv, 271. See also in general *Duponceau on the jurisdiction of the courts of the United States*; *Rawle on the Constitution*, ch. 30; *North American Review* for July, 1825; 2 *Wilson's Law Lect.* 48 to 55; *Chisolm v. Georgia*, 3 Dall. (U. S.) 435; *Town of Pawlett v. Clark*, 9 Cranch (U. S.) 292; *Wheaton v. Peters*, 8 Pet. (U. S.) 541; *Cathcart v. Robinson*, 5 Pet. (U. S.) 196; *Comm. v. Lodge*, 2 Gratt. (Va.) 579; *Pemle v. Clifford*, 2 McCord (S. Car.) 31; *Baker v. Mattocks*, *Quincy (Mass.)* 72; *Swift v. Lourey*, 5 Ind. 196.

1. When it is said that we have in this country adopted the common law of England, it is not meant that we have imitated any mere formal rules, or any written code, or the verbiage in which the common law is expressed. It is the unwritten law of England which

we have adopted rather as a system of legal logic than as a code of rules.

Of the unconscious change of substance under unchanged forms, the commission to revise the civil code of Pennsylvania say in their second report, presented in 1832: "The changing relations, customs, and intelligence of communities exert an irresistible force in operating a change upon the laws; the change, therefore, is in the substance—the names and theories remain by force equivalent to the force of language."

2. "The laws and usages which govern the tenure of land in England are, as a whole, unique. Our land system is commonly called feudal, sometimes by persons who use the word as a disparaging epithet without any clear notion of what it means. This is not in itself wrong, but it conveys a most imperfect notion of the number and variety of the influences that have made our land laws what they are. The statement and the belief implied in it are so inadequate as to be misleading. Almost every possible kind of ownership, and almost every possible relation of owners and occupiers of land to the State and to one another have existed in England, and left a more or less conspicuous mark in the composite structure of the English law of real property." *Pollock's The Land Laws* 1. "The main body of the technical expressions of the law, and of the technical habit of thought which they preserve, is derived from feudalism; but this feudalism has been deeply modified by circumstances peculiar to England." *Id.* 2.

3. Original formative elements of the most diverse character had left their impression; legislation, custom and judicial decision had all contributed to further modify it.

"The English law of land is of a mixed origin. The customs of the early Teutonic invaders; the inevitable effect of conquest and settlement of the land on a large scale; the gradual and what

It is, therefore, clear that the original land tenure in the *United States* was feudal. Whether tenure is the same to-day must be determined by discovering whether separation from the mother country, or legislation, or both have effected an entire change in our theory of land-holding. And here it must be remembered that almost limitless changes of particular features of the law of real property may be made without abolishing the feudal system as its basis. As in *England*, the incidents may be varied or abrogated, and yet the theory of tenure remains the basis of the law.

The cardinal principle of the feud is that all title to land is derived, mediately or immediately, from the king, as the lord paramount. It is clear that the effect of the Revolution was to transfer this dignity from the king to the people of the respective States in their collective capacity. No change whatever was

may be called the natural growth of feudal ideas; the effect of the Norman Conquest in developing these ideas into a system of law and imparting doctrines unknown before; the subsequent influence of the Roman and Canon law, all these are elements of which account must be taken in attempting to trace the growth of the law of land." Digby Hist. Law. Real Prop., § 1.

So complete was the change that the system no longer continued to subserve even one of the purposes for which it was established. Conditions were so different that its use as a military system was obsolete, and the incidental benefits to the lord were likewise obsolete or directly abolished.

The tenant's lands are held of the crown, or perhaps of some other superior who himself holds of the crown. His predecessors before the commonwealth time owed rent or services, or both, and were subject to a variety of occasional dues and payments, some of them of a vexatious kind. They were bound to follow the king or other overlord to the wars, and bring with them a specified armed force, or pay for the maintenance of its equivalent. The feudal dues and services have been abolished; but ancient money rents, now reduced to a nominal amount by the changes that have taken place in the standard of the coinage and the value of the precious metals, often survive to this day. Some ancient rents are not in money, but in kind. The city of London still pays to the crown certain horseshoes and nails as the rent of a piece of land in the parish of St. Clement Danes, once granted by the king to a farrier, and a fagot as the

rent of some waste lands in Shropshire. The remnant of feudal relations to a superior is at this day no burden to the English landowner and at most only adds a picturesque circumstance to his title. Perhaps the lord of an estate is lord in a strict legal sense—that is, lord of a manor. In this capacity he is a kind of small sovereign prince, possessed of his own courts, and doing justice according to his own procedure and customs. But his powers and jurisdiction are shriveled by the changes and chances of centuries into nothingness, and only the names of them remain. In the voluminous settlement which confers title to these lands on him and his issue, the manorial franchises are enumerated in a roll of strange looking terms, many of which are now obscure even to the lawyer, unless he is also a historical student. As for the lord himself, he neither knows the words nor their meaning unless he happens to be a scholar and an antiquarian. Nor is he concerned to know them for any purpose of business. The ancient franchises and profits are obsolete, and have been so for many generations. The manorial courts exist in form, and their records are kept in the ancient fashion. But the fine by which a thief, caught within the boundaries, redeemed his life is no longer a source of revenue to the manor, neither does the lordship of "view of frank pledge and all that to view of frank pledge doth belong" convey any sensible increase to the wealth or the dignity of the modern landowner. To be lord of a manor is to be the lord of a secular ruin, in which he that knows the secrets of the crabbed spell-book

effected in the mode of tenure of land. The State became lord paramount.¹

Since, then, the Revolution produced no change in tenure, the remaining question is the effect of subsequent legislation in the various States. It is clear that in those in which there has been no legislative action on the subject, feudal tenure still obtains. In sixteen States there are legislative or constitutional provisions relating to land tenure.² In the remaining States

may call up the ghosts of a vanished order of the world. Pollock's *The Land Laws*, 7, 10.

1. *United States v. Repentigny*, 5 Wallace (U. S.) 267. "The States, by the Declaration of Independence, threw off the allegiance of the crown, and stood in its place, or perhaps, we ought to say, reassumed the original sovereignty always inherent in the people of any kingdom or state. Is it to be doubted that while the republic existed in England *de facto* the tenure of all land was of the commonwealth? And it would have continued if the monarchy had not been restored. The revolution of 1688 transferred the chief lordship from the Stuarts to the Prince and Princess of Orange, and ultimately to the House of Brunswick. In like manner operated the American Revolution." Lectures Introductory to the Study of the Law, Sharswood, p. 212. The relative position of a civil government to its citizens, that of protection on the one hand and of dependence on the other—necessarily involves the idea of allegiance and service to the State, as a condition to the use and enjoyment of the land within its boundaries. Hence some mode of tenure is incident to every government; and the highest estate which a man can have in land has direct reference to his duty to the State. He holds of the State, to which he owes fealty and service, and if he fails in his allegiance to her, or dies without heirs upon whom this duty may devolve, the tenure is at an end, his land returns to the common stock from which he had it, and vests again in the prince, or other representative of state sovereignty, whoever it may be, who is thence called in common-law language, the lord paramount. Taylor's *Landlord and Tenant*, § 1. According to the doctrine of our law, all private title to land within the United States, is derived ultimately from grants of the State, or the general government, or royal grants made prior to the Revolution. Fletcher

v. Peck, 6 Cranch (U. S.) 87; *Jackson v. Waters*, 12 Johns. (N. Y.) 365. Land was held of the crown in colonial times, and it does not seem that so fundamental an alteration in the theory of property as the abolition of tenure would be worked by a change of political sovereignty. Tenure still obtains between a tenant for life or years and the reversioner; and so in like manner, it is conceived, a tenant in fee simple holds of the chief lord, that is, of the State. *Gray on Perp.*, § 22; *Hoffman's Legal Outlines* 593; 2 *Bl. Comm.* (Sharswood's ed.) 77, note. But see 1 *Washb. Real Prop.* 39-42; 2 *Bl. Comm.* (Cooley ed.), note.

2. *California*.—Tenure seems not to exist. *Civil Code*, § 762.

Connecticut.—"Every proprietor in fee simple of lands has an absolute and direct dominion and property in the same." Statute of October 1793. See statute 1821, tit. 56, ch. 1, § 1, note; *Rev. Stats.*, tit. 48, ch. 6, pt. 1, § 1.

Georgia.—"The tenure by which all realty is held in this State is under the State as original owner." *Rev. Code of 1873*, § 2221.

Illinois was one of the States formed from the Northwest Territory, and the law on tenures is the same as that of *Indiana*.

Indiana.—This is one of several States formed out of the Northwest Territory, which was ceded to the United States government in 1784, by Virginia. This was subsequent to the Virginia statute, so that in this State there was originally no tenure. In 1795 the territorial government passed an act declaring that the common law of England and all acts of Parliament of a general nature made in aid of the common law prior to 4 Jac. 1, "and also the several laws in force in this territory" should be in full force. 1 *Chase Stat.* 190, 191. If this act was valid, then tenure was thereby re-established in the Northwest Territory. It has been doubted, however, whether it was within

the power of the territorial government. 1 Chase. Stat. 190, note; *Thompson v. Gibson*, 2 Ohio 439; *Helfenstein v. Garrard*, 7 Ohio, pt. 1, 275; *Carroll v. Olmstead*, 16 Ohio 260.

Kentucky was a part of Virginia originally, and was set off in 1791. This was subsequent to the Virginia statute on the subject, and therefore that statute was carried with it as part of the law of the State. The revised statutes of 1851 (p. 127) repealed all general statutes of England, Virginia and Kentucky. It would seem this repealed the Virginia abolishing statute, and thereby revived the law as it stood before the passage of the Virginia act.

Maryland.—There has been legislation on the question of tenure, but in *Matthews v. Ward*, 10 Gill & Johns. (Md.), 443, 451, it is said that after the Revolution, "lands became allodial, subject to no tenure." No other case, either in Maryland or elsewhere, supports this view of the effect of the Revolution, and we have already seen, *supra*, that the Revolution did not alter tenure.

Michigan was one of the States formed from the Northwest Territory, and the law on tenures is the same as that of *Indiana*.

Minnesota.—The constitution of 1857 declares that all land shall be allodial. Art. 1, § 15.

New Jersey.—The act of Feb. 18, 1795 provides that the purchaser of lands shall hold them of the chief lord, if there be any, of the fee. It also enacts that all tenures are turned into free and common socage, but that this shall not take away "any rents certain, or other services incident or belonging to tenure in common socage, due or to grow due to this State, or any mean lord, or other private person, or the fealty and distresses incident thereunto;" and that the tenure of all grants made by the State shall be "allodial and not feudal," and in "free and pure allodium only." Rev. Stat. 1877, pp. 165, 166.

New York.—"All lands within this State are declared to be allodial, so that, subject to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates; and all feudal tenures of every description, with all their incidents, are abolished." Rev. Stats., pt. 2, ch. 1, tit. 1, § 3. This statute had been preceded by the statute of Feb. 20, 1787, which was identi-

cal with the *New Jersey* statute cited above.

Ohio was one of the States formed from the Northwest Territory. For the legislation on tenure prior to the separation see *Indiana*. After it was created a State, the legislature passed a statute repealing the act of the territorial government, and then re-enacting it. 1 Chase. Stat. 512; but the next year, Jan. 2, 1806, an act was passed repealing so much of the last act as declared that the common law and English statutes should be in force. 1 Chase, Stat. 528. It would seem, therefore, that the law of Ohio was relegated to its condition before the territorial act of 1795, and that there is no tenure in that State. Gray on Perp., page 15.

Pennsylvania.—The province of Pennsylvania was granted to William Penn by King Charles II, in 1661, in free and common socage. The charter provided in the seventeenth section that the statute *Quia Emptores* should not be in force in the province. After the Revolution the General Assembly, in 1779, passed an act divesting all right of the Penn family to the unsold soil of the State, and appropriating to the Penns one hundred and thirty thousand pounds in consideration of their expectations. 1 Smith's Laws 480. The Penns accepted the consideration, thus making valid an act of questionable justice. This act simply resulted in vesting the State with all the feudal rights of the Penn family, but in no manner affected tenure. In 1781 an act was passed establishing a land office. 1 Smith's Laws 529. After providing in the tenth section for the form of patent by deed-poll, for lands granted by the commonwealth, "to have and to hold" (here inserting the tenure and reservation) it then enacts that "all and every the lands granted in pursuance of the act shall be free and clear of all reservations and restrictions as to mines, royalties, quit rents, or otherwise, so that the owners thereof, respectively, shall be entitled to hold the same in absolute and unconditional property, to all intents and purposes whatsoever." As to the effect of these acts on tenure there has been much discussion. In *Wallace v. Harmstad*, 8 Wright (Pa.) 492, Chief Justice Woodward positively decided that Pennsylvania titles are allodial. This case, as likewise *Arrison v. Harmstad*, 2 Barr (Pa.) 191, and *Wallace v. Harmstad*, 3 Harris (Pa.) 462, arose from the following circum-

stances: In 1838 Arrison conveyed severally to four brothers Harmstad four lots of ground in Philadelphia. When the deeds came to be executed one of the brothers Harmstad discovered unfilled blanks in all of the deeds, and upon inquiry was told by the magistrate before whom the acknowledgments were to be taken, that it meant that there was no limit to the time within which the rents could be extinguished. This was in accordance with the understanding. The deeds were executed and delivered. The Harmstads took their original deeds and Arrison took the four counterparts. Arrison's agent afterwards procured from the Harmstads their four deeds for the alleged purpose of recording. While in the possession of Arrison's agent, the blanks were filled in with the words "within ten years from the date thereof." The deeds were then recorded by Arrison's agent, and the recorder's receipt given to the Harmstads. On getting the deeds from the recorder's office, the Harmstads discovered the insertions in the deeds and refused to pay the rent reserved. In 1844 an action of debt was brought by Arrison against Oliver Harmstad, which was decided against the plaintiff because of the alteration in the deed. *Arrison v. Harmstad*, 2 Barr (Pa.) 191. In 1850 Wallace, an innocent grantee of Arrison, brought an action of covenant to recover rent against Joseph Harmstad, and it also was decided against the plaintiff for the same reason. *Wallace v. Harmstad*, 3 Harris (Pa.) 462. Subsequently Wallace distrained for rent on the premises of Edwin Harmstad, who brought an action of replevin. The case was decided by the Supreme Court in 1863. Counsel for Wallace contended, *inter alia*, "that a ground rent reserved in a deed by a grantor is an estate which vests in him the instant the fee simple in the land vests in the grantee; that that estate is a rent service; and continues to exist, though the instrument creating it be destroyed; and that a right of distress is one of the necessary legal incidents of the estate." In delivering the opinion, the court said: "I see no way of solving this question except by determining whether our Pennsylvania titles are feudal or allodial." The chief justice, as a negative to the theory that titles in Pennsylvania are feudal, quotes from Wright's *Tenures* 35, as follows: "Fealty, the essential feudal bond, is so neces-

sary to the very notion of a feud, that it is a downright contradiction to suppose the most improper feud to subsist without it." After stating that the question is narrowed down to whether fealty is any part of Pennsylvania land tenure, he erroneously states fealty to be what was the ceremony of homage, and concludes that fealty does not subsist in Pennsylvania because no such ceremony ever took place in the State. He then sets forth that the Revolution, the divesting act and the act establishing a land office emancipated every acre of soil in the State from feudal tenure. As to the case under consideration, he says: "Here was a conveyance in fee simple of an allodial estate, without any reversion remaining in the grantor, and therefore all his remedies for rent rest on the contract," and consequently the case was decided against Wallace because of the fraudulent alteration. This opinion has been severely criticised, the most prominent authority against it being the late Chief Justice Sharswood of Pennsylvania. See Sharswood's *Lectures Introductory to the Study of the Law*, 179, *et seq.* The opinion was rested mainly on the fact that the ceremony which the court supposed to be fealty, never took place in the State. Since the court confounded fealty with homage, this reason falls to the ground. Besides, the question of tenure was not necessary to the decision of the case, the better opinion being that the fraudulent alteration in the deeds was of itself ample ground for deciding as the court did, regardless of tenure. The court in this case approved also of the decision rendered many years before in the great case of *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337, which decided that a ground rent in Pennsylvania was a rent service, and not a rent charge, because the statute of *Quia Emptores* was not in force there. To speak of rent service, or the statute of *Quia Emptores* where there is no tenure is an absurdity. Rent service and the statute *Quia Emptores* necessarily imply tenure. They are meaningless terms without it. See *Cadwalader on Ground Rents*, ch. 1; *Gray on Perp.*, § 26. For these reasons *Wallace v. Harmstad* is now considered of little weight; in fact it is unintelligible. There has been some suggestion that in Pennsylvania some titles are feudal and others allodial. Jackson and Gross on *Landlord and Tenant*, page 11. This

there has been no legislation affecting the theory of tenure. Leaving out of consideration *Louisiana*, in which a modified Roman law prevails, the result may be summarised as follows: Tenure is abolished and all land made allodial in *California*, *Connecticut*, *Minnesota*, *Ohio*, *New York*, *Virginia*, *West Virginia* and *Wisconsin*. In *New Jersey* part of the land is allodial and part feudal; all land granted by the State being allodial. In *Illinois*, *Indiana* and *Michigan* the question is doubtful, depending upon the validity of a territorial statute. In *Pennsylvania* the better opinion is that tenure exists, though there is a case in which the Supreme Court of that State professed to decide otherwise.¹ In all the other States tenure undoubtedly exists.

It may, therefore, be safely asserted that the feudal system of tenure is the basis of the law of real property in every State except nine.² Of these *Louisiana* has the system of the Roman law.

The greatest uncertainty exists as to the effect of the statutes declaring tenure to be allodial in *California*, *Connecticut*, *Ohio*, *New York*, *Virginia*, *West Virginia*, *Wisconsin* and *New Jersey*. The most authoritative and best grounded opinion seems to be that despite the statutory abrogation of feudal tenure the feudal system must remain the basis of the law of real property in the absence of any other basis.³

opinion has but slight support, however. The Divesting Act, of itself, produced no change in tenure. If it operated in conjunction with the Land Office Act, it could only be on titles which originated under and subsequent to that act; and the logical conclusion would be, that one-half of the lands in the State would be feudal and the other half allodial. "It would require something more than argumentative inference from general legislative language to warrant a doctrine which would lead to such results." Sharswood's Lectures Introductory to the Study of the Law, page 189.

South Carolina.—The only tenure of lands was declared to be that of free and common socage by the act of 12 Dec. 1712, § 5; Grimké's Laws, 99; Rev. Stat. 1873, p. 416.

West Virginia.—This State was separated from *Virginia* in 1862, and carried with it the law of *Virginia*. Tenure there never existed in this State.

Virginia.—Tenures were abolished by the statute of 1779, ch. 13. See 10 Hen. St. 50, 64, 65; 2 Minor Inst. 71; 1 Lomax's Dig. 539.

Wisconsin.—Was one of the States formed from the Northwest Territory.

The constitution of 1848, art. 1, § 14, provides that all lands shall be allodial. For prior legislation see *Indiana*.

1. Wallace v. Harmstad, 8 Wright (Pa.) 492.

2. For a discussion of the question in these and other States, see the second preceding note.

3. In all these States the original basis was feudal tenure; the theory of real property owed its development to the feudal system in the hands of judges trained in that system, familiar with its mode of reasoning, unconsciously influenced by feudal notions. It would certainly not be a tenable position to assume that real property law in those States was relegated to practical anarchy; that nothing of scientific system remained, and that the whole law of land had been created anew subsequent to the abolition of tenure. But unless such is the case, it is evident that what of systematic law on the subject exists must be based upon feudal theories. There was nothing else upon which it could be based. Even if the law were to be assumed as a new creation, dating from the legislative change to allodial holding, yet the result must still be the same. A system of law on any subject

It would seem, therefore, that with the exception of *Louisiana* the theoretical basis of the system of land holding is feudal.¹

3. Real Rights Treated with Reference to their Qualification—

a. QUALIFICATIONS RELATING TO QUANTITY OF ESTATE—(1) *Conditions at Common Law*.—Conditions may be annexed to estates in such a way as to create or enlarge them. These will be found treated elsewhere.² It is here proposed to discuss only conditions in so far as they may defeat existing estates. A condition may be annexed to an estate bounded by appropriate words of limitation (such as "in fee," "for life," or "for years"), with the result that, on its breach, the estate is liable to be defeated. The characteristic feature of such a condition is that it shall be no part of the limitation, but external to it, though in

develops in accordance with the customs, habits and prior notions implanted in the community. But the people in all these States were, by long association and habit, accustomed to a system of land-holding which we have seen was in its main features feudal.

1. All our legal nomenclature, our system of conveyancing, our law as to rights of owners of different estates, rules as to future interests, perpetuities, in fact, the entire theory of landed property is explainable on no other theory than that of feudal tenure.

"Allodial land" often means land held of no one. 2 Bl. Comm. 45 note. 47-105; Wright, Tenures 146, 147; Gilbert, Tenures (4th ed.) 352, Watkins' note 5; Somner, Gavelkind, 109, 111, 126. But the expression is also employed to mean land which, though held of a lord, is not subject to any services. "*Erat alodium prædium non modo ab omni præstatione liberum sed a quolibet servitio reali et personali immune, licet illius possessor dominum agnosceret, a quo illud tenebat in feudum honoratum.*" Ducange, *Glos. Aloidis*; Spelm., *Glos. Aloarius, sub fine*. See Co. Lit. 1b, 5a, 65a, Hargrave's note; Allen, *Prerog.* 196; Digby, *Hist. Law Real Prop.*, ch. I, § 1, §§ 2-4.

The feudal system is the keynote of our jurisprudence. It is, as was said by Binney, by "beginning with the fundamental law of estates and tenures, and pursuing the derivative branches in logical succession, and the collateral subjects in due order, that the student acquires a knowledge of principles that rule in all departments of the science, and learns to feel as much as to know what is in harmony with the system and what is not." Leaders of the old Bar, page 50. See REMAINDERS.

2. See also for this division of conditions precedent and subsequent, and for a discussion of implied and express conditions, and other incidents of estates upon condition, *ESTATES*, vol. 6, p. 900-905. See also, as to precedent and subsequent conditions, *Cooley's Bl. Com.*, bk. 2, 154, note 4, citing 4 Kent Com. 125; *Rogan v. Walker*, 1 Wis. 555; *Burnett v. Strong*, 26 Miss. 116; *Finlay v. King's Lessee*, 3 Pet. (U. S.) 346; *Taylor v. Mason*, 9 Wheat. (U. S.) 325; *Ward v. New England Screw Co.*, 1 Cliff. (U. S.) 555; *Notham v. East India Co.*, 1 T. R. 638, 645.

The validity of a condition annexed to a conveyance in fee was upheld in a decision in *Van Rensselaer v. Ball*, 19 N. Y. 100, which was well grounded in authorities, distinguishing *De Peyster v. Michael*, 6 N. Y. 467. See Litt., § 325, where he says of an estate on condition that it "is as if a man by deed indented enfeoffs another in fee-simple, reserving to him and his heirs, yearly, a certain rent payable at one feast or divers feasts, per annum, on condition that if the rent be behind, etc., that it shall be lawful for the feoffor and his heirs to enter, etc., and if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year, etc., that then it shall be lawful for the feoffor or his heirs to enter, etc. In these cases, if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and them of his former estate, to have and hold, and the feoffee quite to oust thereof. And it is called an estate upon condition, because that the estate

the same deed. The result is that upon the breach, the estate is not, *ipso facto*, determined. It can only be actually defeated by entry of the grantor or feoffor.¹ This right of entry is inalienable by a rule of common law. Hence no estate can be limited over on breach of a condition.²

of the feoffee is defeasible, if the condition be not performed." See Cruise's Dig., vol. 2, ch. 1, § 1, pl. 3, 9; 4 Kent's Com. 123.

Effect of Assignment of Mortgage Title.

—In *Merritt v. Harris*, 102 Mass. 326, where A granted land to B on condition subsequent, taking a mortgage for purchase money, then assigned to C "said mortgage deed, the real estate thereby conveyed, and the promissory note, debt and claim thereby secured," it was held that C took only a title in mortgage, which was subject to be defeated by mortgagor's breach of condition, the right of entry remaining in A. The principle of this case is rather the indestructibility than the inalienability of rights of entry, on the ground that the assignment of a mere mortgage title cannot have the effect of an absolute alienation in fee. See *Hancock v. Carlton*, 6 Gray (Mass.) 39; *Richardson v. Cambridge*, 2 Allen (Mass.) 118; *Rice v. R. Co.*, 12 Allen (Mass.) 141.

1. In *Carter v. Branson*, 79 Ind. 14, it was held that the grantor in a conveyance upon a condition subsequent, must have re-entered and had possession at the time of an alleged trespass upon the land, in order to be entitled to an action therefor; that the mere assertion of an ownership or control does not constitute a re-entry and recovery of possession for the purpose of an action. See *Cross v. Carson*, 8 Blackf. (Ind.) 138; *Barber v. Barber*, 21 Ind. 468; *Broker v. Scovey*, 56 Ind. 588.

In *Memphis & Charlestown R. Co. v. Neighbors*, 51 Miss. 412, it was held that in order to revest an estate forfeited for conditions broken, the grantor must make an entry or do some act equivalent thereto,—assert a conditional claim manifesting a determination to take advantage of the breach.

In *Tallman v. Snow*, 35 Me. 342, there was a condition in a deed conveying land with a right to immediate possession, that a third person be allowed to have the use and occupation of it for life, if he shall request it. This was held to be a condition subsequent; also that, in order to revest the es-

tate in the grantor or those succeeding to his right, an entry was necessary, which was not dispensed with by R. S. (Me.), ch. 145, § 6.

In *Williams v. Angell*, 7 R. I. 145, it was held that where a life estate was liable to forfeiture for the non-payment of an annuity charged upon it, there must be an entry for condition broken, or claim, by the heirs, for the purpose of avoiding the life estate; that the breach of condition does not in itself destroy the life estate so as to cause the remainder over to fail for want of an estate of freehold to support it. See *Washburn, Real Property*, vol. 1, 451, citing *Chalker v. Chalker*, 1 Conn. 79; *Sperry v. Sperry*, 8 N. H. 477; *Fonda v. Sage*, 46 Barb. (N. Y.) 109; *Green v. Pettingill*, 47 N. H. 375.

But in *Cowell v. Col. Springs Co.*, 100 U. S. 55, upon breach of the condition, it was held that the grantor had a right to treat the estate as having reverted and bring ejectment of the premises without previous entry upon them or demand for their possession, such entry or demand being necessary under a statute of *Colorado* where the premises were situated.

So in *Massachusetts*, under Pub. Stat. (Mass.), ch. 173, § 3, whereby entry in case of an action to recover land forfeited is dispensed with by statute. See *Austin v. Cambridgeport*, 21 Pick. (Mass.) 215. See also *Cornelius v. Ivins*, 2 Dutch. (N. J.) 376; *Ruch v. Rock Island*, 97 U. S. 693.

In *New York*, see *Bradt v. Church* (1887), 110 N. Y. 537, and *Martin v. Rector* (1890), 118 N. Y. 893, with cases cited, for the construction of sections 1504 and 1505 of the Code of Civil Procedure, giving to "the grantor or lessor, or his heirs, devisee or assignee" an action to recover the property, where there is "a subsisting right by law to re-enter for the failure to pay rent," or where a right of entry is reserved "in default of a sufficiency of goods and chattels whereon to distrain for the satisfaction of rent due."

2. This inalienability of the right of entry is in harmony with the rule as stated by Mr. Challis (*Real Prop.* 63),

But under a well-established doctrine, equity will enforce a restriction on the use of land in the nature of an easement at the prayer of others than the original grantor or his heirs.¹

which forbids any one taking advantage of the breach of a condition, except the person who makes the condition or his privies in right and representation; "that is (1) the heirs, *quoad* estates descendible to them; (2) the executors or administrators, *quoad* estates transmissible to them, and (3) the successors of corporations sole (Preston, Shep. T. 149)." See Co. Litt. 214*b*. See Washburn, Real Property 451, who gives as the underlying principle, "that it required as solemn an act to defeat as to create an estate," *citing, inter alia*, 1 Prest. Est. 46, 48, 50; 2 Flint Real Prop. 231; Co. Litt. 201*a*, n. 84; Walker, Am. Law 207; Sperry v. Sperry, 8 N. H. 477; McKelway v. Seymour, 29 N. J. L. 321, 329; Com. Dig. O. 6. See 2 Bl. Com. 156, *citing* Cro. Eliz. 205; 1 Roll. Abr. 411. See Butler's note to Co. Litt. 201*a*.

The reason given by Coke against assignment of right of entry is that "under color thereof, pretended titles might be granted to great men, whereby the right might be trodden down and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession." Co. Litt. 325.

In the case of conditions implied, which are sometimes called conditions in law, the right of entry passed with the assignment of the estate. See Washb. R. P., vol. 1, 451, *citing* Co. Litt. 216; Sheppard, Touch. (fol. ed.) 441; 2 Crabb, Real Prop. 835. See Martin v. Strachan, 5 T. R. 107, n. In Nicoll v. N. Y. & Erie R. Co., 12 N. Y. 121, it was held that a grant to a railroad company of lands upon the express condition that the road be constructed by the company within the time prescribed by the act of incorporation, vested the fee of the lands in the railroad company at once, subject to being divested on a failure to perform the condition, by the entry of the grantor or his heirs; that, such right of entry is not an interest in land which may be assigned; and that where a breach of the condition by the company did not occur until after a conveyance of the land by the original grantor to a third person, the latter could not take advantage of the breach, and divest the title of the grantee on condition. See 4 Kent's Com. 130; Livingston v. Stickles, 8 Paige (N. Y.)

398. See also Vail v. Long Island R. Co., 106 N. Y. 283 (1887). See Norris v. Milner, 20 Ga. 563; Smith v. Brannan, 13 Cal. 107; Warner v. Bennett, 31 Conn. 468.

But in leases for life or years, and in grants in fee reserving rent, the right of entry has been made assignable by statute in *New York* and in several other States where the statute 32 Henry VIII, ch. 34, has been adopted. See N. Y. Co. Civ. Proc. 1504, 1505. See, as to construction of the sections of the code, Martin v. Rector, 118 N. Y. 483 (1890); Van Rensselaer v. Ball, 19 N. Y. 100; Nicholl v. New York & Erie R. Co., 12 N. Y. 131.

As to the inclusion of rights of entry for breach of condition in an estate in fee simple within the Wills Act (7 Wm. IV and 1 Victoria, ch. 26, § 2), see Challis on Real Property 176, 177.

As to the extinguishment of the right to enter after breach of condition, attached to particular estate, see Hooper v. Cumming, 45 Me. 359. See also Neederhill v. Sara. etc. W. R., 20 Barb. (N. Y.) 455. See Hamilton v. Elliott, 5 S. & R. 375.

See, however, McRissick v. Pickle, 16 Pa. St. 140; Southard v. Cent. R., 26 N. J. L. 1.

As to the right of the devisee of grant (or residuary devisee or his heir) where the conditional estate is created by devise in the same will, to enter and defeat the estate on condition, see the remark at the close of this note, on the construction of such devises on condition as devises on trust.

See *infra*, in the text under *Limitations at Common Law*, the distinction between *Estates on Condition* and *Limitations*. See also Avelyn v. Ward, 1 Ves. Sen. 420; Henderson v. Hunter, 59 Pa. St. 335.

1. Thus where the owners of a piece of land laid it out into house lots, orally agreeing among themselves that they shall be occupied exclusively for dwelling houses, and accordingly gave deeds therefor upon condition that no buildings should be erected thereon except for dwelling houses only, it was held that one who took such a deed was bound in equity by the condition; and purchasers of others of the lots whose estates would be injured by his violation of the

condition, might maintain a bill in equity, without joining their grantors as plaintiffs, against him and his tenant, to prevent the conversion of a dwelling-house upon his lot into a public eating-house. *Parker v. Nightingale*, 88 Mass. 341.

See *Tulk v. Moxhay*, 11 Beav. 571. See *Bispham's Equity*, §§ 263-463.

The ground of the right of plaintiffs in the *Massachusetts* case cited, to enforce the restriction, seems to have rested, in the mind of Bigelow, C. J., on the fact that "the purposes intended to be accomplished by the restrictions . . . was for the benefit and advantage of other owners of lots situated on the same street or court;" . . . that "it was not imposed by the original grantors for their own benefit or advantage, and cannot be considered as personal to them."

The court distinguished the case of *Badger v. Boardman*, 16 Gray (Mass.) See Story Eq. Pl., §§ 121, 126; *Adair v. New River Co.*, 11 Ves. 429, 444; *Gray v. Chaplin*, 2 Sim. & Stu. 267; *Whitney v. Union Ry.*, 11 Gray (Mass.) *Mann v. Stephens*, 15 Sim. 377; *Patching v. Dubbins*, Kay. 1; *Coles v. Sims*, 5 DeG. M. & G. 1; *Piggott v. Stratton*, DeG. F. & J., 33. See to the same effect *Payson v. Burnham*, 141 Mass. 547 (1886). See also *Barrow v. Richard*, 8 Paige (N. Y.) 351. See *Vermont v. Proprietors*, 2 Paine C. C. 545; 2 Crabb. R. P. 315. See also *Gilbert v. Peteler*, 38 N. Y. 165.

In *McIlroy v. Morley*, 40 Kan. 76, it was held that where a grantor conveys an estate upon a condition subsequent, and the condition is broken, the owner of adjacent property deriving his title from the same grantor on a subsequent deed, cannot claim a reverter or forfeiture of the estate described in the former one. He is not a party to the prior deed, and the conveyance to himself does not refer to the condition subsequent contained in said deed, nor is such adjacent owner entitled to take any advantage of the breach of any condition contained in such prior deed to which he is in no way a party. See *Skinner v. Sheppard*, 130 Mass. 180; *Cooper v. Cummings*, 45 Me. 359; *Piper v. Railway Co.*, 14 Kan. 568. See also *O'Brien v. Wetherell*, 14 Kan. 616.

Enforcement at Equity.—It is thoroughly settled, however, that equity will never lend its aid to enforce a forfeiture or a penalty, or divest an estate for a breach of a subsequent condition, even though upon the

special ground of removing clouds. *Memphis & Charleston R. Co. v. Neighbors*, 51 Miss. 412. See *Cooley's Bl. Com.* 2, 157, n. 9, citing *Smith v. Jewett*, 40 N. H. 530; *Livingston v. Thompson*, 4 Johns. Ch. (N. Y.) 415; *Wing v. Railey*, 14 Mich. 83. See also *Hagar v. Buck*, 44 Vt. 285; *Fitzhugh v. Maxwell*, 34 Mich. 138; *Warner v. Bennett*, 31 Conn. 468; *Palmer v. Ford*, 70 Ill. 369; *Orr v. Zimmerman*, 63 Mo. 72.

As to the mode of creation of estates on condition and their construction; the nature of the condition (whether repugnant or illegal); their enforcement; as to waiver and release, and as to the interference of equity to enforce or prevent forfeiture; also as to the distinction between estates on condition and a gift on trust, see *ESTATES*, vol. 6, p. 900; as to the last point, see this note, *infra*. See also, as to construction, *Langley v. Chapin*, 134 Mass. 82; *Moore v. Pitts*, 52 N. Y. 85; *Board etc. v. Trustees*, 63 Ill. 204; *Marshall v. School*, 28 Iowa 360; *Skinner v. Sheppard*, 130 Mass. 180; *Fuller v. Arms*, 45 Vt. 460.

In *Cowell v. Colorado Springs Co.*, 100 U. S. 55, where land had been conveyed on a condition that intoxicating liquors should never be manufactured or sold on the premises, and that on breach of condition, the title should revert to the grantor, the condition was held not repugnant to the estate granted nor unlawful, nor against public policy. See *Plumb v. Tubbs*, 41 N. Y. 442; *O'Brien v. Wetherell*, 14 Kan. 616. See also *Doe v. Keeling*, 1 Maule & S. 95; *Gray v. Blanchard*, 8 Pick. (Mass.) 284.

Devises upon Trust.—In a note to section 282 of his work on *Perpetuities*, Mr. Gray shows how entries for breach of condition have become, when attached to an estate in fee, to some extent obsolete within the last two centuries, devises with a condition having, in almost every instance, been construed as a devise upon trust, in which, instead of the heir taking advantage of the condition broken, the *cestui que trust* can compel an observation of the trust by a suit in equity. "The only case," says Mr. Gray, "found in either the last or present century in *England*, where the heir has entered for a breach of condition attached to a fee simple, is *Doe d. Gill v. Pierson*, 6 East 173 (1805)." See *Atwater v. Atwater*, 18 Beav. 330; *Sugden on Powers* (1st ed.) 96. See *Wright v. Wilkins*, 2 B. & S. 252, 259, where, upon a devise, on

It must be remembered that the rights of entry, after breach of condition, are in no sense reversionary interests. They may be regarded as a remedy for breach of contract.¹ They are, therefore, in nowise affected by the statute *Quia Emptores* as are possibilities of reverter.²

(2) *Limitations at Common Law.*—Besides common or direct limitations by which estates are bounded and naturally determined (such as "for life," "*pur autre vie*," in "fee simple"), there may be special or collateral limitations,³ whose effect is, as

condition that the devisee will pay certain legacies, it was held that the heir could not enter for breach of condition, but that the devisee took the land on trust. *A. G. V. Wax Chandlers' Co.*, L. R. 16 H. L. I. See also *A. G. v. South Molton*, 14 Beav. 357; *Merchant Taylor Co. v. A. G.*, L. R., 11 Eq. 35.

In *United States* see *Stanley v. Bolt*, 5 Wall. (U. S.) 119; *Sohier v. Trinity Church*, 109 Mass. 1; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Ayling v. Kramer*, 133 Mass. 12. See *Fuller v. Arms*, 45 Vt. 400. See also *Mitchell v. Leavitt*, 30 Conn. 587. And see *Borrie v. Smith*, 47 Mich. 130. But see *Blanchard v. Detroit etc. R. Co.*, 31 Mich. 43; *Underhill v. Saratoga, R. Co.*, 20 Barb. (N. Y.) 455; *Aikins v. Albany etc. R. Co.*, 26 Barb. (N. Y.) 289; *Douglass v. Hause*, Ritch. Eq. Dec. 146, 152; and *Van Rensselaer v. Ball*, 19 N. Y. 100.

1. See Gray, Rule against Perpetuities, §§ 12, 30; Litt. §§ 325, 347; Co. Litt. 202; *Doe d. Freeman v. Bateman*, 2 B. & Ald. 168; *Van Rensselaer v. Ball*, 19 N. Y. 100; 2 Bl. Com. 154; *Cruise's Dig.* vol. 2, ch. 1, § 1, pl. 319; 4 Kent's Com. 123.

2. As to these see *supra*, under *Tenures*, this article, II, 1.

For a discussion of rights of entry as affected by the Rule against Perpetuities, see PERPETUITIES. See, in general, ESTATES ON CONDITION, vol. 6, p. 900. See also CONDITIONS, vol. 3, p. 422.

3. *Nomenclature.*—It is highly important that the conception of the determination of an estate by its own expiration, a conception strictly within the common law, should be clearly distinct, not only from another common-law conception, that of a destruction of the estate by the act of the grantor (which has been considered above under *Conditions at Common Law*), but likewise from a third conception impossible at common law, being directly contrary to its prin-

ciples of limitation. This is the cutting off one estate by the arising of another, a class of disposition first permitted under the Statutes of Wills and of Uses. (See this article, *Limitations Under the Statute of Uses and Wills.*)

It seems best, therefore, to apply to the common-law limitation a name which is characteristic, and is different from the name given to the statutory interests—in accordance with what seems to be the better right of authorities on real property—of whom the most prominent are Preston, Fearn, Butler, Smith (on Executory Interests), Williams (on Settlements), Kent, Challis and Professor Gray. (Even with these the distinction is not always maintained between that which denotes the measure of the estate and the estate itself—the word "limitation" serving both uses. But the distinction is of slight importance, since no material confusion could result.)

The meaning of the terms, as used in the text, follows the definition of Mr. Preston:

"A direct limitation marks the duration of estate by the life of a person, by the continuance of heirs, by a space of precise and measured time; making the death of a person in the first example, the continuance of heirs in the second example, and the length of given space in the third example, the boundary of the estate or the period of duration."

"A collateral limitation, at the same time that it gives an interest which may (by possibility) have continuance for one of the times (marked out) in a direct limitation, may, on (the happening of) some event which it describes, put an end to the right of enjoyment during the continuance of that time." (1 Prest. Est. 42.)

And the term "special limitation" is used precisely in this sense of "collateral" limitation, in Smith on Executory Interests, p. 12.

opposed to conditions, to put an end to the estate *ipso facto*, on the happening of a certain event, or the expiration of a certain condition of things. Such limitations are in no proper sense conditions, although many writers have so classed them.¹ The distinction appears plainly here, that at common law an estate can be limited over after the termination of a prior estate by special limitation, provided such prior estate be not a fee.²

"A special limitation," says Mr. Smith, "is a qualification serving to mark out the bounds of an estate, so as to determine it *ipso facto* in a given event without action, entry or claim, before it would or might otherwise expire by force of, or according to, the general limitation."

Mr. Challis, quoting Preston's definitions with approval uses the term "determinable limitation." Challis, *Real Property*, 198, 199.

In a note under § 22 of his work "Restrictions on Alienation," Mr. Gray speaks of the confusion of usage as follows:

"The term 'conditional limitation' is used in two senses. In the sense in which it is generally employed by courts and writers, it is a generic term, comprising two species, (1) shifting uses, and (2) executory devises, and is a proviso cutting short an estate previously created and substituting another in its stead. It is very convenient to have such a common term for shifting uses and executory devises; but, unfortunately, some writers have confused legal nomenclature by attempting to use it in another sense. With them it means a proviso operating to determine an estate by intrinsic force, but not by itself substituting another. In a devise to A and his heirs, *but if A died unmarried then to B and his heirs*, the words in italics form a conditional limitation in the first sense, while in a devise to A, *so long as he remains unmarried*, the words in italics form a conditional limitation in the second sense. A proviso of this latter kind is generally called a special limitation. Among the treatises in which the term 'conditional limitation' is used in the first sense are, *Fearne Cont. Rem.* 14, 15; *Butler, Notes to Fearne Cont. Rem.* 381; *Smith, Executory Interests.* § 149; 3 *Prest. Abs.* 284; *Williams on Settlements* 21; 2 *Cruise Dig.* 315; 4 *Kent. Com.* 249, 250. See *Gilbert Uses*, (Sugd. ed.) 178 note. Those in which it is used in the second sense are, 1

Sand. Uses 150, 151; 1 *Steph. Comm.* (8th ed.) 295, note (k); 1 *Leake, Land Law* 216, note (a); *Tud. L. C. on Real Prop.* (3rd ed.) 347, 348."

To the latter list must be added the notes on *Leading Cases in American Law on Real Property* by Sharswood & Budd, vol. 1 pp. 186-190. See also *In re Machee*, 21 Ch. D. 842, in which there is no attempt at a separation of terms. See the following authorities and decisions, which are in harmony with the fore-quoted definitions: 2 Bl. Com. 155; *Tho. Co.*, 2 vol. 120, 121; *Shep. Touch.* 121; *Washburn Real Prop.*, vol. 1, 457-461 (where, however, the term "conditional limitation" is sometimes used in both senses); *Miller v. Levi*, 44 N. Y. 494; *Pennoyer v. Brown*, 13 Abb. N. C. (N. Y.) 82; *Stearns v. Godfrey*, 16 Me. 160; *Henderson v. Hunter*, 59 Pa. 340; *Fifty Associates v. Howland*, 11 Met. (Mass.) 102; *Att'y-Gen'l v. Merrimac Manufacturing Co.*, 80 Mass. 612; *Owen v. Field*, 102 Mass. 105; *Brattle Sq. Ch. v. Grant*, 3 Gray (Mass.) 147. See also *Watkins, Conveyancing* 204.

1. Littleton distinguishes between a condition in deed and a condition in law, of which the latter is equivalent to limitation, as above defined. See *Litt.* § 380; 1 *Sand. Uses* (5th ed.), vol. 1, p. 156. See also *Plowd.* 242. 2 Bl. Com. 155; and 1 *Sand. Uses* 150, 151; 1 *Steph. Comm.* (8th ed.) 295; n. k.; 1 *Leake, Land Law* 216, n. (a); *Tud. L. C. on Real Prop.* (3d ed.) 347, 348. See also *Challis, Real Prop.* 199.

2. Logically, it would be possible to treat limitations under the head of the *Quantity of Estate*. The fact, however, that special limitations may be annexed to any estate, suggests their treatment under *Qualifications*.

Remainder After Special Limitation.—

As special limitation may be annexed to any estate, whether for years, for life, or in fee, so a remainder may be limited after such special limitation in all except estates in fee, where it is forbidden by the force of the meaning

Since estates limited over after breach of condition were defeated by the entry of grantor, the rule of construction resulted that where there was an estate over after breach of condition, the condition was turned into a limitation.¹

Cases of common law limitation are infrequent in modern law. Fees determinable by limitation will be discussed below in a note

of the terms "fee" and "remainder" at common law (see on this point, the note below on *Determinable Fees*). See Challis, *Real Prop.* 64, 65, and ch. 17, *citing* Co. Litt. 18a; Washburn, *R. P.*, vol. 1, 458, *citing* 1 Prest. Est. 54; Fearn's *Cont. Rem.* 13 and n.; *Brattle Sq. Church v. Grant*, 69 Mass. 150, *citing*, 4 Kent Com. 10, note; *Martin v. Strachan*, 5 T. R. 107, note. 1 Jarman on Wills 792.

1. Distinction of Conditions and Limitations.—The line between conditions and limitations is one of the most delicate distinctions in the law. Blackstone's exposition is as follows:

"When an estate is so expressly confined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation; as when land is granted to a man, so long as he is parson of Dale, or while he continues unmarried, or until, out of the rents and profits, he shall have made five hundred pounds, and the like. In such case, the estate determines as soon as the contingency happens, and the next subsequent estate, which depends on such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, on condition in deed (as if granted expressly upon condition to be void upon the payment of forty pounds by the grantor, etc.), the law permits it to endure beyond the time when such contingency happens, unless the grantor, his heirs or assigns, take advantage of the breach of the condition, and make either an entry or claim in order to avoid the estate." 2 Bl. Com. 155.

So, as to the effect of the words "until," "so long," "if," "whilst" and "during." See *Henderson v. Hunter*, 59 Pa. 340, *citing* Smith on Exec'y Interest, 12; Tho. Coke, 2 vol. 120-121; Fearn on Rem. 12, 13, and note p. 10. See also *Brattle Sq. Church v. Grant*, 69 Mass. 149-150, *citing*; 1 Jarman on Wills 780; 4 Kent Comm. 197.

There is no doubt that whatever be

the conjunction used, whether conditional or purely temporal, a provision for re-entry is an unfailing characteristic of an estate upon condition. This was held by the Supreme Court of Massachusetts in *Attorney-General v. Merrimac Mfg. Co.*, 80 Mass. 612, where the court gave as the reason for this rule of construction that "the stipulation for a right to re-enter would be senseless if the deed were construed to create a limitation, because, the estate vesting upon the happening of the event, the right to enter would, of course, follow with all other rights of ownership." See *Shep. Touch.* 121, 122; Litt., §§ 329, 330; 4 Cruise Dig., tit. 32, ch. 25; 4 Kent's Com. (6th ed.) 125, 126. It was said by Lord Coke in *Mary Partington's Case*, 10 Coke 41, that if there be express words of condition annexed to the estate, it cannot be construed a limitation.

This rule of construction was denied by Lord Hale in *Lady Ann Fry's Case*, 1 Vent. 202, 203, to be law in all cases; likewise in *Crabbe on Real Property*, §§ 2135, 2136; 55 Law Library 524, where it is said that there was no other authority for the position. And the rule as given by Blackstone (2 Comm. 156) is: "Though strict words of condition be used, if, on breach of condition, the estate be limited over to a third person, it does not immediately revert to the grantor (as if the estate be limited to B on condition that within two years he intermarry with C, and, on failure, then to D and his heirs), this the law construes to be a limitation and not a condition; for if a condition, only A or his representatives would avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter; but when it is a limitation, the estate of B determines, that of C commences, and he may enter on the lands immediately without any act as entry or claim." See *Miller v. Levi*; 44 N. Y. 494, 495. See also *Bennett v. Robinson*, 10 Watts (Pa.) 348; *Stearns v. Godfrey*, 16 Me. 160.

In *The Fifty Associates v. Howland*, 52 Mass. 103, it was said: "This is a

under *Determinable Fees*. In *New York* cases have occurred in which the question was whether a lease is determinable by a condition or limitation, as affecting the jurisdiction of justices.⁴

well founded exception to the general rule of construction as laid down by Lord Coke," citing 2 Wooddeson 143, 144; Bac. Ab. Conditions 2. See Washburn, *Real Prop.*, vol. 1, 458, citing *Vellock v. Hammond*, Cro. Eliz. 204; 2 Flint *Real Prop.* 231; *Brattle Sq. Church v. Grant*, 3 Gray (Mass.) 142.

1. Condition in Lease.—In *Miller v. Levi*, 44 N. Y. 491, there was a lease which provided that the lessor might terminate it at the end of any year by giving sixty days' notice in case he should sell or desire to rebuild, said sale and notice terminating the lease. Under 2 Rev. Sts. 513, § 28, subdivision 21, in construction of the words "where such person (tenant or lessor of will, etc.) shall hold over and continue in possession of the demised premises after the expiration of his term without the permission of the landlord," it was held that immediately upon the sale and the notice thereof to the tenant, the limitation attached to the estate of the latter without further act on the part of the lessor; that there then arose a limitation of the term, to-wit, its expiration upon the time of the sale. That the act itself in the lease contemplated, to-wit, a sale without notice, created the expiration; that nothing further was necessary. The court distinguished the case of *Beach v. Nixon*, 9 N. Y. 335, holding that the breach of a condition that the lessee will not permit the premises to be used for a purpose deemed extra hazardous, and that in case of such use the lease shall cease and determine at the option of the lessor, and that he may thereupon recover immediate possession under the statute in question, is not such an expiration of the term as will authorize a summary proceeding. So in distinguishing *Oakley v. Schoonmaker*, 15 Wend. (N. Y.) 226, the court said that a breach of an agreement to cut no wood or timber to be used for fencing and not to carry off any wood or timber, does not create such an expiration of the term as will authorize a summary proceeding under the statute.

The case of *Miller v. Levi*, 46 N. Y. 691, was itself distinguished in *Pennoyer v. Brown*, 13 Abb. N. C. (N. Y.) 82.

In *The Fifty Associates v. Howland*, 11 Met. (Mass.) 99, a lease for five years contained the proviso that if the lessee shall neglect to perform any of the stipulations of the covenant, the lessor might lawfully enter upon the premises and expel the lessee. When the lessee failed to pay rent according to covenant and the lessor entered for condition broken, it was held that the lessee's estate was not determined by his failure to pay rent, but by the lessor's entry. And further, that the lessor could not maintain an action against the lessee under the Rev. Sts. (Mass.), ch. 104, providing for recovery of possession of the demised premises in case a lessee held possession without right after determination of the lease, either by its own limitation or by notice to quit.

See the remarks in *Bennett v. Robinson*, 10 Watts (Pa.) 348, and in *Ashley v. Warner*, 11 Gray (Mass.) 43; in *Sharswood & Budd's Notes on Leading Cases in the American Law of Real Property*, vol. 1, pp. 189-190.

Condition in Easement.—In *Owen v. Field*, 102 Mass. 90, the owner of land on which were springs, conveyed to one K and his heirs "the whole use" of such springs and also the right of entry upon the land at all reasonable times for the purpose of construction and repairs, doing no unnecessary damage; and K covenanted to furnish the owner and his heirs a reasonable supply of water at his house "and if for any reason the water should not be delivered from the main pipe for the space of one whole year at one time, this indenture is to cease and therefore be void and of no effect." The court held that the indenture gave K no right in the soil of the owner's land, but only an easement, which was determined by its own limitation on K's ceasing for the space of more than a year to deliver water. The importance of the case lay in the question whether an entry was necessary on a breach of the agreement or whether, on determination of the easement by the limitation, the use and control of the springs would by their abandonment *ipso facto* go back to the owner of the soil.

Condition in Legislative Grant.—In *Stearns v. Godfrey*, 16 Me. 158, the

A characteristic distinction between estates on condition and estates with special limitation must be noticed. In estates on condition the contingency of their determination must not be repugnant to the quantity of estate, which must be clearly defined in proper words of direct limitation.¹ In estates with special limitation, where the contingency forms part of the whole limitation, there is no necessity for a separate direct or common limitation, nor can there be properly any incongruity between the common and special words of limitation. Both are construed as a whole to determine the quantity of estate. Thus, an estate to A and his heirs as long as B shall live, is a properly limited estate *pur autre vie*.²

The effect of the statute *Quia Emptores* on these common-law estates is most important, especially in the modern law of the United States. It has been seen how, in prohibiting subinfeudation, the statute forbade the conveyance of any estate in fee other than in fee simple where, on conveyance, the feoffee held of feoffor's lord in feoffor's place. Fees tail were specially excepted from the operation of the statute. Further, an estate in fee with right of entry for breach of condition was not affected by the statute, since the right remaining in the grantor was not reversionary, but purely remedial. But determinable or qualified fees, it is clear, were made impossible of creation by the statute.³ In those

commonwealth of Massachusetts had granted a tract of land to B and F by name and to certain settlers named only in the *habendum*, each settler to have a one hundred-acre lot "on condition that each of the grantees aforesaid pay to said B and F five pounds in lawful money within one year from the time with interest to the payee;" "provided, nevertheless, if any settler or other grantee aforesaid shall neglect to pay his proportion of the sum or sums aforesaid, in that case the said B and F shall be entitled to hold the same in fee, which such negligent person might have held by complying with the condition aforesaid for his part." It was held that a title of any settler who failed to perform the condition within the year became vested *ipso facto* in fee in B and F, and was out of the reach of legislative control. The decision rested on the rule that "if a condition subsequent is followed by a limitation over in case the condition is not fulfilled or there is a breach of it, that is termed a conditional limitation." See *Pells v. Brown, Croke, James* 59.

1. As to illegality and impossibility of conditions, see *ESTATES*, vol. 6, p. 875. See for discussion of repugnant conditions, in *Washb. on Real Prop-*

erty, vol. 1, p. 448. Among such conditions are restrictions on the free conveyance of an estate in fee, although a restriction confined to certain persons named is not invalid. See *Atwater v. Atwater*, 18 Beav. 330; *Co. Litt.* 223 a. See *Anderson v. Cary*, 36 Ohio St. 56. See *Plumb v. Tubbs*, 41 N. Y. 442.

As to conditions not to use premises for the manufacture or sale of intoxicating liquors, and as to conditions in restraint of marriage, see *Washb. on Real Property*, vol. 1, p. 448, notes 5 and 6.

2. The difference in this respect between conditions and limitations is that while in the former the repugnant condition becomes simply void, in limitations the original estate is cut down to a lesser one. Thus, in determinable fees, the collateral limitation must be by possibility such as may never happen; but if it is such as must, in the nature of things, happen sooner or later, the whole estate granted becomes either an estate for life or for years, depending on whether the happening of the event is fixed in point of time or not. See *Challis on Real Property* 197; 1 *Prest. Estates* 479; *Litt.*, §§ 82, 740. See also *Plowd.* 342.

3. The question, what kind of tenure exists in the different States will be

States, however, where the statute is not in force, they may still be created.

found discussed under the head of *Tenures*, *supra*, this article. This question is at the foundation of the subject of determinable fees.

The second point to be considered is whether the statute *Quia Emptores* is in force in those States in which feudal tenure still subsists. All this will be found discussed under the same head of *Tenures*. The reasoning is very clear that the statute had the effect of abolishing, as involved in any feudal relation remaining between the parties to a conveyance in fee, the possibility of reverter after a determinable fee, since it was expressly enacted that in the conveyance of a fee the grantee should hold of the grantor's lord. But this conclusion has been strikingly ignored by many writers and judges, so that such estates are commonly thought to exist in *England* as well as in the *United States*. For a thorough discussion of the subject and an analysis of the cases which might be thought to support determinable fees, see Gray on Perpetuities, §§ 31-42. See for the same conclusion 1 Sand. Uses (5th ed.) 208. See also Third Rep. Real Property Com., p. 36. See Leake Land Law 36, note d. See also *Re Machu*, 21 Chan. Div. 838, discussed in Gray, Restraints on Alienation, § 22, note.

By many writers, however, the question is not even mentioned. Thus, Mr. Challis, in his treatise on Real Property gives a prominent position to determinable fees, adding a list of examples which are, however, for the most part, supposititious illustrations. See Challis Real Property 201, 206. Despite the frequent mention of determinable fees in textbooks and in briefs of counsel and *obiter dicta* of judges, it is apparent from an analysis of all cases which might be thought to support the existence of such estates that with one exception there is no actual case supporting the legal creation of a determinable fee in English law, while, on the other hand, there is a decision which is founded directly on the invalidity of such determinable fees. See Christopher Corbett's Case, 2 Anderson 134.

In the *United States* qualified or determinable fees have been upheld more frequently, not only in those States in which there is no statute precluding

their existence, but also in States in which tenure has been abolished, and in those in which the statute *Quia Emptores* is in force. See for a discussion of these cases Gray on Perpetuities, §§ 40-42, in which Mr. Gray concludes that the case of *Leonard v. Burr*, 18 N. Y. 96 "is the only weighty case reported on either side of the Atlantic since the passage of the statute of *Quia Emptores* in which the validity of the possibility of reverter has been clearly adjudicated." Many cases which on first sight appear to be determinable fees or have been so spoken of in the opinions, turn out to be examples of shifting uses or of resulting trusts. A reason why the distinction between possibilities of reverter and other determinable fees should be clearly distinguished from such shifting uses and resulting trusts is, as Mr. Gray observes (§ 41), that the latter are clearly subject to the operation of the Rule against Perpetuities, while as to the former there is much doubt.

The question of the application of the Rule to such interests has, owing to their absence, not been considered in *England*. The only ground against such application could be their origin in the common law, but since contingent remainders are commonly admitted both in *England* and the *United States* to be subject to the Rule (see PERPETUITIES), this argument would seem to fail. In the *United States*, however, where other future estates of a similar kind, such as rights of entry and resulting trusts have not been considered subject to the Rule, it is difficult to say how the courts will view the application of the Rule to possibilities of reverter.

The cases as given by Gray (Rule against Perpetuities, § 33) in which *dicta* occur, sustaining determinable fees, are: 7 Edward IV, 12a; Brian and Cawsen's Case, 2 Leon. 68, 69; 3 Leon 115, 117; Liford's Case, 11 Co. 46b, 49a; Pells v. Brown, Cro. Jac. 590, 593; Gardner v. Sheldon, Vaugh. 259; Ayers v. Falkland, 1 Ld. Raym. 325; Idle v. Cook, 1 P. Wms. 774; Lethieulier v. Tracey, 3 Atk. 774; Wellington v. Wellington, 1 W. Bl. 645.

In Pool v. Needham, Yely. 149, there would seem to have been a direct

determination that such estates exist. The case was in ejectment, where the remainderman, after an estate in tail male in J, granted his remainder to the queen in fee as long as any issue male of J should live. J suffered a common recovery (under which the plaintiff claimed) and died without issue. The court held the grant of the remainder to the queen void because it could never come into possession; that therefore J's recovery barred the remainder. This was evidently on the ground that the queen took a fee simple determinable; although the same result might have been reached if it had been a fee simple absolute.

In this case it was held that if land be given to one and his heirs so long as J S has heirs of his body, the donee has a fee and can aliene notwithstanding there be a condition that he shall not aliene . . . and if land be given to one and his heirs so long as J S or his heirs may enjoy the manor of B, these words "so long" are utterly vain and idle and do not abridge the estate . . . and yet it is to be admitted that one may have an estate in fee determinable, but not by the act and consent of the parties without any entry for condition broken or title defeasible."

In the recent case of *Collier v. Walters*, L. R., 17 Eq. 252 (1873), the question was as to a devise to a trustee to hold during the life of A B, and also until the testator's debts and legacies were paid. It was said by the Master of the Rolls, Sir George Jessel, directly overruling a previous decision of Sir John Romilly, M. R., in a case arising under the same will (*Collier v. M'Bean*, L. R., Ch. 81), in reference to this decision: "His lordship having determined that, according to the true construction of the will, there was a determinable fee, neither of the counsel for the plaintiff will argue in support of that proposition at all. In fact, there is not any authority to be found for any such determinable fee. I have looked at an enormous number of cases to see if I could find such an estate, but I have been quite as unsuccessful as the counsel for the plaintiff. I think there is no such case to be found. I think therefore I may dismiss the interpretation of the will given by Lord Romilly as untenable."

Still more recent is a case whose importance on the question of determinable fees is greater than has been attrib-

uted to it. (See Challis, Real Property 207; Gray, Rule ag. Perp., § 36, n. 3.)

In re Machu, 21 Ch. Div. 838 (1882) involved the devise by testator of a freehold estate to the use of his daughter in fee "subject nevertheless to the proviso hereinafter contained for determining her estate." This proviso was that in case the daughter should at any time be declared bankrupt, then and thenceforth the devise thereinbefore made to her should be void, and the premises should thenceforth go, remain, and be to the use of her children. It was held that the devise did not operate as a limitation, and that the condition in the proviso was void for repugnancy, and accordingly the daughter was entitled to the property in an absolute estate in fee simple. The case has been considered as bearing only indirectly on the question, because the court expressed no more than a *quære* whether an estate in fee simple can be subject to a limitation. But it is clear that the ground of the construction of the condition was founded directly on the unwillingness of the court to find that there was a devise of a determinable fee.

In the case of *Webb v. Grace*, 2 Ph. 70, which was suggested to the court, the wording of the gift was precisely the same as in the case before the court, with the only difference that there was an estate for life instead of in fee. The court remarked that in that case there was undoubtedly a limitation, and that if the present devise had been for life, the proviso would have been good as a limitation. It would seem that the decision of the court construing the proviso as a condition, resulted directly from a view that limitations in estates in fee were invalid.

Cases in the *United States* which have been treated as determinable fees, but which are in reality either executory devises or resulting trusts, are among others a large class of grants of land for special uses; such as for school purposes, for public buildings, etc. See *Board of Education of Van Wert v. The Inhabitants*, 18 Ohio St. 221; *Bolling v. Mayor*, 8 Leigh (Va.) 224; *State v. Brown*, 3 Dutch. (N. J.) 13. See further *Lee v. Shivers*, 70 Ala. 288; *Adams v. County of Logan*, 11 Ill. 336; *Armstrong v. Board of Commissioners*, 4 Blackf. (Ind.) 208; *Broadway v. State*, 8 Blackf. (Ind.) 290; *Connor v. Waring*, 4 Gill (Md.) 394.

The last mentioned case, is discussed

The so-called "fee simple conditional," which the statute *De Donis* turned into a fee tail, is misleading in name. It is essentially a fee determinable by limitation, not an estate on condition. No entry is required by the reversioner to defeat the prior estate. There was, however, a conditional feature in the estate which justified the name. If issue of the prescribed kind was born, a tenant had the rights, for several purposes, of a tenant in fee simple, though if he failed to make use of these rights, the estate descended to the special heirs, and on their default reverted to the lord of the fee.¹

by Mr. Gray at some length. Rule against Perpetuities, §§ 37, 40.

See *People v. White*, 11 Barb. (N. Y.) 26.

So in cases of dedication of streets, courts have spoken of determinable fees. See *Helm v. Webster*, 85 Ill. 116. But *contra*, see *Pettingill v. Devin*, 35 Iowa 344.

In *Thayer v. McGee*, 20 Mich. 195, the court expressed a *quære*, whether a fee vested in the county in trust, for the public uses of the dedication, might be held to be a base, limited or determinable fee, and whether after dedication, there remained any assignable interest.

Other cases which have occurred in the *United States* outside of *Pennsylvania* and *South Carolina* (where tenure exists and the statute *Quia Emptores* is not in force), in which determinable fees are approved, are: *Jamaica Pond Aqueduct Co. v. Chandler*, 9 Allen (Mass.) 159; *Hooker v. Utica Turnpike Co.*, 12 Wend. (N. Y.) 371; *Gillespie v. Broas*, 23 Barb. (N. Y.) 370; *State v. Brown*, 3 Dutch. (N. J.) 13; *Foy v. Mayor etc. of Baltimore*, 4 Gill (Md.) 394. Where there was a trust for uses, with a provision over if the uses were not observed, there does not seem to be room for the construction of a determinable fee at common law. See Gray, Rule against Perp., § 40 (7).

In the case of *Leonard v. Burr*, 18 N. Y. 96, there was a devise to one of the use of land until Groversville was incorporated into a village and then to the trustees of said Groversville. The first was held to be a determinable fee; the devise over to the trustees, void under the Rule against Perpetuities. This decision was directly on the point, as the devise to the first taker was held to be determinable by its own limitation. The correct construction would seem to be of a devise in fee, subject to an

executory devise void for remoteness. See Gray's Rule against Perpetuities, § 40.

1. Bl. Com. 110, 111; Plowd. 241; Co. Litt. 19. See Challis, Real Prop. 209-214.

As to the question in what States the statute *De Donis* is in force, see under *Tenures*, *supra*, this article. See *ESTATES*, vol. 6, p. 879. See Gray, Perpetuities, § 14.

If there was issue (and the condition thereby fulfilled) and no alienation, the issue take not an absolute estate, but subject to the same condition. Co. Litt. 19. See note, *Jones v. Postell*, Harp. (S. C. Law) 97.

Fees simple conditional exist in *South Carolina*. *Jones v. Postell*, Harp. (S. C.) 92. In this case arose the difficult question whether such estates could be devised. The court granted that a tenant in fee simple conditional might, after the existence of issue, aliene; but it held that a devise is not such an alienation within the meaning of the law; that if such an alienation does not take effect in the lifetime of the tenant, the estate must descend to the heirs of limitation *per formam doni*. The court was at a loss for any authorities in the common law, owing to the fact that in *South Carolina*, while the Statute of Wills was recognized (Act of 1734; P. L. 438), the Statute *De Donis* was never in force, a conjunction which never existed at the English law. The argument which the court adduced and on which the decision was founded was, that as between the rights of the issue on the death of the testator and those of the devisee (which rights would seem to devolve at the same instant), the question as to preference must be determined by the order in point of time in which the devise and the limitation over to the heirs were to take effect. And the principle invoked to determine this priority was

A fee with a special limitation is called a determinable (or qualified) fee.¹

that he shall take who derives his title from the highest source. This was in close analogy to the right of a joint tenant to defeat the *jus accrescendi* by alienation or forfeiture, but not by testament; since, as Littleton says: "No devise can take effect until after the death of the devisor, and all the land presently cometh by the law to his companion who surviveth," resting on the distinction of the words *post mortem* and *per mortem*. See Co. Litt. 180a. See notes under *Jones v. Postell*, Harp. L. (S. Car.) 62; *Wright v. Herron*, 5 Rich. Eq. (S. Car.) 441, and cases there cited. Also 6 Rich. Eq. (S. Car.) 406; *Bruist v. Rores*, 4 Rich. Eq. (S. Car.) 421; *Bailey Eq.* (S. Car.) 228; 2 Hill Ch. (S. Car.) 184, 244; 1 Hill Ch. (S. Car.) 268; 1 Brev. (S. Car.) 190, 331; 2 Bay (S. Car.) 397.

In *Pennsylvania and South Carolina* there is no reason against the validity of determinable fees. See *Scheetz v. Fitzwater*, 5 Pa. St. 126; *Penn. R. Co. v. Parke*, 42 Pa. St. 31; *Henderson v. Hunter*, 59 Pa. St. 335.

See also *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410; *Kerlin v. Campbell*, 15 Pa. St. 500.

In the *First Methodist Church v. Columbia Co.*, 103 Pa. St. 608, it was considered what words will create a "base or determinate fee." It was held that whenever words can be construed either as a condition, reservation, or a covenant, the tendency of the court is to construe them as one of the latter rather than as the former.

Where, then, A covenanted with B, C, and D, that he would, when required, convey to them a certain piece of land in fee simple, in trust for the sole use of a company, thereafter to be formed, for supplying a certain borough with water, and B, C and D covenanted that A should have a supply of water from the reservoir for his own use, it was held after the water company had abandoned the premises and conveyed the land to a religious corporation for church purposes, that the agreement between A and B, C and D did not constitute a "base fee determinate" on the cessation of the use of the premises for a reservoir, but that it passed as a fee simple. In *Kirk v. King*, 3 Pa. St. 436, an estate conveyed for an "English school-house," and no other purpose,

was held to revert to the grantors after the school had been discontinued for seven years. See also *Scheetz v. Fitzwater*, 5 Pa. St. 126. See also *Packard v. Ames*, 16 Gray (Mass.) 327, and *Labaree v. Carleton*, 53 Me. 211.

1. The terms base, determinable, determinate, and qualified fees, are used with so little agreement and so much arbitrary discretion that it is impossible to find a name for the estate under consideration, which is sanctioned by common use. A division of qualifications in estates in fee is suggested by Mr. Challis, *Real Property* 197, as follows:

"1st. The succession of the heirs instead of enduring forever, may be liable to be cut short by the happening of a future event which limitation gives rise to a determinable fee.

"2. The heirs to whom the inheritance can descend may be restricted to the heirs of the body of a specified person (or persons), which limitation gives rise to a conditional fee at common law and to a fee tail under the statute *De Donis*.

"3. The heirs to whom the inheritance can descend may be restricted to a particular class, such as to a man and the heirs of any ancestor in the paternal line whose heir he is."

Of this division the first and second class are given names which seem reasonable and practicable and which are therefore used in the present article. "As to the third class, the existence of such estates is quite doubtful. (See *Slake v. Hynes*, L. R. (Ir.), 11 Eq. 417; 11 L. R. (Ir.) 284; 1 Prest. Estates 475; Litt. S. 354; Co. Litt. 13a; Challis, *Real Property*, ch. 19.) But the question as to their existence is sufficiently prominent to suggest the separate name of *base fee*.

The term "base fees" is also distinct from determinable fees (as they are here under discussion), in so far as there must be a remainder or reversion after them. Plowden's definition, as given by Challis (*Plowd.* 557, Challis, *Real Property* 264) is "a fee descendible to the heirs general, upon which subsists a remainder or reversion in fee simple. Here the descent to the heir general distinguishes it from a fee tail, where the descent is to the heirs of the body; and the existence in expectancy upon

(3) *Limitations Under the Statutes of Uses and Wills—Common Law Rules of Limitation.*—It is clear, that the utmost ingenuity of a common lawyer was as yet unable to compass certain kinds of limitations: First, he could not limit a fee to take effect in possession on a fee; secondly, he could not provide for any interval of time between the determination of one estate and the beginning of a second estate of freehold, because the common law forbade abeyance of the seisin and the creation of freehold estates *in futuro*; thirdly, he could not provide that the same contingency should cut short one estate and cause a second to begin in possession; in other words, he could not provide that a second estate should begin otherwise than after a natural determination of the prior estate. Under the Statutes of Uses and Wills all these limitations were made possible.¹ (See, for their treatment, REMAINDERS, REVERSIONS. See also PERPETUITIES.)

b. QUALIFICATIONS RELATING TO THE RIGHT OF ENJOYMENT—(1) *Uses*—(a) *Definition.*—A use in the strict sense of the

of a remainder or reversion distinguishes it from the common-law fees." It is evident that such an estate could not be created by the intention of the parties. It is said to arise when a conveyance by tenant in tail operates as a discontinuance without destroying the right of the reversioner or remainderman to a formdon. See Gray, Rule against Perpetuities, § 35, note; 3 Co. Litt. 18a; Leake's Landlord 40, 319; Challis Real Property 164-272.

There would seem, therefore, to be sufficient ground for the use of the term "determinable fee," first by virtue of its etymological meaning, and secondly for the negative reason that all other terms are otherwise employed.

1. A clear and original exposition of the theory of common-law interests in land and of the rules of limitation governing their creation and transfer will be found in Mr. Challis' Law of Real Property. For purpose of research his work is invaluable; on questions of modern law, its assistance is much impaired by an attitude of championship of the common law as against modern law, and by a prejudice in favor of obsolete rules.

A presentation of future interests from a diametrically opposite point of view is given by Mr. Gray in his work on the Rule against Perpetuities, where, after a succinct and scholarly review of these common-law interests and of rules relating to them, the superseding of the latter by a practical rule, univer-

sal in its application, is clearly and vigorously shown.

Bearing in mind what has been said about the invalidity of determinable fees, and remembering also the effect of the Rule against Perpetuities, in limitations void for remoteness on preceding limitations, it is clear that interests in land may be created determinable in any manner except the two following: First, an estate in fee may not be qualified, except in *Pennsylvania* and *South Carolina*, by any special limitation. Secondly, an interest may not be limited to be determined by the arising of a future estate when the contingency upon which such future estate arises lies beyond the period of the Rule against Perpetuities. As to the latter see PERPETUITIES; *Effect of Limitations Void for Remoteness on Subsequent and Preceding Limitations.*

In § 66 of his work on Perpetuities Mr. Gray concludes in a summary, that there is no restraint on the creation of future estates in land, either by way of use or by will, other than the Rule against Perpetuities; but Mr. Gray seems here to overlook the argument which he himself has so ably put forth as to the validity of qualified or determinable fees, the effect of which is clearly to cause a second restraint upon the creation of future estates in land; i. e., of possibilities of reverter in those States in which qualified fees exist. See *In re Machu*, *supra*, 21 Ch. Div. 838.

early law,¹ is the right to the beneficial enjoyment of an interest as distinct from the legal estate.²

(b) **Importance in Modern Law.**—The importance of the consideration of uses at the present day lies in the fact that the modern law of conveyancing depends more closely on the nature and incidents of uses than on those of legal estates. When the former were by statute executed,—in other words, converted into legal estates, they did not lose their facility of transfer, unrestrained by the rule of feudal property. By their conversion into legal estates, the whole system under which they were developed not only lost none of its character, but gained a new prominence by becoming an integral part of the law of conveyancing. While, therefore, uses in their original purpose are obsolete, and in so far the doctrines upon which they are founded have lost their importance, they are yet indispensable as a foundation for most of the modes of transfer, a comprehension of which is impossible without a thorough understanding of the underlying principles.³

(c) **Origin.**—In uses and trusts⁴ is the first appearance in English law of the conception of a right founded on confidence. This conception was absolutely foreign, if not hostile to the feudal law of the land. Its growth was, therefore, not from the body of the law but purely as a graft thereon. It arose in the necessities as well as in the learning of the clergy,—in the former, owing to the restraint on the acquisition of land by religious corporations by the statutes of mortmain, in the latter by the revival of the institution of the *fideicommissum*. This was a device in the Roman law by which, where devises to certain persons or

1. The effect of the Statute of Uses in incorporating uses into the body of the law relating to alienation of property, was to create a second meaning of the term which is such a limitation of a future interest in land as is void at common law, but valid by the Statute of Uses.

2. Washburn's definition is, the right in one person called a *cestui que use*, to take the profits of land of which the owner has the legal title and possession together with the duty of defending the same and of making estates thereof according to the direction of said *cestui que use*. See Tud. L. Cas. 252; Chudleigh's Case, 1 Rep. 121; 2 Bl. Com. 330; Bac. L. Tracts 307, 150.

See Co. Litt. 273b. "A trust (in the sense of 'use') is a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by *subpœna* in chancery."

See Perry on Trusts, § 13; Wallace v. Wainwright, 87 Pa. St. 263; Chaffee v. Risk, 12 Harris (Pa.) 432.

Blackstone's definition is: "A confidence reposed in another who was tenant of the land or *terre-tenant* that he should dispose of the land according to the intention of *cestui que use* of him to whose use it was granted and suffer him to take the profits." See Plowd. 352.

3. In their original function as purely beneficial interests, uses are the foundation of the present law of trusts. This will be found treated under TRUSTS.

See the first note under the next subdivision, (c) *Origin*.

The process by which this conversion took place and the manner in which uses gave rise to forms of conveyance, will be treated below under (bb) *Effect of the Statute*.

4. The distinction between uses and trusts before the statute related simply to the duration of the beneficial interest and to the nature of this interest.

in a certain manner could not be effected by law, this was accomplished by a legal devise to one person burdened with a trust in behalf of the intended beneficiary.¹ As in Roman law, so in England, this beneficial right had no means of enforcement and depended purely on the confidence imposed upon the legal devisee or feoffee. As in the Roman law, a judicial office was in course of time created, with power to enforce this trust, that of the *praetor fideicommissarius*, so in England a certain officer, the chancellor, who was invariably a member of the clergy, was given exclusive jurisdiction over this class of rights and duties. The first judicial method for enforcing the trust was the *subpoena* by which the feoffee to uses could be compelled to account under oath.²

(d) *Development and Incidents Before the Statute of Uses.*—The fact that confidence was the source of the use as a right, is seen in the manner in which uses were enforced against persons other than the original trustee. At first even the heir took the legal estate free from the use, on the ground that there was no privity of person, in other words, no confidence between himself and *cestui que use*. Gradually privity of person was enlarged so as to include the heir, and finally any one who took the estate with notice of the use, even though he paid a consideration. But at all times privity of estate was necessary to enforce the trust, so that a disseisor or abator, or a tenant in dower, by curtesy or by *electio* besides the purchaser without notice and for valuable consideration, took free of the use, as the privity of estate had been destroyed.³

It was a part of the very purpose of uses and a necessary consequence of their external origin that they were not liable to the

Where the beneficial enjoyment was a permanent one without any qualification, it was called a use, and where it was temporary and complex it was called a trust. The distinction was the same as between simple and special trusts after the Statute of Uses. The distinction between "use" and "trust" before the Statute is of no weight; either term was used as the generic term; as such, uses included beneficial interests of all kinds. (See *Hurst v. McNeill*, 1 Wash. C. C. 70.) After the Statute, the term was abolished as a beneficial interest and the distinction was now between active and passive trusts, or simple and special trusts. See Washb. on Real Property, 95-96; 1 Cruise Dig. 246; Cornish Uses, 14; Tudd. Lead. Cas. 255; Sand. Uses 7; 1 Spence Eq. Jur. 448; 2 Bl. Com. 328. See also Challis Real Property, 311.

1. The earliest conveyances to the

use of the clergy in evasion of the statutes of mortmain were simply "upon the faith that the feoffee should permit the ecclesiastical body intended to be benefitted, to enjoy the profits of the estate." Per Washb. Real Property 94. See 1 Spence Eq. Jur. 446.

2. It was invented by John de Waltham in 1380.

3. The vitality of this element of confidence is further shown in the prohibition of corporations from holding to uses, on the ground that they are incapable of confidence. See 2 Bl. 330; Bro. Abr. tit. Feoffm. al uses, 40; Bacon of Uses, 347.

And by reason of this same requirement of privity of person, "if the feoffee to uses died without heir or committed a forfeiture or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor to the wife to whom dower was

burdens of feudal tenure. Nor could there be any estate of dower or curtesy in a use.¹

As regards descent, uses followed strictly the course of the legal estate, varying, therefore, with the different kinds of tenure.² The great value of uses lay in the extreme facility by which they could be created, and also transferred both *inter vivos* and by will. In a feoffment, a mere oral declaration of the use was sufficient; and since feoffments were originally not made in writing but only by livery, the whole conveyance could be made by parol. Herein must be noticed the distinction between a conveyance of the use by transmutation of the possession and without transmutation,—a distinction which under the Statute of Uses gave rise to two classes of conveyances. A use could be created by a simple declaration of the owner without more; but such a use could never be enforced without either a valuable consideration or a good consideration. It was early common for an owner in fee to enfeoff another to the feoffor's use. It is noteworthy how, under this system, there gradually arose a presumption in a feoffment opposite to the presumption of the common law, while in the latter a feoffment in itself presumed a consideration. In equity, where there was no consideration, a use to the feoffor was invariably presumed which was termed a resulting use, and this explains why conveyancers were careful to mention expressly the consideration and the use.³

It was part of the conception and purpose of the use that the intention of the beneficiary should govern the feoffee in the disposition of the use; and so in most definitions the term involves a duty of the feoffee that he shall make estates according to the direction of *cestui que use*. Hence there could be an alienation of the use by mere declaration either *inter vivos* or by devise; nor was any act of notoriety required either in the creation or the transfer of the use, although, of course, the legal estate could not pass without the concurrent act of the trustee. Any direction whether oral or in writing must be obeyed by the trustee; hence, during all the time before the Statute of Wills, when no estate of freehold in land could be devised, *cestui que use* could devise his interest without restraint: either in the nature of a direction to the trustee, as aforesaid, or in the execu-

assigned, were liable to perform the use." 2 Bl. 330; 1 Rep. 122.

1. This followed also from the requirement of privity of person and estate, for, says Blackstone, bk. 2, p. 331, "no trust was declared for their benefit (that of the husband or wife) at the original grant of the estate." And see 4 Rep. 1.

2. See 2 Bl. 330; 2 Roll. Abr. 780. For this Blackstone adduces the maxim *aequitas sequitur legem*: that equity cannot establish a different rule of prop-

erty from that which the law has established.

The use of gavelkind lands descended according to the custom of gavelkind; and the use of borough-English according to the custom of borough-English; and so of copy-holds. See Challis Real Property, 310; 1 Prest. Estates, 448; Rob. Gav. 98, 99. See also Washb. R. P. 100; 1 Spence Eq. Jur. 454; 2 Bl. Com. 329.

3. See 2 Washburn, Real Prop. 100, 101.

tion of a power reserved to himself in the original conveyance to use.¹

For the same reason that uses followed the descent of legal estates, the same divisions of the quantity of interest existed in them as at law, so that a use could be for life, in tail or in fee.² Uses thus had the benefit of the certainty of common-law estates, without the restraint of the rules of limitations at law.

Uses might exist of personal property. But the purpose of their invention as well as their peculiar advantages referred solely to their application to real property, and caused them to be employed almost exclusively in relation to land. It must be remembered, too, that the Statute of Uses applied only to estates of which the feoffee to uses was seized; that therefore no use was executed except in estates of freehold. Therefore only so much of the early law of uses has any bearing upon modern conveying as related to freehold estates in realty. One of the few rules by which the creation of uses was restrained was that there must always be a seisin, or something corresponding to the seisin. Of such hereditaments, therefore, as lay purely in grant there could be no use since there could be no separation between possession and enjoyment.³

(e) *Statute of Uses*—(aa) *AIM AND PURPORT*.—The actual aim of the Statute of Uses has been much discussed without exact agreement;⁴ but whatever may have been the hidden aim, its purport, to gather from its own terms, was to restore notoriety in the transfer and ownership of land, and likewise to re-establish the

1. See Washb. Real Property, 99, 100; Cornish Uses, 19; 2 Bl. Com. 331; 1 Spence Eq. Jur. 454; Crabb Real Property, 1614-16; Cruise Dig. 3, 4; 2 Bl. Com. 329; Co. Litt. 271*b*, Butler's note, 231; 2 Bl. Com. 329; Crabb Real Property, 1616; Co. Litt. 112, 138; Co. Litt. 271*b*, Butler's note 231; Sir Edward Clere's Case, 6 Rep. 17*b*; Co. Litt. 112*a*, note 142; Tud. L. Cas. 268.

2. See Washburn Real Property, 105; 1 Spence, Eq. Jur., 455.

3. See 2 Bl. 330. "Nothing could be granted to a use whereof the use is inseparable from the possession; as annuities, ways commons and authorities, *quae ipso usu consumuntur*; or whereof the seisin could not be instantly given." See 1 Jon. 127; Cro. Eliz. 401.

See Washb. Real Property 98, where he says: "It was necessary, however, that the property conveyed should be *in esse* at the time and capable of having what answered to the seisin thereof given instantly and simultaneously with

the creation of the use therefor. Though a man might convey lands to another and his heirs to the use of a third person for years, he could not so convey them if he had only a leasehold interest therein for years, since he had no seisin to part with upon which the use might depend. So for the same reason no one could raise the use in favor of another by a covenant to stand seized to use of lands of which he has no title or possession." See Crabb Real Property, §§ 1610, 1612; Yelverton v. Yelverton, Cro. Eliz. 401.

4. See 2 Washb. on Real Property 109. One statement of this aim is the entire abolition of uses. 1 Cruise Dig. 349; Gilbert's Uses 74; Chudleigh's Case, 1 Rep. 124; Co. Litt. 271; Butler's Notes 231, § 3. According to another writer it was to abolish the jurisdiction of the court of chancery over landed estates. See Williams' Real Prop. 133. See also Bacon Law Tracts 332; Gilbert's Uses (Sugden's ed.) 139, n.; Sand. Uses 86, 87.

incidents of legal estates which had been evaded under the doctrine of uses, such as dower, curtesy, escheat, and feudal burdens which have been since abolished.¹ It would seem from the preamble that it was the intention entirely to do away with trusts, uses, and confidences. The direct mode by which this was to come about was by what was called the execution of the use, immediately upon its creation; in other words, the union or fusion of the legal estate or seisin with the use. In order to this operation, certain elements must exist.

By way of preliminary it must be mentioned that while the property which may be held or conveyed to uses executed by the statute, embraces generally "every kind of real property"² whether in possession, reversion or remainder, as well incorporeal

1. The title of the statute is, "An act concerning uses and wills." The preamble recites that, by common law, lands, etc., are not devisable, and ought not to be transferred but by solemn livery, matter of record, etc., without covin. Yet by subtle inventions . . . they have been conveyed . . . by assurances craftily made and secret uses, interests, and trusts; and also by wills, sometimes by words, sometimes by writing, by reason of which heirs have been disinherited, lords have lost their wards, marriages, aids, etc.; persons purchasing lands could not know their title; husbands lost curtesy; widows dower; the king had lost the profits of attainder . . . to the utter subversion of the ancient common law of this realm. This, then . . . for the extirping and extinguishment of all such subtle practiced feoffments . . . to the intent that the king's highness, or any other of his subjects of this realm shall not in any wise hereafter by any means or inventions be deceived, damaged, or hurt by reason of such trusts, uses, or confidences . . . enacts that when any persons stand seised, or so happen to be seised of or in any honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person . . . such person shall stand and be seised of such hereditaments to all intents and purposes in the law . . . of and in such like estates as they had or shall have in use trust, or confidence in the same; and that the estate, right, and possession of the person seised shall be deemed and adjudged to be in him or them of such use, confidence or trust after such quality, manner, form, and condition as

they had before in or to the use . . . See summary of the act in 2 Washb. on Real Prop. 100; Challis on Real Prop. 313.

By the statute Henry VIII, ch. 10, it was enacted that "when any person shall be seised of lands, etc., to the use, confidence or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, entail for life or years, or otherwise, shall, from thenceforth, stand and be seised or possessed of the lands, etc., of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use in such quality, manner, form, and condition as they had before in the use."

2. It was owing to the term "seised" that the statute was early held to apply only to freeholds, copyholds and terms of years being excluded as well as personal chattels. In these, therefore, the use is not executed, but remains an equitable interest. See *Warner v. Sprigg*, 62 Md. 14.

To avoid confusion in discussing the property which may be held or conveyed to uses executed by the statute, it is most important to distinguish between the property or estate in the feoffor or in the feoffee to uses out of which the uses is raised, and, on the other hand, the property or estate in the *cestui que use*. Thus, while one who is seised in fee may bargain and sell land to another to his use for years, a lessee for years cannot bargain and sell his lease to the use of one for years. See *Bac. Abr.*, tit. Uses and Trusts, F; *Brownl.* 40. See *Ingerfield's Case*, And. 294.

as corporeal,"¹ the property must be of such a kind that the seisin or possession can exist separate from the use, as otherwise there is lacking one of the two elements to be united by the statute.² Hence it is that annuities, ways and commons are not capable of a use, and finally it is this principle which is at the foundation of the doctrine that a use cannot be limited upon a use.³

The requisites for the operation of the statute are generally said to be a person seised to the use, a *cestui que use*, and a use *in esse*.⁴ Under the first the only exception which existed in England, that of corporations, has been abolished in the United States.⁵ It may be mentioned here that quite distinct from the use itself, it is necessary that there be a certain estate in the person seised to the use or in the feoffee to use. This followed from the legal requirement that when the seisin passed out of the grantor it should exist in some person in order to support all the uses declared. There was no limit to the kind of estate of which the use itself might consist; but this did not do away with the rule of law relating to the continuity of the passage of the seisin. Under this principle, it was first held necessary that the person seised to uses must have an estate in fee simple; but later this was cut down to a freehold estate. It is obvious that the estate in the person seised must be at least as large as the sum of the estates conveyed to use. The reason why freehold estates were requisite was because there could be no seisin in an estate less than freehold.⁶

Secondly, it is necessary that there should be a *cestui que use* and that he must be distinct from the feoffee to uses;⁷ but it is

1. See Washb. Real Property, bk. 2, 113.

2. See Bac. Abr., tit. Bargain and Sale, B; 2 Coke 35, 36, 54; Dyer 309; 2 Insts. 671; Poph. 76; Bac. Abr. Uses and Trusts, F; Brownl. 40.

3. See 2 Washb. Real Prop. 114; Bacon's Law Tracts 335; Gilbert's Uses (2d ed.) 194, n.; Gilbertson v. Richards, 5 H. & N. 453; Franciscus v. Reigart, 4 Watts (Pa.) 98, 118; Bac. Abr. Uses and Trusts, F; Lord Willoughby's Case, Sir William Jones 127.

Thus in an action on the case the plaintiff declared that the defendant, seised in fee of the lands over which there was a way, and of other lands by indenture of bargain and sale enrolled, conveyed his lands to J. S. in fee, with a way over his lands, and that J. S. leased the premises to the plaintiff, and that the defendant disturbed him. The court were all of opinion that, by this bargain and sale, the land only passed, and not a way over the same, because nothing but the use passed by the deed, and there cannot be the use of a thing

which is not *in esse*, as a way, common, etc., newly created, and until they are created no use can be raised by bargain and sale, and, consequently, nothing passed by the indenture. Per Bac. Abr. Uses and Trusts, F.; Cro. Ja. 189, pl. 13; Bewdley v. Brookby, Jones 127 S. Car.

4. Minor's Institutes, vol. 2, 181; 2 Washb. Real Prop. 113; 1 Cruise Dig. 349; Tud. Leading Cas. 258; Crabbe Real Prop., § 1646; Witham v. Brooner, 63 Ill. 346.

5. See 2 Washb. on Real Prop. 113; United States v. Amedy, 11 Wheat. (U. S.) 392; First Parish of Sutton v. Cole, 3 Pick. (Mass.) 240.

6. See 2 Washb. on Real Prop. 114; 1 Cruise Dig. 350; Bacon's Law Tracts 325; Tudor's Lead. Cas. 257; Warner v. Sprigg, 62 Md. 14; 1 Cruise Dig. 351; Jenkins v. Young, Cro. Car. 230; Sand. Uses 109; Crabbe Real Prop., § 1646; 1 Cruise Dig. 353; Tudor's Lead. Cases 259.

7. This separation of *cestui que use* from the person seised to uses may be

not necessary that *cestui que use* be in existence at the time of the original conveyance.¹ Finally, there must be a *use in esse*, though this need not be in present possession.²

of great importance in determining whether a conveyance passes a title directly to *cestui que use*, or only an equitable interest by way of trust. For, as has been shown, where there is a use upon a use, the statute executes only the first, leaving the second use a purely equitable estate.

In *Brown v. Benshaw*, 57 Md. 67, there was a conveyance which the court held to be a bargain and sale, although, as was said in the opinion, the result would not have been different if the deed had been treated as a feoffment. Under the latter construction, it was decided that a conveyance by way of feoffment to A and his heirs, to the use of him and his heirs, to the use of another, will give A the legal estate, and this although by the terms of the Statute of Uses one person must be seized to the use of another in order to the execution of the use. See *Doe v. Passingham*, 6 B. & C. 305; *Jackson v. Cary*, 16 Johns. (N. Y.) 302; note 2 by Sugden to Gilbert on Uses and Trusts, p. 359; *Sammer's Case*, 13 Co. Rep. 56.

In such case "it is not a use divided from the estate as where it is limited to a stranger, but the use and the estate go together." See *Meredith v. Jones*, Cro. Car. 244; *Whetstone v. Bury*, 2 P. Wm. 146. Construing (in the case *supra*, of *Brown v. Benshaw*, 57 Md. 67), the conveyance as a bargain and sale, the court held that the words "to his proper use and behoof" following the words of limitation to the grantee, have no particular meaning or effect in determining either the extent of the interest conveyed, or the nature and quality of the estate intended to be vested. See also *Franciscus v. Reigart*, 4 Watts (Pa.) 118; 2 Smith's Lead. Cas. (5th Am. ed.) 454; 2 Washb. on Real Prop. 151. On the other hand, in *Hurst v. McNeil*, 1 Wash. (C. C.) 70, it is held that in a lease and release to A and his heirs, to the use of A and his heirs, to the use of B and his heirs, this would not be a use upon a use, but the deed would operate like a feoffment to A to the use of B, where the statute executes the use in B. On the principle that where an estate can vest by common law and does

not require the aid of the statute to execute the use, there is, therefore, no second use, and the statute executes the use in the second person named. See 2 Washb. on Real Prop. 150.

The rule is generally strict that wherever possible a conveyance will operate by common law. (Certain exceptions to this do not concern the point in issue as, where the interest of the feoffee to uses is less than the legal estate conveyed, or where part of a general settlement to uses is an interest possessed under the statute. See 2 Washb. on Real Prop. 117, and the cases cited there.) It has been held that where in a deed operating as a feoffment the words "to the use of" are added to the feoffee, followed by a second use, the phrase "to the use of the feoffee" is simply inoperative, conveyance to him passing by common law. See *Warner v. Sprigg*, 62 Md. 14; 2 Washb. on Real Prop. 148. See, however, *Hurst v. McNeil*, 1 Wash. 70; *Doe v. Passingham*, 6 Barn. & C. 305; *Franciscus v. Reigart*, 4 Watts (Pa.) 118. See also 2 Washb. on Real Prop. 151, n. 2, and cases cited. See also 2 Sm. Lead. Cas. 454.

1. There are not wanting decisions which hold that a bargain and sale to a person not in being is bad. The authorities to this doctrine are Mr. Sugden's Notes to Gilbert on Uses 398. See also Pl. 91; 2 Sand. on Uses (5th ed.) 62; 2 Sid. 158; *Dillon v. Frane*, Pop. 70. The question is thoroughly discussed by Mr. Gray in Rule against Perpetuities, §§ 61-66. Mr. Gray accounts for the origin of the doctrine on the ground that because in a covenant to stand seized no use can be raised to one who is not of kin or connected by marriage, so in a bargain and sale a money consideration cannot come from a stranger. He shows that a consideration paid by one person can raise a use, and even a future use, to another; therefore, also to a person not in being. He concludes that the true doctrine is that a bargain and sale to a person not *in esse* is good. See *Ocheltree v. McClung*, 7 W. Va. 232.

2. In *Massachusetts*, the doctrine is thoroughly established that a future freehold cannot be created by a bargain and sale. See *Welch v. Foster*, 12

A deed of bargain and sale will, therefore, strictly speaking, be incapable of transferring a contingent future interest.¹

Mass. 93; Wallis v. Wallis, 4 Mass. 135; Pray v. Pierce, 7 Mass. 381; Arthur v. Nichols, 7 Pick. (Mass.) 111; Hunt v. Hunt, 14 Pick. (Mass.) 374; Gale v. Coburn, 18 Pick. (Mass.) 396; Brewer v. Hardy, 22 Mass. 356. The ground of this doctrine is that a freehold to commence *in futuro* could only be conveyed in this way by making the bargainee hold to the use of another until the future freehold should vest, which would be impossible as a use upon a use. As has been clearly pointed out by authorities cited below, this view of the process of the raising of the use is incorrect, since the use in the future freehold arises not out of the estate of the bargainee but out of the original estate of the bargainor, which he retains until the future event. See Gray on Rule against Perpetuities, §§ 56, 57; Rogers v. Eagle Co., 9 Wend. (N. Y.) 64; Bell v. Scammon, 15 N. H. 381; Wyman v. Brown, 50 Me. 139; Jordan v. Stevens, 51 Me. 78; Brown v. Smith, 52 Me. 141; Savage v. Lee, 90 N. Car. 320; Parsons v. Mills, 2 Roll. Abr. 786; Gilbert Uses Sugden's ed. 163; 1 Washb. on Real Prop., 116.

It is, therefore, generally well settled that an estate of freehold *in futuro* may be created by a conveyance under the statute of uses. Dennett v. Dennett, 40 N. H. 498; Rogers v. Eagle Fire Co., 9 Wend. (N. Y.) 625. See Bell v. Scammon, 15 N. H. 381.

1. There are two aspects under which this rule appears. First, as to whether a conveyance by way of use will transfer interests that are merely contingent. Secondly, whether such a conveyance will operate, like a feoffment to destroy a contingent remainder, and thereby indirectly convey a larger estate than was in the bargainor. As to the first, there is no doubt that a conveyance under the Statute of Uses must be based upon possession, although this possession may be a possession in law and not actual. See Mason v. Smallwood, 4 Harr. & McH. (Md.) 484. See also 2 Insts. 672; 2 Rep. 24a, 54a; Co. Litt. 49a, 48b, 214a. See also Shepard's Touchstone 218; 1 Bacon's Abr. 274, 275. Any freehold in possession, reversion, or remainder upon an estate for life or years may undoubtedly be bargained and sold. 9 Viner's Abr. 448; Pl. 17; Pl. 19; Co. Litt. 15b; 1 Wood Conv.

715. Where, therefore, there is no vested interest in the bargainor, no estate can pass; but the modern view, which seems to be well established in the cases and grounded in justice, is that the contingent or after-acquired interest will pass by estoppel as a result of a conveyance under the Statute of Uses, if such was the intention of the parties.

The question arose in a recent case in New Jersey: Hannon v. Christopher, 34 N. J. Eq. 459. Here there was a devise to three persons, "to the survivor of them," and the heirs, or assigns of such survivors, which was held to create a joint estate for life in the three with contingent remainders in fee to the survivor. After the death of one of them, one of the survivors by deed of bargain and sale purported to convey to the other all his estate, right, title, and interest whatsoever under the will. The deed was without covenants. The court held that while there was no conveyance of the contingent estate, the grantee and his donee were estopped from asserting that the deed passed only a life estate. The question of estoppel in deeds will be found thoroughly discussed in the American notes to the Duchess of Kingston's Case, 2 Smith's Lead. Cases. The principle was stated in the case of Van Rensselaer v. Kearney, 11 How. (U. S.) 97, 191, by Nelson, J., of the Supreme Court of the U. S., as follows: "If the deed bears on its face evidence that the grantor intended to convey, and the grantee expected to become invested with the estate of a particular description or quality, and that the bargain proceeded upon that form between the parties, then, although it may not contain any covenants of title in its technical sense of the term, still, the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him in respect to the estate thus described as if a formal covenant to that effect had been inserted, at least, so far as to estop him from ever afterward denying that he was seised with the particular estate at the time of the conveyance." See also French v. Spencer, 21 How. (U. S.) 228; Jackson v. Waldron, 13 Wend. (N. Y.) 178; Fitzhugh v. Tyler, 9 B. Mon. (Ky.) 559. As to the question

whether where truth appeared upon the face of the instrument, there could be no estoppel, see 4 Com. Dig. 205, title, ESTOPPEL; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 111; *Jeffrey v. Buchnell*, 2 Barn. & Ad. 278, cited in *Hannon v. Christopher*, 34 N. J. Eq. 459. See also *Jolley v. Arbuthnot*, 4 DeG. & J. 224.

In *Morton v. Woods*, L. R. 4 Q. B. 293, it was said that if there were any decisions or *dicta* which held that where the truth appears there can be no estoppel, the doctrine must now be considered overruled. In the above mentioned case of *Hannon v. Christopher*, 34 N. J. Eq. 449, the court adduced as second ground that where it distinctly appears from the face of the deed that it was intended to transfer any future interest which the grantor might acquire, equity will treat the deed as an executory agreement to convey, and compel the grantor to convey the subsequently acquired interest. See also 2 *Smith's Lead. Cases*, 641; 2 *Story's Eq. Jur.* 1040; *McWilliams v. Nisly*, 2 S. & R. (Pa.) 409.

As to the second aspect, it has been repeatedly said that conveyances operating under the Statute of Uses will not pass any greater estate than the grantor may lawfully convey. See 4 *Kent's Com.* 255; 2 Washb. on Real Prop. 151. See also *Gilbert's Law of Uses* (Sugden's ed.) 312; *McInnes v. McCullough*, *Gilbert*, 236; *Dennett v. Dennett*, 40 N. H. 498; *Den v. Crawford*, 8 N. J. L. 90. By this is meant that a bargain and sale as distinct from a feoffment or other common law conveyance, if made by a tenant for life, cannot bar a contingent remainder, and thus indirectly convey a greater estate than was in the grantor. The question arose in the case of *Dennett v. Dennett*, 40 N. H. 498, under a will in which testator gave his son the residue of his estate, to descend to the youngest son of said son, and from him to the oldest male heir of such youngest son, and in failure of such issue then to the heirs of the first devisee. This was held to give an estate for life to testator's son, and a contingent remainder for life to the said youngest son.

After the death of testator, his son, the first devisee, conveyed the premises by bargain and sale, and the question was as to the effect of this conveyance upon the contingent remainder to the youngest son under the will. The

court held that while it was clear that such remainder would be destroyed by a feoffment or fine, conveyances which derive their operation from the Statute of Uses, as a bargain and sale, lease and release, and the like do not bar contingent remainders, for none of them pass any greater estate than the grantor may lawfully convey. Further, that "though to prevent a deed from failing of any effect, it may be regarded as a feoffment; yet it will not have that effect given to it to affect the estate of a third person. By such a deed nothing more is conveyed by a tenant for life than he may rightfully convey, that is, his own interest alone, and any contingent remainder remains unaffected by it." See 4 *Kent's Com.* 255, 235.

See *Archer's Case*, 1 Co. 66; *Bowles'*, 11 Rep. 79.

In *Denn v. Crawford*, 8 N. J. L. 90, it was considered whether the language of the New Jersey Statute of Uses gave to a deed of bargain and sale equal efficacy as had a deed of feoffment at common law. By § 7 (Rev. Laws), the statute provides that: "Any particular person or persons to whom the use or uses of any tract or tracts of land within this province have been sold, given, limited, granted, or conveyed, by deed, grant, or any other legal conveyance whatsoever, or that shall hereafter be granted by any deed or conveyance whatsoever, such grantees, their heirs and assigns shall be deemed taken and estimated to be in full and ample possession of such lands, tenements, and hereditaments to all intents, instructions, and purposes as if such grantees, their heirs and assigns were possessed thereof by solemn livery of seisin and possession in usage or custom."

It was said by the court that the statute has no relation to the estate or quantity of interest which may be conveyed and was not designed in any degree to abridge or enlarge the interest intended to be passed to the grantee; that this action is on the possession only. To unite or transfer the possession to the use and to declare the nature and quality of such possession are its legitimate purposes, but as to quantity of interest or duration of the estate in the use conveyed, it has no concern. But finally, that a deed of bargain and sale, although purporting to convey an estate in fee simple, yet actually conveys nothing more than the estate of the bargainor, such an

(bb) EFFECT OF STATUTE.—There are two important features in the interpretation of the statute of uses which account for the fact that the result of the statute was widely different from that intended. Had the construction been a natural one, there is little reason to doubt that the effect would have been the abolition of uses, and a complete revival of common-law rules and limitations. These features are, first, the construction that a use upon a use could not be executed. The result of this was that the whole system of uses remained in full force, and the only difference in their creation was the addition of a short phrase to the conveyance.¹

The second was a construction based upon the wording of the statute in section one, which enacted, "that the estate, right, and possession of the person seised shall be deemed and adjudged to be in him or them that have such use, confidence or trust *after such quality, manner, form, and condition as they had before in or to the use, etc.*" It must be remembered that before the statute, the rules of the limitation of estates at common law were never violated by the doctrine of uses, but expressly acknowledged in the very evasion.

When uses were transformed into legal estates, there would seem to be no reason why their devolution should not have followed common-law rules. But by the construction based upon the words italicized, *all the rules of the creation and the transfer of equitable interests* which had been developed under the system of uses were retained after the statute, and applied to legal estates.² A fee could therefore be conveyed *in futuro* without hindrance; and an estate in fee could be limited to be cut off by the arising of contingent estate.

The result was that an entirely new foundation for conveying legal estates was brought about, and that the principles and the modes of modern conveyancing had their source directly in this statute. It must be noted that this suspension of the rules of common law was in the nature of an exception, and that in all other respects they were in full force.

estate only as the bargainor might lawfully transfer, an estate commensurate with the estate of the bargainor at the execution of the deed. Hence, if a tenant for life make a deed of bargain and sale, though in language a fee simple, yet it destroys or disturbs no contingent estate which may be limited after the life of the bargainor and passes merely an estate for the life of the bargainor only. See Saund. USES, 231; 1 Bac. Ab. 274, tit. Bargain and Sale a.

1. See 2 Blackstone's Com. 335; Bacon's Uses 43; 1 Atkins 591; Challis on Real Prop. 311.

2. As explained by Lord Bacon, the effect of this phrase was, "that *cestui*

que use shall be in possession of like estate as he hath in the use. The fiction *quo modo* is that the statute will have the possession of the *cestui que use* as a new body compounded of the matter and the form, and that the feoffee shall give matter and substance and the use will give form and quality." But it would certainly seem that the very opposite was the intention of the statute since the legal estate was itself mere form, and the purpose of the fusion would be to give this legal form to the use. See 2 Washb. Real Prop. 121; 1 Cruise Dig. 363; Castle v. Dodd. Cro. Jac. 201; Bacon Law Tracts 337, 340.

Thus, estates executed by the Statute of Uses could not be devised until the Statute of Wills, 32 Henry VIII, ch. 1, although uses were freely devisable before the Statute of Uses.¹ Further, estates created by the statute were vested with all the legal incidents of an estate, such as escheat, dower, curtesy, etc.²

The question of transmission of the seisin in contingent future uses was discussed with much subtlety, and various doctrines were propounded, the most important of which was that of the *scintilla juris*.³ All that is of importance to-day is that in whomsoever the seisin may exist, the use is transmitted by the statute if there be a person originally seised, a use *in esse*, and a *cestui que use*, whether in being or not. So a use may be limited to be cut off by the arising of a contingency, or a freehold may be limited by use to arise in *futuro*, or there may be an interval between the termination of one estate and the beginning of another. All these limitations are void at common law, and were introduced by the peculiar construction of the statute.

1. 2 Washb., Real Prop., 111; Bac. Law Tracts 344.

2. Washb. on Real Prop. 126. And the estate of a feoffee to use "being instantly taken out of him as soon as created is not subject to any of these legal incidents." Tudor's Lead. Cases 261; Sand. Uses 119. It has been frequently said that contingent remainders created by way of use or devise are subject to the rule of the common law which requires contingent remainders to be supported by a preceding particular estate of freehold. Without entering upon an extended discussion of this question, which is one of the profoundest in the law of real property, it is sufficient to say that there is no such restriction on the creation of contingent interests by use in modern law. The rule that in a conveyance or in a will so much of the estate or inheritance as is not disposed of results back to the grantor or his heirs, seems clearly to cover any need of a disposition of the inheritance sufficient to support a contingent interest. The strict position that the common-law rule applies to interests created by use is taken by Mr. Washburn, bk. 2, pp. 118, 125, 126, and generally in chapter 5.

But the more correct view seems to be that of Chancellor Kent in 4 Kent's Com. 257, where he says: "If a contingent remainder be created in conveyances by way of use, or in disposition by will, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor or his heirs, or descends to the heirs of the testator to

remain until the contingency happens. This general and equitable principle is one of acknowledged authority." See Sir Edward Clere's Case, 6 Co. 17b; Carter v. Barnadiston, 1 P. Wms. 516. The question is briefly treated by Mr. Gray in Rule against Perpetuities, §§ 58, 59, 60, in which he disposes of it as follows: "It is well settled that if a future limitation can be construed as a remainder, it must be so construed, and not as a springing use; but it is a very different thing to say that a good springing use must be construed into a bad remainder, because it is preceded by an estate which is insufficient to support a remainder. To construe a limitation as a remainder if it can be a remainder is one thing; but to insist upon construing it as a remainder, when it cannot be a remainder, seems the very wantonness of destruction. In fact, an estate after an estate for years, though commonly called a remainder, is not strictly so." He concludes that it has been repeatedly held that a future contingent devise after an estate for years is a good executory devise and not a bad remainder; that the question is uncertain as to estates arising under a deed, because of the absence of decisions. Finally, that the statement may be ventured that a contingent use is good although preceded by an estate for years. See Gore v. Gore, 2 P. Wms. 28; Haywood v. Stillingfleet, 1 Atk. 422; Harris v. Barnes, 4 Burr. 2157; Gilbert Uses (Sugden's ed.) 171.

3. This doctrine was attacked by Mr. Sugden. As has been shown, there

(cc) **MODES OF CONVEYANCING UNDER THE STATUTE.**—Instead, therefore, of restoring notoriety in the creation and transfer of estates there was now no bar to the secret conveyance of legal estates, except the rule of equity, which refused to raise a use against a grantor without a valuable consideration.¹ The most important instrument of conveyancing which resulted from the interpretation of the statute was the *bargain and sale*, by which upon the paying of a consideration a use immediately arose in favor of the purchaser which was executed by the statute.² When the

must be, by the statute, a person originally seized to the uses of at least an estate of freehold, through whom the uses are instantly executed into legal estates, whether in possession or in expectancy. Where there is a contingent use to a person not in being it must await his arrival before it can be executed; until then the use remains in the grantor, the legal estate or seisin being in the person seized to uses. See 2 Washburn Real Property 116; Chudleigh's Case, 1 Rep. 226; 2 Bl. Com. 336; Bac. Law Tracts 350; Ref. Prot. Dutch Ch. v. Veeder, 4 Wend. (N. Y.) 494; Shapleigh v. Pilsbury, 1 Me. 271; Soule v. Cargill, 15 Me. 414; Ashurst v. Given, 5 W. & S. (Pa.) 323; Miller v. Chittenden, 2 Iowa 371.

But the case may arise of a series of limitations, one of which is a contingent use, and the others when executed exhaust the whole legal estate (or seisin). Such a case would be a conveyance to B in fee to the use of A for life, remainder to the use of A's first and second sons, unborn, for their respective lives successively, remainder to the use of B in fee simple. (See 2 Minor's Inst. 182.) The question then arises what legal estate will support such contingent use as the remainder to A's sons unborn. The doctrine of *scintilla juris* holds that there is a spark of right in the person originally seized to uses sufficient to support the contingent use when it arises, but this doctrine was defective in not passing the legal estate, and in complicating the title. Sugden's substitute was to hold that the other estates must open and let in the contingent use without any *scintilla* in the feeoffee, or person originally seized. As Prof. Minor expresses it, it is sufficient if *at the time the estates were created* there was a seisin to any one, sufficient to *serve* all the uses. See 2 Minor Inst. 182; 1 Sugden Pow. (3d Am. ed.) 83-100. See also Brent's

Case, 3 Dyer 340a; Chudleigh's Case, 1 Co. 120.

The question becomes of practical importance in a case such as that of *Dennett v. Dennett*, 40 N. H. 498, where a testator gave his son the residue of his estate, "to descend" to the youngest son of said son, and from him to the eldest male heir of such youngest son, and in failure of such issue then to the heirs of the first devisee. This was held to give an estate for life to testator's son and the contingent remainder for life to the said youngest son; it was held that even if by the rule in *Shelley's Case*, the first devisee by the union of the estate for life and of the remainder to his heirs in fee became the owner of the fee, yet the two limitations became united in him only until the intervening limitations became vested, and must then open to admit such limitations as they arose. See 4 Kent's Com. 210-214; Bowles' Case, 11 Rep. 79; *Ballard v. Ballard*, 18 Pick. (Mass.) 44.

1. See *Challis, Real Prop.* 337, 315; 2 Washb. Real Prop. 129; 4 Kent. Com. 493; *Dead Springs v. Hanks*, 5 Ired. (N. Car.) 30; *Sand. Uses* 81; *Jacksond. Houseman v. Sebring*, 16 Johns. (N. Y.) 515; 1 Cruise Dig. 107; *Smith v. Risley*, Cro. Car. 529; 3 Wood Com. 285. But see *Martindale, Conveyancing* 53, n. 1.

2. Bargain and sale is without doubt the commonest mode of conveyancing in use to-day in the *United States*. See 2 Washb. on Real Prop. 143, 154; *Martindale on Conveyancing* 53. The whole question of the mode of conveyancing in modern law will be treated below under the title, *Modes of Conveyance*.

In *England*, bargains and sales have become obsolete. This is due partly to the fact that they cannot be used other than for a direct conveyance by reason of the doctrine of a use upon a use and are impossible for purposes of settlement. They have been entirely superseded by

statute of 27 Henry VIII, ch. 16, required that conveyance of land by bargain and sale must be in writing, indented and sealed, if of a freehold estate, a new form was developed in evasion of this requirement by the *lease and release*, by which it was possible to raise a use in another for the term of one year, when, by operation of the statute, the lessee was in of his term and could then by common law acquire the whole estate in fee by means of a release of the reversion.¹

Another mode of conveyancing which was used between relatives upon the consideration of blood or kinship, was a *covenant to stand seised*. It was essential that the covenant be a formal declaration of the intention, in view of the absence of a valuable consideration.²

In all these conveyances which have been so far mentioned there was no actual passage of the seisin. These modes were, therefore, called conveyances without transmutation of possession. Besides these, there was another class in which the legal estate was conveyed by common law to a feoffee to uses, whereupon by the statute the use became instantly executed. These were called conveyances with transmutation of possession. The most important of these are the *feoffment to uses* and the *fine and recovery*.³ In *England*, the statutory *grant* is now the universal method.⁴

(2) *Trusts*.—See TRUSTS.

4. Real Rights Treated with Reference to the Time of Their Enjoyment—*a.* ESTATES IN POSSESSION.—See REMAINDERS; REVERSIONS.

b. ESTATES IN EXPECTANCY.—See REMAINDERS; REVERSIONS.

5. Real Rights Treated with Reference to the Number and Connection of their Owners—*a.* ESTATES IN SEVERALTY.—See ESTATES, vol. 6, p. 875.

b. ESTATES WITH A PLURALITY OF TENANTS—(1) *Joint Tenancy*.—See JOINT TENANTS, AND TENANTS IN COMMON, vol. 11, p. 146.

the statutory grant, under 89 Vict., chap. 106. See Challis on Real Prop. 339.

1. See Challis on Real Prop. 331, 332; Co. Litt. 270a, 270b; Litt. 459, 460, 546; 2 Washb. on Real Prop. 131; Williams on Real Prop. 151, 153; Rawle's Notes, 2 Prest. Conveyances 219; Tudor's Lead. Cas. 255. See generally Wyman v. Brown, 50 Me. 139; Abbott v. Holway, 72 Me. 298; Witham v. Brooner, 63 Ill. 344; Schackelton v. Sebree, 86 Ill. 620; Love v. Harbin, 87 N. Car. 249; Mosely v. Mosely, 87 N. Car. 69; Ochletree v. McClung, 7 W.

Va. 232; Eysaman v. Eysaman, 24 Hun (N. Y.) 430.

See *infra*, this title, *Modes of Conveyance*.

2. See Challis on Real Prop.; Shepard's Touchstone 508; Page v. Moulton, Dy. 296a, pl. 22. As to its use in the *United States*, see *infra*, this article: *Modes of Conveyance*, II, 6 d, (3) (b).

3. Of these, those in modern use will be found discussed below under *Modes of Conveyance*, this article, II, d, (3) (b).

4. 8 & 9 Vict., ch. 106, § 2.

(2) *Tenancy in Common*.—See JOINT TENANTS AND TENANTS IN COMMON, vol. 11, p. 146.

(3) *Tenancy in Coparcenary*.—See COPARCENARY, vol. 4, p. 146.

6. Real Rights Treated with Reference to the Manner of Acquisition; or Title—*a. NATURE OF TITLE*.—See TITLE.

b. TITLE BY DESCENT.—See STATUTES OF DISTRIBUTION.

c. TITLE BY PURCHASE OTHER THAN ALIENATION—(1) *Title by Escheat*.—See ESCHEAT, vol. 6, p. 854.

(2) *Title by Occupancy*.—See ABANDONMENT, vol. 1, p. 1; TITLE.

(3) *Title by Adverse Possession*.—See ADVERSE POSSESSION, vol. 1, p. 225.

(4) *Title by Estoppel*.—See ESTOPPEL, vol. 7, p. 1.

(5) *Title by Prescription*.—See PRESCRIPTION.

(6) *Title by Forfeiture*.—See FORFEITURE, vol. 8, p. 443.

(7) *Title by Accretion*.—See ACCRETION, vol. 1, p. 136.

d. TITLE BY ALIENATION INTER VIVOS, OR TITLE BY GRANT.

—(1) *Title by Public Grant*.—See GRANTS, vol. 9, p. 43.

(2) *Title by Office Grant*.—See GRANTS, vol. 9, p. 43.

(3) *Title by Private Grant*.—See DEDICATION, vol. 5, p. 395.

(a) *Persons Capable of Making and Receiving Grants*.—See GRANTOR AND GRANTEE, vol. 9, p. 19.

(b) *Modes of Conveyance*—(aa) *IN GENERAL*.—The law relating to modes of conveyance in modern use in the United States chiefly with respect to their connection with the old forms of the common law and under the Statute of Uses, may be summed up in the following interdependent propositions: First: The English modes of conveyance which originated at the common law or under the Statute of Uses, are still valid modes of transfer.¹

Second. Modern statutory provisions for modes of conveyance are for the most part enabling, not exclusive.²

Third. It is a well settled policy of interpretation of instruments of conveyance that such instruments are not condemned because the particular mode purported to be used fails. Where the instrument may operate by another mode, it will be given

1. In fact, this is more especially true of the law of the *United States* than of the law of *England*. To the American lawyer the consideration of these early modes are of vastly greater importance than to the Englishman. In *England* an early statute, by requiring enrollment, prevented the widespread use of the bargain and sale—a mode which was otherwise excellently adapted to simple conveyancing, and led ultimately to an almost exclusive use of a purely statutory form. See the act of 8 and 9 Vict., ch. 106. "All modern assurances," says Mr. Challis, *Real Property*, p. 307, "of estates of freehold in possession, except a feoffment and a bargain and sale enrolled, de-

pend for their validity upon this statute." See Washb. *Real Prop.*, bk. 2, 131.

In the *United States*, bargain and sale became from the beginning and remains to-day the most popular mode for transfers of interest, in real property. 2 Washb. *Real Prop.* (4th ed.) 439; Martindale on Conveyancing, § 56. *Contra*, see Greenleaf's *Cruise, Real Prop.*, tit. 12, ch. 1, § 4, note.

2. Exceptions, where statutes are exclusive, are those of *New York* and of *Minnesota*. See *N. Y. Rev. St.* 4th ed., p. 148; *Minn. Stat.* at Large 1873, vol. 1, ch. 35, § 1. See Martindale *Conv.*, § 60. See Montgomery & Sturdevant, 41 *Cal.* 290. The *New*

the force of such mode.¹ In general, it may be said, the significance of the various modes developed at the English law appears to be that they are not so much strict forms operating by force of formalism (like the modes of early common law), as convenient types of the operation of an agreement when supported by a valid consideration, by the inherent force of such agreement. The law of conveyancing becomes a system of principles of the

York statute requires a deed to be made directly to the person in whom the possession and profits are intended to be vested, and not to his use.

1. Many cases might be mentioned supporting this view. Some will be discussed specifically in considering *feoffments*, and *covenants to stand seised*. A number of decisions to this effect are reviewed in the American note appended to *Roe v. Transmaar*, in 3 Sm. Leading Cases (9th Am. ed.) 1791, where this rule is laid down: "Deeds are to be so construed as to effectuate, if possible, the intent of the parties; and where the intent is apparent to pass the land one way or another, there it may be good either way, by which word *intent* is not meant to pass the land by this or that particular kind of deed, or by any particular mode or form of conveyance, but that the land shall pass at all events one way or another." Among other cases were cited *Carroll v. Norwood*, 1 Har. & J. (Md.) 167; *Chamberlain v. Crane*, 1 N. H. 64; *Lambert v. Smith*, 9 Oregon 185; *Kirder v. Lafferty*, 1 Whart. (Pa.) 303; *Peoria v. Darst*, 101 Ill. 609; *Wolfe v. Scarborough*, 2 Ohio St. 361; *Coleman v. Beach*, 97 N. Y. 545; *Smith v. Warden*, 19 Pa. St. 424, 430.

See especially *Bell v. Scammon*, 15 N. H. 381, where a deed by one to his son-in-law in consideration of "one dollar and the love and good will" he bore him, was held valid either as a bargain and sale, or as a covenant to stand seised to pass an estate in fee *in futuro*; that in neither of these modes are any formal words required; that "so long ago as the time of *Levinz* it was said, 'that the judges of late years have had more consideration of the substance, viz., the passing of the estate, than the shadow, viz., the manner of passing it.'" 3 *Levinz* 372.

So in *Sprague v. Woods*, 4 W. & S. (Pa.) 192, it was held that "equity in enforcing trusts does not regard so much the mode of conveyance as the intent of the parties, and to effectuate

that, will construe the instrument so as to give it effect, and will remedy defects in the forms employed."

It would seem, however, that though a deed which is bad by one mode, may operate by another, yet it must distinctly operate by some one mode. In so far the requisite prescribed in 2 Sm. Lead. Cas. (8th Am. ed.) 541 would seem to be, if not insufficient, at least uncertain, viz.: "All that is necessary is an intention to convey and sufficient matter to support it."

See *Lynch v. Livingston*, 8 Barb. (N. Y.) 463; *Krider v. Lafferty*, 1 Wh. (Pa.) 303. On page 146 of his second book on Real Property, Mr. Washburn concludes that the cases which he discusses "justify the language of the courts in several cases where they have stated, in effect, that a conveyance of land by deed, may be considered any species of conveyance necessary to effect the intent of the parties to the deed, and not repugnant to the terms of it." The cases cited are *Trafton v. Hawes*, 102 Mass. 533; *Shapleigh v. Pillsbury*, 1 Me. 271; *Emery v. Chase*, 5 Me. 232; *Marshall v. Fisk*, 6 Mass. 24, 32; *Foster v. Dennison*, 9 Ohio 121; *Wyman v. Brown*, 50 Me. 139.

In *Vermont*, the supreme court, though holding that the Statute of Uses had been generally adopted in *New England*, decided that it was not in force in that State, on what would seem the frivolous ground that a court of equity could carry out the intention of the parties without resort to the statute.

See *Gorham v. Daniels*, 23 Vt. 600; See *contra*, *Society etc. v. Hartland*, 2 Paine C. C. 536.

See further 2 Sm. Lead. Cas. 1791 (9th Am. ed.); *Bryan v. Bradley*, 16 Conn. 474; 3 Washb. R. P. 607, reviewing *Exum v. Canty*, 34 Miss. 569; *Wall v. Wall*, 30 Miss. 91; *Edwards v. Smith*, 35 Miss. 197; 2 Lomax Dig. 141; *Eckman v. Eckman*, 68 Pa. St. 460; *Horton v. Sledge*, 29 Ala. 478; *Steel v. Steel*, 4 Allen (Mass.) 417.

construction of the expression of agreements to transfer real property.¹

In the *United States*, bargain and sale became from the beginning and remains to-day the most popular mode for transfers of interests in real property.² The remark that the modes developed under the English Statute of Uses derive force not from formalism, but from the agreement supported by a consideration, is confirmed herein, since bargain and sale was less a distinct form of conveyance than a typical example of the operation of

1. The question which is sought to be answered here is simply, what element, be it a form of words, or a public act or a mere intention, will effect the legal transfer of the ownership of real property. On the one hand it is clear that a deed duly recorded and delivered will be effectual even in the absence of consideration; on the other hand it is equally clear that a recorded deed is not the only method of conveyance. The question arises whether ancient modes of the common law, operating by force of a symbolic act, are still potent in the *United States*, and further, if conveyances are valid by reason of formalism (as livery of seisin or obedience to statutory prescription), whether other modes exist and to what elements they owe their validity. Finally, if modes of conveyance obtain by reason of elements other than formal (*i. e.*, by the force of the intention or agreement of parties, and a valuable consideration), the question inevitably presents itself, to what extent is a deed at all necessary to a conveyance?

The answer to all these questions can best be given in a short historical statement.

Historical Outline of the Law of Conveyancing.—Originally transfers of real property owed their whole momentum to outward notorious form. Thus no consideration was needed in the old feoffment. With the introduction of the system of uses into conveyancing, notoriety was forthwith dispensed with, and the moving force in a conveyance was simply the agreement of parties based on a consideration. For a short time absolute secrecy existed until a statute compelled the enrollment of all bargains and sales of estates of freehold. Affecting the only mode known under the Statute of Uses, this enactment produced a return to notoriety until an evasion was discovered in the lease and release. At this time, then, in the seventeenth century, it was still possible

to convey an estate of freehold without any writing or outward token until the Statute of Frauds (29 Charles II.) required all transfers of interests in land to be in writing. It is to be noticed, therefore, that, what formal requisites are now essential in conveyancing, are not a remnant of ancient formalism, but mere provisions for the prevention of fraud superadded to the inherent force of a valid contract.

In the *United States* it is important to remember that while the Statute of Frauds was generally adopted, the statute relating to the enrollment of bargains and sales was never in force. Registration laws do not affect the validity of instruments as conveyances, they relate merely to the doctrine of notice.

Therefore, it is clear that all modes of transfer which existed at the English law are valid in the *United States*, provided they are in writing, except such as have been specially abolished by statute. Further they are the only modes except in so far as statutes have supplied others.

To this brief statement of the development of conveyancing a remark in the nature of an exception must be added: While in early times livery of seisin was alone necessary to the transfer of a freehold, and writing was therefore not required, this did not apply to those interests in real property which were incapable of livery. Such incorporeal hereditaments were said to lie in grant, and did, at all times require a deed for their conveyance. See generally *Roe v. Transmar*, 3 Sm. Lead. Cas. (9th Am. ed.) 1780, with the notes and the cases discussed therein. See also Washb. Real Prop., Book ii, §§ 127-156; 605-609. Martindale on Conveyancing, ch. ii, art. 1.

2. 2 Washb. Real Prop. (4th ed.) 439; Martindale Conveyancing § 56, note; see *contra*, Greenleaf's *Cruise Real Prop.* tit. 12 ch. 1, § 4, note.

the Statute of Uses, the other modes being devised for special purposes as for the consideration of affection, or for the evasion of the statute requiring enrollment.

For a review of all the English modes the reader is referred elsewhere.¹ On the basis of the separate discussion there contained it is proposed here to treat the modes in actual use in the United States.

Following the usual order, the common law modes invite the first notice, of which the only one of present importance is the *Deed or Charter of Feoffment*, which has retained its hold in several States, notably in *Massachusetts*.² It will be remembered that the early mode of feoffment derived its effect from formality of livery of seisin; no writing or deed was necessary, although a charter was common as evidence of the conveyance. It having been held in decisions, as well as enacted by statute,³ that acknowledgment and record was equivalent to livery, the charter of feoffment was a convenient mode where bargain and sale was inadequate. Thus by reason of the doctrine of a use upon a use a bargain and sale to A to the use of B executed the use in A, leaving a mere equitable estate in B. But by feoffment the legal estate in A would pass by the doctrine of uses, to B.

1. See this article, *Modes of Conveyancing under the Statute of Uses*.

2. See 2 Washb. Real Prop., *145-6; *Thatcher v. Omans*, 3 Pick. (Mass.) 521; *Marshall v. Fisk*, 6 Mass. 24; *Hunt v. Hunt*, 14 Pick. (Mass.) 374; *Bryan v. Bradley* 16 Conn. 474; *Caldwell v. Fulton*, 31 Pa. St. 475.

3. In *Caldwell v. Fulton*, 31 Pa. St. 475, it was said that in *Pennsylvania* "livery of seisin is supplied by the deed and its registration."

In *Massachusetts* an early statute (o Will. III ch. 7) was held to supplant livery of seisin by acknowledgment and record, in *Thatcher v. Omans*, 3 Pick. (Mass.) 533—and the term feoffment was specifically applied to a conveyance by husband and wife who by deed acknowledged and recorded "gave, granted, bargained, sold, enfeoffed and conveyed" land to J S in fee to the use of the husband and wife, their heirs and assigns. Bargain and sale, or covenant to stand seized would have failed to execute the use upon the use. See also *Hunt v. Hunt*, 14 Pick. (Mass.) 374; *Marshall v. Fisk*, 6 Mass. 24. See *Taylor v. Brigham*, 143 Mass. 410.

In *Bryan v. Bradley*, 16 Conn. 474, the Supreme Court held that it had never been the general practice in *Connecticut* to accompany a conveyance of land with livery of seisin; that the reas-

ons which made it necessary or proper in *England* did not exist in *Connecticut*; that "since . . . livery of seisin has no place here on feudal principles, and is not only inadequate for the purpose of notoriety, but our registry laws were enacted expressly, and are amply sufficient for that purpose, there seems to be no substantial reason why that useless ceremony should be required."

In Maine the above mentioned statute (9 Will. III ch. 7) which was specially incorporated with the statutes of the State in 1821, was construed in the case of *Wyman v. Brown*, 50 Me. 159, in the spirit of the opinion of Chief Justice Dana in *Thatcher v. Omans*, 3 Pick. (Mass.) 159. The court, in the former case, remarked that the deeds under the statute "relying upon the statute to annex the legal title to the use . . . purport to convey the land itself, and being duly acknowledged and recorded . . . operate more like feoffments than like conveyances under the Statute of Uses." See also *Greenleaf's Cruise*, Real Prop. tit. 12, ch. 1, § 4, note. (The statutory mode will be discussed separately in the text.) See also 2 Sm. Lead. Cas. (9th Am. ed.) 1796, citing *French v. French*, 3 N. H. 234; *Sprague v. Woods*, 4 W. & S. (Pa.) 192; *Ware v. Richardson*, 3 Md. 505; *Hogan v. Strayhorn*, 65 N. C. 279. See also

(bb) BARGAIN AND SALE is, as has been said, the most common mode of transfer of real property in the *United States*.¹ It is distinguished from the common law mode of feoffment in that it passes without transmutation of possession, *i. e.*, the use only is "sold," and is thereupon executed by the Statute of Uses. Hence it is absolutely requisite that there be a valuable consideration. Equity will indeed enforce a conveyance against a feoffee to uses in favor of a volunteer. But it will refuse to raise a use directly against a donor who is a volunteer.²

In *Massachusetts*, the unique doctrine exists that a bargain and sale will not convey an estate of freehold *in futuro*.³ The courts evade the difficulty by a liberal construction of the next mode derived from the Statute of Uses, the *covenant to stand*

Tiedeman, Real Prop. § 780, citing *Russell v. Coffin*, 8 Pick. (Mass.) 143; Miss. Code (1871) § 2294; R. S. Rhode Island, ch. 146, § 1; *Roe v. Domes*, 48 Mo. 481.

In *Sprague v. Woods*, 4 W. & S. (Pa.) 192, it was said in regard to an unrecorded deed from one W to his daughter E, and son in law S, for a consideration paid by them, in trust for their children in fee, "had the deed in question been duly recorded at the trial it would have been equivalent to a feoffment to S, to the use of his children; their use would have been a use executed in them.

As to the effect of the words "to the use of" when used in a feoffment to uses as referring to the feoffee to uses, see the discussion *supra*, this article, II. (3) *b* 1, *Uses*. — The discussion of the requirements of a use. See also *Brown v. Renshaw*, 57 Md. 67; 2 Washb. Real Prop. 150, citing *Hurst v. McNeil*, 1 Wash. C. C. 70; *Doe v. Passingham*, 6 Barn. & C. 305; *Franciscus v. Reigart*, 4 Watts 118; 2 Sm. Lead. Cas. 5th Am. ed. 454. See *Phila. Trust, Safe Dep. etc. Co.'s App.*, 93 Penn. St. 209; 2 Washb. Real Prop. 480, citing *Jackson v. Cary*, 16 Johns. (N. Y.) 302.

1. See *Martindale, Conveyancing*, § 56, note; 2 Washb. Real Prop. 4th ed. 439. See *contra*, *Greenleaf's Cruise*, Real Prop. tit. 12, ch. 1, § 4, note.

2. See the discussion of this point, *supra*, this article, II, (3) *b*. (1) 4.

But a deed which is bad as bargain and sale, there being no money consideration may operate as a feoffment. *Cheney v. Watkins*, 1 Har. & J. (Md.) 527; see also *Mason v. Smallwood*, 4 Har. & McH. (Md.) 484.

The consideration need not be expressed. See cases last cited. See also

Sprague v. Woods, 4 W. & S. 192. See however, *O'Risan v. Patterson*, 1 W. & S. 395. See further, on this point, the text below, on *Covenants to Stand Seized*.

Pray v. Pierce, 7 Mass. 381; *Brewer v. Hardy*, 22 Pick. (Mass.) 376. In *Trafton v. Hawes*, 102 Mass. 532, a deed of land to take effect at the grantor's death, was held good as a covenant to stand seized to the grantee's use, notwithstanding the absence of any relationship between them by blood or marriage. See *Exum v. Canty*, 30 Miss. 91.

The *Massachusetts* decisions on the covenant to stand seized, are absolutely alone, on the matter of consideration, and can only be explained as an attempt to correct the effect of another error. For the common view, see *Greenl. Cruise, Real Prop.*, tit. 32 ch. 2, § 41; ch. 10, § 12; 2 Washb. R. P. 605; *Jackson v. Sebring*, 16 Johns. (N. Y.) 515; *Jackson v. Caldwell*, 1 Cow. (N. Y.) 622; *Jackson v. Delancey*, 4 Cow. (N. Y.) 427; *French v. French*, 3 N. H. 234; *Bell v. Scammon*, 15 N. H. 381; 4 Kent. Com. 493 (6th ed.).

3. The fallacy of this doctrine has been pointed out *supra*, this article, under *Modes of Conveyancing under the Statute of Uses*.

See also *Gray, Rule against Perp.*, § 57. *Massachusetts* cases supporting the doctrine are *Gale v. Coburn*, 18 Pick. 397; *Wallis v. Wallis*, 4 Mass. 135; *Parker v. Nichols*, 7 Pick. 111.

In *Maine* the common view is held. See *Wyman v. Brown*, 52 Me. 14.

To the same effect are *Rogers v. Eagle Ins. Co.*, 9 Wend. (N. Y.) 611; *Bell v. Scammon*, 15 N. H. 381; *Jackson v. Dunsbagle*, 1 Johns. (N. Y.) Cas. 96; 2 Washb. Real Prop., *124; *Gilb. Uses by Sugd.* 163; *Cornish, Uses* 44.

seised, holding that a consideration of blood or marriage is not indispensable.¹ But in all other jurisdictions, a consideration of blood or marriage is necessary to support a covenant to stand seised; though the additional presence of a valuable consideration will not affect its validity.²

(cc) LEASE AND RELEASE—QUIT CLAIM.—The mode of *lease and release* was adopted in *England* to avoid the statute requiring enrollment of bargains and sales of freeholds.³ It has no existence nor reason for existence in the *United States*.⁴

Analogous to the release of the English law in its original and literal conception is a mode of conveyance distinctively American—the deed of *quit-claim*. But it differs from the *release* in actual effect in that it is valid as a primary mode, and does not require a precedent conveyance nor a pre-existing interest in the grantee.⁵

(dd) STATUTORY MODES OF CONVEYANCE.—The effect of statutory provisions of a mode of conveyance is either to afford a separate form, or to simplify the requirements of other modes. They are never exclusive of pre-existing modes except in so far as they may superadd a formal requisite to their substance.⁶

89; 4 Kent's Com. 298; 1 Greenl. Cruise Real Prop., tit. 1, § 36; 2 Sm. Lead. Cas., 451 (5th Am. ed.).

1. See the last mentioned *Massachusetts* cases. See also 2 Washb. Real Prop. *144, citing *Cox v. Edwards*, 14 Mass. 492.

In the American note in 3 Sm. Lead. Cas. (9th Am. ed.), 1791, is found a review of cases of covenant to stand seised, such as where the relation of son-in-law was sufficient consideration: *McDaniel v. Johns*, 45 Miss. 632; *Lambert v. Smith*, 9 Oregon 185; *Watson v. Watson*, 24 S. Car. 228; *Bell v. Scammon*, 15 N. H. 381. *Contra*, as construing the consideration strictly, are *Jackson v. Sebring*, 16 Johnson (N. Y.) 515; *Jackson v. Caldwell*, 1 Cow. (N. Y.) 622; *Doe v. Hines*, 1 Busb. (N. Car.) 343.

See also *Sherman v. Dodge*, 28 Vt. 26; and, generally, *Bryan v. Bradley*, 16 Conn. 474; *Sprague v. Woods*, 4 W. & S. (Pa.) 435.

Mr. Washburn, 2 Real Prop. *130, in a note bases the difference between the strict English and the liberal American policy of construction of the covenant to stand seised on the ground that "there is no distinction here as in *England* as to recording the deeds, no enrollment being required there of a covenant to stand seised. See Rawle's note to *Wms. Real Prop.* 153; 4 Kent Com. 494.

2. See the article RELEASE.

3. Its adoption to evade the statutory requirement of enrollment of bargains and sales of freeholds has been discussed *supra*, this article, in the introductory remarks of the present heading; also in the last paragraphs of the subdivision, USES, article II, (3), (b.) (1), *Modes of Conveyancing Under the Statute*. See also the article, RELEASE.

4. See Martindale, Conveyancing; § 57; citing *Lewis v. Beall*, 4 Har. & Mch. (Md.) 488; *Craig v. Pinson*, 1 Cheves 272. See RELEASE.

The subject of release, as well as lease and release, will be found fully treated under RELEASE.

5. See RELEASE.

6. In *New Hampshire*, *South Carolina*, *Pennsylvania*, *New York*, *Iowa*, *Maryland* and *Tennessee*, the statutory mode leaves other modes valid. See Tiedeman Real Prop. § 780. See 3 Washb. Real Prop. 361; *Redfern v. Middleton*, Rice (S. Car.) 464; 3 Sm. Lead. Cas. (5th Am. ed.) 453. See also *Den v. Crawford*, 8 N. J. L. 90.

But in *New Hampshire* other modes, though valid, must have the statutory attestation. Comp. Stat., ch. 136, § 41; Gen. Stat. 1867, ch. 15, §§ 3, 4; *Stone v. Ashley*, 13 N. H. 38; *Underwood v. Campbell*, 14 N. H. 396; *Cram v. Ingalls*, 18 N. H. 616; *Kimpley v. Holbrook*, 45 N. H. 320.

In *New York* the conveyance must be made directly to the beneficiary (N.

(cc) **GENERAL REQUIREMENTS—SEAL.**—It appears, then, that any writing containing proper words of grant, release or conveyance will operate by whatever mode best accomplishes the intention of the parties.¹

From the historical outline above given it is clear that contrary to common belief, a seal is not necessary to a conveyance of an estate in fee simple in land. While the original form of grant did require a seal, yet it applied only to hereditaments incorporeal. Further, the Statute of Enrollments requiring a seal in conveyances of freeholds on a valuable consideration, has never been in force in this country. The seal which may be essential to the covenant to stand seised, pertains to that mode only in so far as it is a covenant. In the feoffment, the charter which usually accompanied the conveyance, was not essential. Under the Statute of Uses, an oral bargain was sufficient; and the requirement of a writing was only added by the Statute of Frauds. It follows, therefore, that except where statutes require a seal, it is not necessary to the conveyance of an estate in fee in land.²

(c) **Deeds.**—See **DEEDS OF CONVEYANCE**, vol. 5, p. 423; **ESCROW**, vol. 6, p. 857; **LEASE**, vol. 12, p. 974; **RELEASE**.

(e) **TITLE BY DEVISE.**—See **LEGACIES AND DEVISES**, vol. 13, p. 7; **WILLS**.

REAR.—See note 3.

Y. Rev. Stat., 4th ed., p. 148). So in *Minnesota* (Stat. at Large, 1873, vol. 1, ch. 35).

In *New York*, all conveyances operate as grants, which term receives thereby an enlarged meaning. See 1 Rev. Stat. N. Y. 738. See also *Tiedeman R. P.*, § 768; 3 Washb. R. P. *383; 3 Wood Conv'g 7; 4 Kent Com. 491.

"Under the *California* statute, any words in a deed, indicating an intention to transfer the estate, interest or claims of the grantor, will be a sufficient conveyance, whether they be such as were generally used in a deed of feoffment, or of bargain and sale, or of release, irrespective of the fact of possession of grantor or grantee, or of the Statute of Uses." Martindale, Conveyancing, § 60, citing *Field v. Columbet*, 4 Sawyer (Cal.) 523.

1. See *Tiedeman*, § 782; *Fash v. Blake*, 30 Ill. 367; *Bryan v. Bradley*, 16 Conn. 476; *Emery v. Chase*, 5 Me. 232. See the other cases cited in the beginning of this subdivision.

In *Johnson v. Bantock*, 38 Ill. 111, there was an instrument executed by the sheriff to a purchaser of land at an execution sale, stating that he had sold to him certain land, describing it, and that

he was entitled to a deed therefor, with a *habendum* clause, to have and to hold said premises to him and his heirs and assigns forever, but not containing any words of grant, release or transfer. It was held inoperative as a deed to pass title. See also *Foster v. Dennison*, 9 Ohio 121; *Den v. Hanks*, 5 Ired. (N. Car.) 30; *Emery v. Chase*, 5 Me. 232; *Marshall v. Fisk*, 6 Mass. 24; *Abbott v. Holway*, 72 Me. 298; *Love v. Harbin*, 87 N. C. 249; *Mosely v. Mosely*, 87 N. C. 69; *Ocheltree v. McClung*, 7 W. Va. 232. See also *Gorham v. Daniels*, 23 Vt. 600.

2. See the clear exposition of this view in *Tiedeman Real Prop.*, § 783.

As to the statement that the Statute of Enrollments was not adopted, see the following cases cited by Mr. *Tiedeman*: *Rogers v. Fire Ins. Co.*, 9 Wend. (N. Y.) 611; *Jackson v. Wood*, 12 Johns. (N. Y.) 74; *Jackson v. Dunsbagh*, 1 Johns. (N. Y.) 97; *Given v. Doe*, 7 Blackf. 210; *Welch v. Foster*, 12 Mass. 96.

3. **Rear.**—In *Read v. Clarke*, 109 Mass. 82, it was held, where a testator devised his messuage and "the two stable lots in the rear thereof," that the word "rear" did not necessarily mean directly behind the messuage.

REASONABLE.—Conformable or agreeable to reason; just; rational; equitable.

The word occurs in several technical phrases, the more important of which will be treated under specific titles, *q. v.*, while others together with some phrases, which have not yet acquired a technical meaning, are collected in the notes.¹

1. Reasonable.—In an action for malicious prosecution, the trial court charged that "probable cause is the existence of such facts and circumstances as would excite in a reasonable mind a belief" in guilt, etc. To this the plaintiff objected, as omitting the word "impartial" which he had asked for in connection with the word "reasonable." *Held*, no error. The court by Carpenter, J., said: "This charge is complained of mainly for the reason that it omits the word 'impartial,' in connection with the word 'reasonable,' as used in the plaintiff's fourth request. In *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611, the trial court in its charge to the jury, used the word 'impartial' in the same connection with the word 'reasonable.' The plaintiff had a verdict, and the defendant excepted to that use of the word 'impartial.' This court sustained the charge. Holding, that the use of the word was not erroneous is not exactly the same as requiring its use. In other words, it may be lawfully used, and it may be lawfully omitted. The words 'impartial' and 'reasonable' are practically synonymous. 'Impartial' signifies 'not partial, not favoring one party more than another; unprejudiced; disinterested; equitable, just.' Among the synonyms for 'reasonable,' are 'equitable, just.' *Webst. Dict. in verba*. There is therefore no such distinction in the meaning of the two words as to make the use of both or the omission of one erroneous." *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493.

Upon the constitutionality of an act regulating the practice of dentistry, the Supreme Court of *Minnesota* pronounced that "the only limit to the legislative power in prescribing conditions to the right to practice in a profession, is that they shall be reasonable." And then in defining the word "reasonable" as used in this proposition, the court by Gilfillan, C. J., said: "By the term 'reasonable' we do not mean expedient, nor do we mean that the conditions must be such as the

court would impose if it were called on to prescribe what should be the conditions. They are to be deemed reasonable where, although not perhaps the wisest and best that might be adopted, they are fit and appropriate to the end in view, to wit, the protection of the public, and are manifestly adopted in good faith for that purpose. If a condition should be clearly arbitrary and capricious; if no reason with reference to the end in view could be assigned for it, and, especially, if it appeared that it must have been adopted for some other purpose—such, for instance, as to favor or benefit some persons or class of persons—it certainly would not be reasonable, and would be beyond the power of the legislature to impose." *State v. Vandersluis*, 42 Minn. 129.

A **Reasonable act** is such act as the law requires. *Bouv. Law Dict.; Levering v. Union Transp. Co.*, 42 Mo. 88; 97 Am. Dec. 320; *Wayne v. Bickford*, 9 Price 43; *Pudsey v. Newsam*, *Yelv.* 44.

Reasonable Appearance of Danger.—See *HOMICIDE*, vol. 9, p. 593, *et seq.*; *REAL*.

Reasonable certainty is the being free from reasonable doubt. *State v. Shaw*, 4 Jones (N. Car.) 443. See also *REASONABLE DOUBT*.

Reasonable diligence is synonymous with "reasonable care," *q. v.*

Reasonable Expectation.—A person who begins business without capital and with a mortgage on all his assets and who afterwards becomes bankrupt, has contracted his debts without "reasonable or probable ground of expectation of being able to pay" within the *English Bankry Act*, 1883. *Ex parte White*, 14 Q. B. Div. 600. See also *Ex parte Downman*, 32 L. J. Bank, 49; *Ex parte Mortimore*, 3 De G. F. & J. 599.

Reasonable Facilities.—Under an *English* statute, providing that railroad companies shall afford, according to their respective powers, all "reasonable facilities" for the receiving, forwarding, etc., of traffic upon their respective

REASONABLE CARE.—This term is frequently used both in the law of negligence and in the law of bailments, and definitions are of most importance in these connections.

1. **In the Law of Negligence.**—"Reasonable care," in this connection, has practically the same meaning as "ordinary care,"¹ though the latter term is perhaps more correct, as being sanctioned by the better usage, and is so intimately connected with the doctrines of negligence that to give a comprehensive definition under this title would be, in great part, to duplicate the articles on that subject. See, therefore, CARE, vol. 2, p. 732; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15; NEGLIGENCE, vol. 16, p. 386, and the references there given.

2. **In the Law of Bailments.**—The phrase "reasonable care," occurs less frequently in the doctrines of bailments, than in those of negligence; and, though there is a close analogy between its meanings in both connections, there seems to be this difference in its use, viz.: that while in connection with negligence "reasonable care" is practically synonymous with "ordinary care," when used to describe the care to be exercised by a bailee, it describes

lines, it was held that the mere refusal by a railway company to receive and forward the traffic of persons in general, except upon the prepayment of charges somewhat in excess of the maximum authorized rates, was not a denial of "reasonable facilities." Reg. v. Railway Com'rs, L. R., 22 Q. B. Div. 642; 40 Am. & Eng. R. Cas. 59. See also FACILITY, vol. 7, p. 658; CARRIERS OF GOODS, vol. 2, p. 788; FREIGHT, vol. 8, p. 923.

Reasonable and Just.—See JUST, vol. 12, p. 385.

Reasonable Line of Credit.—See LINE, vol. 13, p. 844.

Reasonable Notice.—See AUDITORS, vol. 1, p. 1011. See generally NOTICE, vol. 16, p. 787; REASONABLE TIME.

Reasonable Portion.—A power to charge estates "with reasonable portions, or fortunes for younger children, and for their maintenance and education," is sufficiently certain to be capable of execution; and the word "reasonable" there, is applicable not only to the amount of the portion, but also to the time and occasion on which the child would want it. Edgeworth v. Edgeworth, Beatty 318.

Reasonable and Probable Damages.—In an action for the condemnation of land for railroad purposes, the jury were instructed that the owner was entitled to just compensation for the land taken and for all "reasonable and probable damages" to the balance of the

land not taken. *Held*, that such instruction did not include possible, speculative, and remote damages, and was proper. Chicago etc. R. Co. v. Bowman, 122 Ill. 595. For the general rule in such a case, see EMINENT DOMAIN, vol. 6, p. 571.

Reasonable Rates.—See FREIGHT, vol. 8, p. 900.

Reasonable Question.—"We are unable to draw any distinction between proving 'beyond reasonable doubt' and beyond 'reasonable question,' unless we treat the latter expression as the stronger of the two. One of our leading lexicographers defines 'question' to mean (in such connections as that in which it appears in the charge of the judge) 'doubt,' in another, 'dispute.' So, if the former definition be adopted, the words are synonymous; if the latter be correct, it may be that there is still room for reasonable dispute, when the doubt that lingers in the mind is no longer within the domain of sound reason." *Harding v. Long*, 103 N. Car. 1. See also REASONABLE DOUBT.

Reasonable Regulation.—Authority "to cause the streets of the city to be lighted" and to make "reasonable regulations" with reference thereto, does not empower the city government to grant one company the exclusive right to furnish gas for thirty years. *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep. 529; 16 Am. & Eng. R. Cas. 562.

1. **Reasonable Care Synonymous With**

the care and foresight which is appropriate to that particular class of bailments, and to the occasion, as contradistinguished from that ordinary care which devolves upon an ordinary bailee.¹ As to what degree of care is required see BAILMENTS, vol. 2, p. 51, and the several kinds of bailments, such as DEPOSIT, MANDATE, PLEDGE AND COLLATERAL SECURITY, etc. See also articles treating the several bailees, such as CARRIERS OF GOODS; CARRIERS OF STOCK; LIVERY STABLE KEEPERS; WAREHOUSEMEN, etc.

REASONABLE CAUSE—(See also BANKRUPTCY, vol. 2, p. 80; CAUSE, vol. 3, p. 45; MALICIOUS PROSECUTION, vol. 14, p. 27; INSOLVENCY, vol. 11, p. 172).—See note 2.

REASONABLE DOUBT.—(See also ALIBI, vol. 1, p. 455; BURDEN OF PROOF, vol. 2, p. 657; CRIMINAL PROCEDURE, vol. 4, p. 856; HOMICIDE, vol. 9, p. 737.)

I. IN CRIMINAL ACTIONS.—It is a well settled doctrine of the criminal law that, in order to find a defendant guilty in a criminal case, the jury must be convinced of his guilt, by the evidence, beyond a reasonable doubt.² This doctrine extends alike to all crimes and misdemeanors.⁴ If the jury entertain a reasonable doubt as to which of two degrees of a crime the defendant is guilty, as, for instance, whether of murder in the first or second degree, the defendant is entitled to the benefit of such doubt, and can only be convicted of the lower offense.⁵

By the better rule and the one supported by the weight of authority, it is sufficient to instruct the jury that they should acquit if upon the whole case they have a reasonable doubt as to the defendant's guilt. It is not necessary that they should be instructed that they must be satisfied beyond a reasonable doubt of each material fact required to convict. The former instruction necessarily includes the latter, and sufficiently directs the jury that each fact material to conviction must be established beyond a reasonable doubt, while the latter has a tendency to distract the attention of the jury from the consideration of the whole case, and to concentrate it upon some particular fact or hypothesis.⁶

Ordinary Care.—See NEGLIGENCE, vol. 16, p. 399, n.; *Read v. Morse*, 34 Wis. 318.

1. *Levering v. Union Transp. Co.*, 42 Mo. 88; 97 Am. Dec. 320.

2. **Reasonable Cause**.—The "reasonable cause," which will justify husband or wife in abandoning each other, within the meaning of the *Pennsylvania* act defining desertion, is that, and only that, which would entitle the party so separating himself or herself to a divorce. *Butler v. Butler*, 4 Pa. L. J. 284. See also DIVORCE, vol. 5, p. 805.

3. **HOMICIDE**, vol. 9, p. 737; **BURDEN OF PROOF**, vol. 2, p. 657. And see also cases cited throughout this article.

4. 1 Bishop Crim. Proc., § 1093; *Thomp. Tr.*, § 2493; *Wasden v. State*, 18 Ga. 264; *State v. King*, 20 Ark. 166; *Fuller v. State*, 12 Ohio St. 433; *Statterwhite v. State*, 28 Ala. 65; *Com. v. Intoxicating Liquors*, 115 Mass. 142; *Stewart v. State*, 44 Ind. 237; *Hiler v. State*, 4 Blackf. (Ind.) 552.

5. *State v. Laliyer*, 4 Minn. 368; *Payne v. Com.*, 1 Metc. (Ky.) 370; *Davis v. State*, 10 Ga. 101; *White v. State*, 23 Tex. App. 154; *State v. Anderson*, 86 Mo. 309; *Stout v. State*, 90 Ind. 12; *State v. Lee*, 7 Oregon 258.

6. *State v. Stewart*, 52 Iowa 284; *Weaver v. People*, 132 Ill. 536; *State v. Roberts*, 15 Oregon 187; *People v.*

The question, however, is a disputed one, and it has been held error in some jurisdictions to refuse an instruction that a particular fact, essential to the defendant's guilt, must be proved beyond a reasonable doubt, although there was a general charge that his guilt must be proved, upon a consideration of the whole case, beyond a reasonable doubt.¹

Where a reasonable doubt is entertained by one juror, the defendant cannot be found guilty, and it has been held error to refuse instructions to that effect.²

Milgate, 5 Cal. 127; Allen v. State, 60 Ala. 19; Mullins v. People, 110 Ill. 42. See also State v. Acker (N. J. 1890), 19 Atl. Rep. 258; Rudy v. Com., 128 Pa. St. 500; Baker v. Com. (Ky.), 17 S. W. Rep. 625.

Upon a trial for burglary, the defendant requested the following instruction: "As the evidence in the case is wholly circumstantial, you must be satisfied beyond a reasonable doubt of each necessary link in the chain of circumstances, to establish the defendant's guilt." This instruction was refused, and the refusal was held not to be error by the appellate court, the court by Rothrock, J., saying: "The instruction asked by the defendant was properly refused, and that given by the court is correct. It is not a reasonable doubt of any one proposition of fact in the case which entitles to an acquittal. It is a reasonable doubt of guilt arising upon a consideration of all the evidence in the case." State v. Hayden, 45 Iowa 17.

"It is the well settled law here that the prisoner is only entitled to the instruction relative to the consequence of a doubt as to his guilt on the whole evidence in the cause; and that he has no right to single out each material fact necessary to be proved and ask the court to direct the jury that if they have a doubt as to the existence of such facts they will acquit him." State v. Schoenwald, 31 Mo. 155.

"There is no warrant for the course of selecting each fact constituting the offense with which one is accused, and asking the court for an instruction to the effect, that if the jury have a reasonable doubt of that fact, they must acquit. All that is required of the court is, that, in suitable cases for such an instruction, it should tell the jury that if, upon the whole case, they have a reasonable doubt of the guilt of the accused, he should be

acquitted." State v. Fletcher, 18 Mo. 425.

1. Territory v. Lopez (N. Mex. 1884), 2 Pac. Rep. 368; Black v. State, 1 Tex. App. 368; Kaufman v. State, 49 Ind. 251; Binns v. State, 46 Ind. 311. See also LARCENY, vol. 12, p. 852.

2. Aszman v. State, 123 Ind. 347; Fassinow v. State, 89 Ind. 235; State v. Stewart, 52 Iowa 284; State v. Witt, 34 Kan. 488.

In State v. Sloan, 55 Iowa 220, the following instruction was held to be misleading: "A reasonable doubt is such a doubt as fairly and naturally arises in the minds of the whole jury."

In Stitz v. State, 104 Ind. 359, which was a trial for arson, the court gave the following instructions: "While each juror must be satisfied of the defendant's guilt beyond a reasonable doubt, to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal." Upon appeal the court by Elliott, J., said: "This instruction is palpably erroneous. There can be no conviction of a crime unless all the jurors are satisfied, beyond reasonable doubt, of the guilt of the accused. The law upon this point is firmly settled. The instruction before us in effect reverses this rule, for it informs the jury that 'such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal.' This must have induced the jurors to think that unless all concurred in entertaining a reasonable doubt the verdict should be against the defendant. This is in direct opposition to the rule declared by our decisions. Castle v. State, 75 Ind. 146; Clem v. State, 42 Ind. 420; 13 Am. Rep. 369. This instruction is essentially different from the one passed upon in Fassinow v. State, 89 Ind. 235. A reasonable doubt entertained by some of the members of the jury may not compel an acquittal, but

Of course this does not involve the idea that the jury must acquit when a single juror has a reasonable doubt.¹

In those jurisdictions in which the juries in criminal cases are the judges both of the law and the facts, it has been held that it is not a reasonable doubt of the law that entitles the defendant to a verdict of not guilty.²

There have been many attempts to define and interpret the term "reasonable doubt," as used in this connection, but it is apprehended that such attempts are futile; that the words are of plain and unmistakable meaning, and that any affirmative definition on the part of the court tends only to confuse the jury and to render uncertain an expression which, standing alone, is certain and intelligible.³

it may so strongly prevail, and among so many, as to warrant others in yielding their opinions, and joining in a verdict of acquittal. At all events, an instruction which indicates, as the one under immediate mention does, that individual jurors should not acquit, unless all the members of the jury entertain doubts of the defendant's guilt, is erroneous."

In *Castle v. State*, 75 Ind. 146, the court by Worden, J., said: "Upon looking through the well prepared charges given by the court, we do not find the idea embodied or stated in them, that each juror must be satisfied by the evidence of the defendant's guilt, before a conviction can be had, except as it may be involved in the charge that the jury generally, as a body, must be so satisfied. The law, where a criminal cause is tried by a jury, contemplates the concurrence of twelve minds in the conclusion of guilt before a conviction can be had. Each juror must be satisfied, beyond a reasonable doubt, of the defendant's guilt before he can, under his oath, consent to a verdict of guilty. The proposition embodied in the charge asked, that 'if any of the jury, after having duly considered all the evidence, and after having consulted with his fellow-jurymen, entertain such reasonable doubt, the jury cannot, in such case, find the defendant guilty,' is correct in point of law. See *Clem v. State*, 42 Ind. 420; 13 Am. Rep. 369. The charge seems to have been, in other respects, correct, and we are of opinion that it should have been given. Each juror should feel the responsibility resting upon him, as a member of the body, and should realize that his own mind must be convinced of

the defendant's guilt, beyond a reasonable doubt, before he can consent to a verdict of guilty. We think, notwithstanding the general charge of the court, the defendant had the right to have the charge asked given, thus specifically calling the attention of each juror to the duty and responsibility resting upon him, as well as to the legal rights of the defendant."

Contra.—In *State v. Hamilton*, 57 Iowa 596, the defendant asked the court to instruct the jury in substance, that if any juror entertained a reasonable doubt of defendant's guilt, he was not required to surrender his convictions because other jurors entertained no such doubts. The instruction was refused, and the court gave the usual instructions upon the degree of proof required to convict. The appellate court by Rothrock, J., said: "Substantially the same instruction was asked in *State v. Rorabacher*, 19 Iowa 154, and the refusal to give it was approved by this court. Of course, each juror is to act upon his own judgment. He is not required to surrender his convictions unless convinced. He may be aided by his fellow-jurors in arriving at the truths, but he is not to find a verdict against his judgment merely because the others entertained views different from his own; but a jury need not be advised of so simple a proposition. The usual method of instructing upon the measure of proof required in criminal cases is sufficient.

1. *State v. Rorabacher*, 19 Iowa 154.

2. 2 Thomp. Tr., § 2492; *O'Neil v. State*, 48 Ga. 66; *State v. Meyer*, 38 Vt. 457.

3. In *Hamilton v. People*, 29 Mich. 194 the court by Campbell, J., said: "If a jury cannot understand their duty

As has been well said upon this question, "all the definitions are little more than metaphysical paraphrases of an expression invented by the common-law judges, for the very reason that it was capable of being understood and applied by plain men in the jury box. The danger of attempting these definitions and explanations is, that they are liable to impress the jurors with the idea that their verdict is not to be the result of the natural impression which the evidence has made upon their minds, but of some artificial rule which the law has created for them to apply in reaching it. Some courts have proceeded upon this view, holding that an instruction that the jury should be satisfied of the defendant's guilt beyond a reasonable doubt, is sufficient without further explanation. Most American courts have, however, felt called upon in instructing juries in criminal cases, to explain this expression, although it is one of the most exact expressions known to the law, and to define this definition, although the original words convey a more exact idea to the minds of average men than can be derived from any attempt to define them. In so doing, they have

when told, they must not convict when they have a reasonable doubt of the prisoner's guilt, or of any fact essential to prove it; they can very seldom get any help from such subtleties as require a trained mind to distinguish. Jurors are presumed to have common sense and to understand common English. But they are not presumed to have professional or any high degree of technical or linguistic training." Again, it is said: "Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further definition or refining. All persons who possess the qualifications of jurors know that a 'doubt' is a fluctuation or uncertainty of mind arising from defect of knowledge, or of evidence, and that a doubt of the guilt of the accused, honestly entertained, is a 'reasonable doubt.'" *People v. Stuebenvoll*, 62 Mich. 329.

"The explanations of the meaning of this phrase have been almost innumerable, and the best jurists have found it difficult to convey to their own satisfaction the idea in their own minds expressed by its use. Not that there is any considerable difficulty in understanding its meaning, but rather in not conveying it. It may indeed admit of grave doubt whether the proposition is in itself so simple and the words so well calculated to express a state of mind so easily felt, though difficult to describe, that in most cases it is sufficient to use the expression alone with-

out any attempt at explanation. All such attempts must result in simply stating the same proposition in a different form of words, and words which are, perhaps, no more easily understood." *State v. Reed*, 62 Me. 142.

As it is impossible precisely to define in a few words what a reasonable doubt is, courts instructing juries would better make no such attempt, but merely follow the language of the statute. *Mickey v. Com.*, 9 Bush (Ky.) 593.

In *State v. Sauer*, 38 Minn. 439, the court by Mitchell, J., said: "The term 'reasonable doubt' is almost incapable of any definition which will add much to what the words themselves imply. In fact it is easier to state what it is not than what it is; and it may be doubted whether any attempt to define it will not be more likely to confuse than to enlighten a jury. A man is the best judge of his own feelings, and he knows for himself whether he doubts better than any one else can tell him."

"Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." *Miles v. U. S.*, 103 U. S. 304.

For other cases remarking upon the impracticability and inexpediency of attempts to define and explain the term "reasonable doubt," see *State v. Rounds*, 76 Me. 124; *State v. Kearley*, 26 Kan. 87; *State v. Bridges*, 29 Kan. 140; *State v. Mosley*, 31 Kan. 358; *McKleroy v. State*, 77 Ala. 97; *McAlpine v.*

attempted to lead juries in mazes of subtlety and casuistry, in which they were lost themselves, and into which the minds of plain men were incapable of following them."¹

And upon the same subject, an eminent author says: "There are no words plainer than 'reasonable doubt,' and none so exact to the idea meant. Hence some judges, it would seem wisely, decline attempting to interpret them to the jury. Others deem that some explanation should be given, especially if requested. Negative descriptions may be safe, and perhaps helpful; as, that it is not a whimsical or vague doubt² or conjecture,³ not an impossibility,⁴ not an exclusion of every hypothesis of guilt,⁵ but it is a reasonable doubt. The books do not contain one affirmative definition which can safely be pronounced both helpful and accurate. Thus, most judges deem the expression 'to a moral certainty' to be an equivalent to 'beyond a reasonable doubt,' therefore properly used in explanation of the latter."⁶

But some deny this.⁷ Assuming it to be synonymous, practically it will darken more minds, of the classes from whom our jurors are mainly drawn, than it will enlighten."⁸

Viewing the subject in this light no attempt has been made here to reconcile the conflicting definitions, but in the note will be found a partial list of the cases, arranged alphabetically by States, in which the term has been defined or explained.⁹

State, 47 Ala. 78; Turbeville v. State, 40 Ala. 715; State v. Ching Ling, 16 Oregon 419; State v. James, 37 Conn. 360; Kane v. Hibernia Ins. Co., 39 N. J. L. 706; 23 Am. Rep. 239; Hampton v. State, 1 Tex. App. 660; Hopt v. Utah, 120 U. S. 430; U. S. v. Harper, 33 Fed. Rep. 483.

1. Thomp. Tr., § 2463.

2. McGuire v. State, 43 Tex. 210; Com. v. Drum, 58 Pa. St. 9; State v. Bodekee, 34 Iowa 520.

3. Giles v. State, 6 Ga. 276.

4. State v. Nueslein, 25 Mo. 111; State v. Evans, 55 Mo. 460; Com. v. Harman, 4 Pa. St. 269; Pate v. People, 8 Ill. 644; Earll v. People, 73 Ill. 329; State v. Van Winkle, 6 Nev. 340; Mose v. State, 36 Ala. 211; Owens v. State, 52 Ala. 400.

5. State v. Ford, 21 Wis. 617; Ray v. State, 50 Ala. 104; Cohen v. State, 50 Ala. 108. But see Com. v. Annis, 15 Gray (Mass.) 197. It should be a "reasonable" hypothesis. Martin v. State, 38 Ga. 293.

6. Com. v. Costley, 118 Mass. 24; People v. Brannon, 47 Cal. 96; People v. Ashe, 44 Cal. 288; State v. Ostrander, 18 Iowa 435; Williams v. State, 52 Ala. 411; Turbeville v. State, 40 Ala. 715; State v. Van Winkle, 6

Nev. 340; Giles v. State, 6 Ga. 276; Donnelly v. State, 26 N. J. L. 601. See also Winter v. State, 20 Ala. 39; Ray v. State, 50 Ala. 104; Cohen v. State, 50 Ala. 108.

7. McAlpine v. State, 47 Ala. 78.

8. 1 Bishop Crim. Proc., § 1094.

9. See also HOMICIDE, vol. 9, p. 737, for a number of cases on this subject.

Winter v. State, 20 Ala. 39; Turbeville v. State, 40 Ala. 715; McAlpine v. State, 47 Ala. 78; Ray v. State, 50 Ala. 104; Cohen v. State, 50 Ala. 108; Williams v. State, 52 Ala. 411; Farrish v. State, 63 Ala. 164; Bain v. State, 74 Ala. 38; McKleroy v. State, 77 Ala. 97; Lang v. State, 84 Ala. 1; Humbree v. State, 81 Ala. 67; Lundy v. State (Ala. 1891), 9 So. Rep. 189; Potter v. State (Ala. 1891), 9 So. Rep. 402; Smith v. State (Ala. 1891), 9 So. Rep. 408; Perry v. State (Ala. 1891), 9 So. Rep. 279; People v. Milgate, 5 Cal. 127; People v. Schuler, 28 Cal. 493; People v. Cronin, 34 Cal. 195; People v. Phipps, 39 Cal. 334; People v. Padillia, 42 Cal. 540; People v. Ashe, 44 Cal. 288; People v. Brannon, 47 Cal. 96; People v. Ah Sing, 51 Cal. 372; People v. Beck, 58 Cal. 212; People v. Hardisson, 61 Cal. 378; People v. Carrillo, 70 Cal. 643; People v. Davies, 64

- Cal. 440; *People v. Lee Sare* Bo, 72 Cal. 623; *People v. Cohn*, 76 Cal. 387; *People v. Bemmerly*, 87 Cal. 117; *People v. Wohlfrom* (Cal. 1891), 26 Pac. Rep. 236; *Minich v. People*, 8 Colo. 440; *Murray v. Hobson*, 10 Colo. 66; *State v. James*, 37 Conn. 360; *Territory v. Bannigan*, 1 Dak. 452; *Heron v. State*, 22 Fla. 86; *Giles v. State*, 6 Ga. 276; *Malone v. State*, 49 Ga. 210; *Moughon v. State*, 57 Ga. 102; *Brewster v. State*, 63 Ga. 639; *Bush v. State*, 65 Ga. 658; *Vann v. State*, 83 Ga. 44; *People v. Dewey* (Idaho 1885), 6 Pac. Rep. 103; *Pate v. People*, 8 Ill. 661; *Miller v. People*, 39 Ill. 457; *May v. People*, 60 Ill. 120; *Peri v. People*, 65 Ill. 17; *Earl v. People*, 73 Ill. 329; *Connaghan v. People*, 88 Ill. 460; *Dunn v. People*, 109 Ill. 644; *Wacaster v. People*, 134 Ill. 438; *Bressler v. People* (Ill. 1885), 3 N. E. Rep. 521; *Spies v. People*, 122 Ill. 1; *Hiler v. State*, 4 Blackf. (Ind.) 552; *Sumner v. State*, 5 Blackf. (Ind.) 579; *Arnold v. State*, 23 Ind. 170; *Bradley v. State*, 31 Ind. 492; *Line v. State*, 51 Ind. 172; *Sullivan v. State*, 52 Ind. 309; *Jarrell v. State*, 58 Ind. 293; *Densmore v. State*, 67 Ind. 306; *Wright v. State*, 69 Ind. 163; 35 Am. Rep. 212; *Garfield v. State*, 74 Ind. 62; *Castle v. State*, 75 Ind. 146; *Stout v. State*, 90 Ind. 1; *Stitz v. State*, 104 Ind. 359; *Brown v. State*, 105 Ind. 385; *State v. Nost*, 7 Iowa 385; *State v. Ostrander*, 18 Iowa 459; *State v. Collins*, 20 Iowa 85; *State v. Porter*, 34 Iowa 135; *State v. Hayden*, 45 Iowa 17; *Sloan v. State*, 55 Iowa 217; *State v. Richart*, 57 Iowa 245; *State v. Elsham*, 70 Iowa 533; *State v. Stewart*, 52 Iowa 284; *State v. Red*, 53 Iowa 69; *State v. Hamilton*, 57 Iowa 596; *State v. Pierce*, 65 Iowa 90; *State v. Witt*, 34 Kan. 488; *State v. Kearley*, 26 Kan. 87; *State v. Bridges*, 29 Kan. 141; *Jane v. Com.*, 2 Metc. (Ky.) 39; *State v. Reed*, 62 Me. 139; *State v. Rounds*, 76 Me. 125; *Com. v. Webster*, 5 Cush. (Mass.) 320; 52 Am. Dec. 711; *Com. v. Tuttle*, 12 Cush. (Mass.) 502; *Com. v. Goodwin*, 14 Gray (Mass.) 55; *Com. v. Costley*, 118 Mass. 24; *Com. v. Leonard*, 140 Mass. 473; 54 Am. Rep. 485; *People v. Finley*, 38 Mich. 482; *People v. Marble*, 38 Mich. 117; *People v. Niles*, 44 Mich. 606; *McGuire v. People*, 44 Mich. 286; 38 Am. Rep. 265; *People v. Cox*, 70 Minn. 247; *State v. Dineen*, 10 Minn. 407; *State v. Sauer*, 38 Minn. 438; *Evans v. State* (Miss. 1888), 4 So. Rep. 344; *Cicely v. State*, 13 Smed. & M. (Miss.) 210; *Browning v. State*, 30 Miss. 657; *Bowler v. State*, 41 Miss. 570; 30 Miss. 657; *James v. State*, 45 Miss. 572; *Garrard v. State*, 50 Miss. 147; *Hawthorne v. State*, 58 Miss. 788; *State v. Blunt*, 91 Mo. 503; *Gardiner v. State*, 14 Mo. 97; *State v. Dunn*, 18 Mo. 419; *State v. Mueslin*, 25 Mo. 111; *State v. Fugate*, 27 Mo. 535; *State v. Schoenwald*, 31 Mo. 147; *State v. Heed*, 57 Mo. 254; *State v. Young*, 105 Mo. 634; *State v. Swain*, 68 Mo. 616; *State v. Gann*, 72 Mo. 374; *State v. Butterfield*, 75 Mo. 301; *State v. Owens*, 79 Mo. 631; *State v. Vansant*, 80 Mo. 72; *State v. Gee*, 85 Mo. 647; *State v. Payton*, 90 Mo. 220; *Territory v. Owings*, 3 Mont. 137; *Territory v. McAndrews*, 3 Mont. 158; *Polin v. State*, 14 Neb. 540; *Binfield v. State*, 14 Neb. 484; *Carr v. State*, 23 Neb. 749; *Heldt v. State*, 30 Neb. 492; *Cowan v. State*, 22 Neb. 519; *State v. Van Winkle*, 6 Nev. 340; *State v. Nelson*, 11 Nev. 340; *State v. Rorer*, 13 Nev. 17; *State v. Hamilton*, 13 Nev. 386; *State v. Jones*, 19 Nev. 365; *State v. Potts*, 20 Nev. 389; *Donnelly v. State*, 26 N. J. L. 615; *State v. Raymond* (N. J. 1891), 21 Atl. Rep. 328; *Territory v. Lopez* (N. Mex. 1884), 2 Pac. Rep. 364; *People v. Guidici*, 100 N. Y. 509; *People v. Bennett*, 49 N. Y. 144; *People v. Thayers*, 1 Park. Cr. Rep. (N. Y.) 595; *State v. Osca*, 7 Jones (N. Car.) 305; *State v. Johnson*, 7 Jones (N. Car.) 305; *State v. Lummins*, 9 West. L. J. (Ohio) 415; *Morgan v. State* (Ohio 1891), 27 N. E. Rep. 710; *State v. Glass*, 5 Oregon 73; *State v. Lee*, 7 Oregon 258; *State v. Ching Ling*, 16 Oregon 419; *Com. v. Harman*, 4 Pa. St. 270; *Fife v. Com.*, 29 Pa. St. 429; *Com. v. Drum*, 58 Pa. St. 9; *McMeen v. Com.*, 114 Pa. St. 300; *Com. v. Miller* (Pa. 1891), 21 Atl. Rep. 138; *State v. Senn* (S. Car. 1890), 11 S. E. Rep. 295; *State v. Coleman*, 20 S. Car. 445; *Champlin v. State*, 1 Tex. App. 108; *Hampton v. State*, 1 Tex. App. 652; *Jackson v. State*, 9 Tex. App. 114; *Robertson v. State*, 9 Tex. App. 209; *Blocker v. State*, 9 Tex. App. 279; *Wallace v. State*, 9 Tex. App. 399; *Sisk v. State*, 9 Tex. App. 246; *Holmes v. State*, 9 Tex. App. 314; *Smith v. State*, 9 Tex. App. 150; *Shultz v. State*, 13 Tex. 401; *Brown v. State*, 23 Tex. 195; *Conner v. State*, 34 Tex. 659; *White v. State*, 36 Tex. 347; *Bray v. State*, 41 Tex. 560; *U. S. v. Harper*, 33 Fed. Rep. 483; *U. S. v. Jackson*, 29 Fed. Rep. 503; *U. S. v. Jones*, 31 Fed. Rep. 725; *Powell v. State*, 28 Tex.

II. IN CIVIL ACTIONS.—A preponderance of evidence is sufficient in general to entitle a party to a verdict in a civil case. But it has been contended by eminent authority that, where crime is imputed in a civil cause, its existence must be proved in the same manner as in a criminal prosecution—*i. e.*, beyond a reasonable doubt.¹ For example, it is said by a learned author: "If an action be brought against an insurance company to recover a loss by fire, and the defendants plead that the plaintiff willfully burnt down the premises, the jury, before they find a verdict against the plaintiff, must be satisfied that the crime imputed to him was proved by as clear evidence as would justify a conviction for arson."²

This rule, however, is not in accord with the majority of modern text-books, nor with the modern decisions, which hold that in civil cases it is sufficient to prove a crime, like any other fact in issue, by a preponderance of evidence, discarding entirely the doctrine of reasonable doubt in civil actions.³

App. 393; *U. S. v. Knowles*, 4 Sawy. (U. S.) 517; *U. S. v. Foulke*, 6 McLean (U. S.) 349; *U. S. v. Babcock*, 3 Cent. L. J. 143; *Miles v. U. S.*, 103 U. S. 304; *Guiteau's Case*, 10 Fed. Rep. 164; *U. S. v. Wright*, 16 Fed. Rep. 112; *U. S. v. Keller*, 19 Fed. Rep. 633; *U. S. v. Johnson*, 26 Fed. Rep. 682; *U. S. v. Johnson*, 25 Fed. Rep. 685; *U. S. v. Hopkins*, 26 Fed. Rep. 433; *U. S. v. King*, 34 Fed. Rep. 313; *U. S. v. Searcey*, 26 Fed. Rep. 435; *Shipp v. Com.*, 86 Va. 746; *State v. Meyer*, 58 Vt. 462; *Leonard v. Territory*, 2 Wash. 381; *Cornish v. Territory* (Wyoming 1884), 3 Pac. Rep. 793.

1. 1 Taylor Ev. (Text Book Series), § 112; 2 Greenl. Ev. (14th ed.), § 426. See also *Darling v. Banks*, 14 Ill. 46; *McConnel v. Delaware Mut. etc. Ins. Co.*, 18 Ill. 228; *Schultz v. Pacific Ins. Co. (Fla.)* 1 Ins. L. J. 495; *Bradley v. Kennedy*, 2 Greene (Iowa) 231; *Forshee v. Abrams*, 2 Iowa 571; *Fountain v. West*, 23 Iowa 9; 92 Am. Dec. 405; *Ellis v. Lindley*, 38 Iowa 461; *Tucker v. Call*, 45 Ind. 31; *Shortly v. Miller*, 1 Smith (Ind.) 395; *Gants v. Vinard*, 1 1 Smith (Ind.) 297; *Byrket v. Monohon*, 7 Blackf. (Ind.) 83; 41 Am. Dec. 212; *Wonderly v. Nokes*, 8 Blackf. (Ind.) 589; *Lanter v. McEwen*, 8 Blackf. (Ind.) 495; *Sperry v. Wilcox*, 1 Met. (Mass.) 267; *Clark v. Dibble*, 16 Wend. (N. Y.) 601; *Woodbeck v. Keller*, 6 Cow. (N. Y.) 118; *Coulter v. Stuart*, 2 Yerg. (Tenn.) 225; *Hopkins v. Smith*, 3 Barb. (N. Y.) 599; *Chalmers v. Shackle*, 6 C. & P. 475; 25 E. C. L. 496; *Thurtell v. Beaumont*, 1

Bing. 339; 8 E. C. L. 538. And see "Some Rules of Evidence," 10 Am. L. Rev. 642, where these cases are cited and criticised at length. See also *Germania F. Ins. Co. v. Klewes* (Ill. 1889), 22 N. E. Rep. 492; *Lavender v. Hudges*, 3 Ark. 763.

In *Polston v. See*, 54 Mo. 291, the court by Adams, J., said: "The reason of the rule is that a verdict of a jury on the question of guilt or innocence has at least the same moral force as a verdict in a criminal trial for the same offense. There seems to be no other civil case where the verdict has the same moral force."

2. 1 Taylor Ev. (Text Book Series), § 112, citing *Thurtell v. Beaumont*, 1 Bing. 339; 8 E. C. L. 538. See "Some Rules of Evidence," 10 Am. L. Rev. 643, for criticism of that case; see also *Magee v. Mark*, 11 Ired. (N. Car.) 449.

The Rule Only Applies Where the Pleadings Charge the Offense.—Those courts which recognize the rule that a criminal offense charged in a civil action must be proved beyond a reasonable doubt, have held that the offense must be charged in the pleadings or the rule does not apply. *Sprague v. Dodge*, 48 Ill. 142; 95 Am. Dec. 523; *Wallace v. Wallace*, 8 Ill. App. 71; 1 Greenl. Ev. 537.

3. Abb. Tr. Ev., p. 494; 2 Whart Ev., § 1246; *May on Ins.*, § 583; *Adams v. Thornton*, 78 Ala. 489; 56 Am. Rep. 49; *overruling Steele v. Kinkle*, 3 Ala. 352; and *Tompkins v. Nichols*, 53 Ala. 197; *Munson v. Atwood*, 30 Conn. 102; *Mead v. Husted*, 52 Conn.

53; 52 Am. Rep. 554; *State v. Goldsborough*, 1 Houst. Cr. Cas. (Del.) 302; *Schnell v. Toomer*, 56 Ga. 168; *Bissel v. Wert*, 35 Ind. 54; *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59; 59 Am. Rep. 194; *Welch v. Jugenheimer*, 56 Iowa 11; 41 Am. Rep. 77; *Behrens v. Germania Ins. Co.*, 58 Iowa 26; *Kendig v. Overhulser*, 58 Iowa 195; *Coit v. Churchill*, 61 Iowa 296; *Riley v. Norton*, 65 Iowa 306; expressly *overruling Bradley v. Kennedy*, 2 Greene (Iowa) 231; *Forshee v. Abrams*, 2 Iowa 571; *Fountain v. West*, 23 Iowa 9; 92 Am. Dec. 405; *Ellis v. Lindley*, 38 Iowa 461; and *Barton v. Thompson*, 46 Iowa 30; 26 Am. Rep. 131; *Aetna Ins. Co. v. Johnson*, 11 Bush (Ky.) 587; 21 Am. Rep. 223; *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442; *Hoffman v. Western M. & F. Ins. Co.*, 1 La. Ann. 216; *Knowles v. Scribner*, 57 Me. 495; *Ellis v. Buzzell*, 60 Me. 209; 11 Am. Rep. 204; *Decker v. Somerset etc. Ins. Co.*, 66 Me. 406; *McBee v. Fulton*, 47 Md. 403; 28 Am. Dec. 465; *Schmidt v. New York Union M. F. Ins. Co.*, 1 Gray (Mass.) 529; *Gordon v. Parmelee*, 15 Gray (Mass.) 413; *Roberge v. Burnham*, 124 Mass. 277; *Watkins v. Wallace*, 19 Mich. 57; *Elliott v. Van Buren*, 33 Mich. 49; 20 Am. Rep. 668; *Semon v. People*, 42 Mich. 141; *People v. Evening News*, 51 Mich. 11; *Hough v. Dickinson*, 58 Mich. 89; *Burr v. Wilson*, 22 Minn. 206; *Thoreson v. Northwestern etc. Ins. Co.*, 29 Minn. 107; *Marshall v. Thames F. Ins. Co.*, 43 Mo. 586; *Rothschild v. American etc. Ins. Co.*, 62 Mo. 356; *Edwards v. Knapp*, 97 Mo. 432; *Folsom v. Brawn*, 25 N. H. 114; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; 23 Am. Rep. 239; *reversing* 38 N. J. L. 441; 20 Am. Rep. 409; *Johnson v. Agricultural Ins. Co.*, 25 Hun (N. Y.) 251; *Allen v. Allen*, 101 N. Y. 658; *People v. Briggs*, 114 N. Y. 64; *New York etc. Ferry Co. v. Moore*, 18 Abb. N. Cas. (N. Y.) 106; *Kincade v. Bradshaw*, 3 Hawks. (N. Car.) 63; *Barfield v. Britt*, 2 Jones (N. Car.) 41; 62 Am. Dec. 190; *Strader v. Mullane*, 17 Ohio St. 625; *Jones v. Greaves*, 26 Ohio St. 2; 20 Am. Rep. 752; *Lyon v. Fleahmann*, 34 Ohio St. 151; *Smith v. Smith*, 5 Oregon 187; *Young v. Edwards*, 72 Pa. St. 257; *Somerset Co. Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 80; *Hills v. Goodyear*, 4 Lea (Tenn.) 233; 40 Am. Rep. 5; *Sparks v. Dawson*, 47 Tex. 138; *March v. Walker*, 48 Tex.

372; *Bradish v. Bliss*, 35 Vt. 326; *Weston v. Gravlin*, 49 Vt. 507; *Simmons v. Ins. Co.*, 8 W. Va. 474; *Washington U. Ins. Co. v. Wilson*, 7 Wis. 169; *Blaesser v. Milwaukee etc. Ins. Co.*, 37 Wis. 31; 19 Am. Rep. 747; *Scott v. Home Ins. Co.*, 1 Dill. (U. S.) 105; *Howell v. Hartford F. I. Co.*, 2 Ins. L. Jour. 649.

Mr. Cooley thus states the law: "Where the charge complained of imputes to the plaintiff criminal conduct, and the truth is relied upon as a justification, it is sufficient to support the plea by a preponderance of evidence; it is not necessary that the crime be made out beyond a reasonable doubt. This is a general rule where the question of criminality is made an issue in a civil suit; it is sufficient to establish it by such evidence as would support any other fact involved in a civil controversy. Some cases, however, dissent from this doctrine, and require the same strict proof of the charge that would be required if the party were on trial for the alleged crime; that is, of guilt beyond a reasonable doubt." Cooley on Torts, p. 208.

In *Ellis v. Buzzell*, 60 Me. 209; 11 Am. Rep. 204, which was an action for slander in charging the plaintiff with a crime, a plea that the words were true was entered. It was held that a preponderance of evidence would support the plea, the court by Barrows, J., saying, with reference to the doctrine of reasonable doubt in civil actions: "We think it time to limit the application of a rule, which was originally adopted *in favorem vitæ* in the days of a sanguinary code, to cases arising on the criminal docket, and no longer to suffer it to obstruct or incumber the action of juries in civil suits sounding only in damages."

In *People v. Evening News*, 51 Mich. 17, the court by Campbell, J., said: "There are but two classes of cases recognized as requiring different rules of proof; first, criminal cases, and second, civil cases; or, to speak more accurately, cases not criminal. In all cases criminal, the jury must be satisfied of guilt not merely by a preponderance of proof but beyond a reasonable doubt. In cases not criminal, they may be satisfied by preponderance of proof . . . But in cases not criminal and involving no criminal judgment and punishment, the court cannot require the jury to disregard any preponderance of evidence

which convinces them." The case under consideration was one of slander, charging the plaintiff with a crime. The defendant pleaded justification, and the court held that a preponderance of proof was sufficient to establish the plea.

An Action for Divorce—Adultery.—

In actions for divorce, where the plaintiff charges the defendant with the commission of a crime, as adultery, in some jurisdictions, the modern rule prevails, and plaintiff need not establish his case beyond a reasonable doubt. This, of course, is equally true when defendant recriminates. *DIVORCE*, vol. 5, pp. 785, 828. It should be observed that the *New Jersey* case (*Berckmans v. Berckmans*, 17 N. J. Eq. 453) cited in the article *DIVORCE* on the pages referred to, cannot be reconciled on principle with the later cases in the same State. *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; 23 Am. Rep. 239; *Traphagen v. Voorhees*, 44 N. J. Eq. 24.

In *Wisconsin* several of the early cases seem to support the view that the same degree of proof is required to sustain a charge of adultery in a divorce suit as would be required to secure a conviction on an indictment for the same offense. *Freeman v. Freeman*, 31 Wis. 235; *Blaeser v. Milwaukee etc. Ins. Co.*, 37 Wis. 31; 19 Am. Rep. 747; *Pryce v. Security Ins. Co.*, 29 Wis. 270. But the law is finally settled to the contrary by *Poertner v. Poertner*, 66 Wis. 644. In which case the court by Lyon, J., said: "We are quite unable to perceive any difference in principle between an issue of adultery in a divorce suit and issues in many civil actions involving charges of other crimes. The consequence of a finding that the crime has been committed may be just as disastrous in the one case as in the other—may even be more disastrous in the latter class of cases than in the former case. That must depend greatly, not only upon the heinousness of the crime, but upon the standing, situation and circumstances of the party charged therewith.

The rule as to the strength and quality of testimony required to justify a finding of guilt, when the issue in a civil action involves a charge of crime other than adultery, having been established by repeated judgments of this court, we have concluded, after much deliberation, that the same rule

should obtain when adultery is charged in an action for a divorce. That rule is that the issue should be determined by the clear and satisfactory preponderance of the evidence. The jury in such a case should be so instructed, but not that the crime must be proved beyond a reasonable doubt before they can properly find it has been committed."

In *bastardy proceedings* the charge need not be established beyond a reasonable doubt. *BASTARDY*, vol. 2, p. 149; *State v. Nichols*, 29 Minn. 357; *People v. Christman*, 66 Ill. 163; *Allison v. People*, 45 Ill. 37; *Knowles v. Scribner*, 57 Me. 496.

Insurance.—As mentioned in the text where suit is brought for insurance, and the insurance company sets up as a defense the burning of the property (or the casting away of the vessel in marine insurance) by design, in order to defraud the company, it has been held that the defense must be proved beyond a reasonable doubt. *Thurtell v. Beaumont*, 1 Bing. 339; 8 E. C. L. 538; *Schultz v. Pacific Ins. Co.*, 14 Fla. 73; *McConnell v. Delaware Mut. etc. Ins. Co.*, 18 Ill. 228; *Germania F. Ins. Co. v. Klewer* (Ill. 1889), 22 N. E. Rep. 489. See also *Lexington Ins. Co. v. Paver*, 16 Ohio 332; probably overruled by *Bell v. McGinness*, 40 Ohio St. 204; 48 Am. Rep. 673; *Butman v. Hobbs*, 35 Me. 227; overruled by *Decker v. Somerset etc. Ins. Co.*, 66 Me. 406. But the weight of authority supports the modern and better rule that a fair preponderance of evidence is sufficient to establish this defense.

Cooley on Torts 208; *May on Ins.*, § 583; *Wood on Ins.* (2d ed.) 533; *Abb. Tr. Ev.*, p. 494; 2 *Whart. Ev.*, §§ 1245-46; *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59; 59 Am. Rep. 104; *Behrens v. Germania Ins. Co.*, 58 Iowa 26; *Hoffman v. Western M. & F. Ins. Co.*, 1 La. Ann. 216; *Regnier v. Louisiana etc. Ins. Co.*, 12 La. 336; *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442; *Decker v. Somerset etc. Ins. Co.*, 66 Me. 406; *Marshall v. Thames F. Ins. Co.*, 43 Mo. 586; *Rothschild v. American etc. Ins. Co.*, 62 Mo. 356; *Schmidt v. New York Union etc. Ins. Co.*, 1 Gray (Mass.) 529; *Aetna Ins. Co. v. Johnson*, 11 Bush (Ky.) 587; 21 Am. Rep. 223; *Sloan v. Gilbert*, 12 Bush (Ky.) 51; 23 Am. Rep. 708; *Kincade v. Bradshaw*, 3 Hawks (N. Car.) 63; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; 23 Am. Rep. 239; reversing

38 N. J. L. 441; 20 Am. Rep. 419; *Johnson v. Agricultural Ins. Co.*, 25 Hun (N. Y.) 251; *Thoreson v. North Western etc. Ins. Co.*, 29 Minn. 107; *Monaghan v. Agricultural Ins. Co.*, 53 Mich. 238; *Simmons v. Insurance Co.*, 8 W. Va. 474; *Blaiser v. Milwaukee etc. Ins. Co.*, 37 Wis. 31; 19 Am. Rep. 747; *Washington Union Ins. Co. v. Wilson*, 7 Wis. 169; *Scott v. Home Ins. Co.*, 1 Dill. (U. S.) 105; *Mack v. Lancashire Ins. Co.*, 2 McCrary (U. S.) 211. See also upon this question *Richardson v. Canada*, 17 U. C. C. P. 341; *Chison v. Provincial etc. Ins. Co.*, 20 U. C. C. P. 11; *Gould v. British*, 27 U. C., Q. B. 473.

Libel and slander.—While it is believed that it has never been contended that in an action for libel the plaintiff, although he charges the defendant with a crime, has to establish his case beyond a reasonable doubt, yet it has been said that in libel and slander, where the defendant has charged the plaintiff with the commission of a crime and pleads justification, the case is an exceptional one, and that the defense must be established beyond a reasonable doubt. *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; 23 Am. Rep. 239.

It is very hard to see how, with reason, this distinction between the proof required to establish the plaintiff's case and that required of the defendant can be maintained. In *England*, it is true, the rule may be supported. For there, upon the trial of a plea of justification of a charge which imputed a felony, if the defendant proved the plea, the plaintiff was subject to be put upon trial for the felony proved without the intervention of a grand jury. The verdict in such a case is equivalent to an indictment by a grand jury. *Sloan v. Gilbert*, 12 Bush (Ky.) 51; 23 Am. Rep. 708; *Cook v. Field*, 3 Exch. 133; *Continental Ins. Co. v. Jachnichen*, 110 Ind. 61; 59 Am. Rep. 194; *Ellis v. Buzzell*, 60 Me. 209; 11 Am. Rep. 204; *Edwards v. Knapp*, 97 Mo. 436.

But in the *United States*, where the verdict in favor of the defendant upon the plea of justification has no such effect, the modern rule prevails, and the defendant may sustain his defense by a fair preponderance of evidence. *Riley v. Norton*, 65 Iowa 306; *Tunnell v. Ferguson*, 17 Ill. App. 76; *Scott v. Fleming*, 17 Ill. App. 561; *Aetna Ins. Co. v. Johnson*, 11 Bush (Ky.) 587; 21 Am. Rep. 223; *Sloan v. Gilbert*, 12

Bush (Ky.) 51; 23 Am. Rep. 708; *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442; *Edwards v. Knapp*, 97 Mo. 432; *Ellis v. Buzzell*, 60 Me. 209; 11 Am. Rep. 204; *McBee v. Fulton*, 47 Md. 403; 28 Am. Rep. 465; *Matthews v. Huntley*, 9 N. H. 150; *Folsom v. Brawn*, 25 N. H. 114; *Kincade v. Bradshaw*, 3 Hawks (N. Car.) 63; *Barfield v. Britt*, 2 Jones (N. Car.) 41; 62 Am. Dec. 190; *Bell v. McGinness*, 40 Ohio St. 204; 48 Am. Rep. 673; *Bradish v. Bliss*, 35 Vt. 326; *Kidd v. Fleek*, 47 Wis. 443.

Contra.—*Townshend Lib. & Sland.* (4th ed.), § 404; *Tucker v. Call*, 45 Ind. 31; *Byrket v. Monohon*, 7 Blackf. (Ind.) 83; 41 Am. Dec. 212; *overruled* by *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59; 59 Am. Rep. 194; *Fountain v. West*, 23 Iowa 9; 92 Am. Dec. 405; *Ellis v. Lindley*, 38 Iowa 461; *overruled* by *Riley v. Norton*, 65 Iowa 306; *Crandall v. Dawson*, 6 Ill. 556; *Harrison v. Shook*, 41 Ill. 141; *Corbley v. Wilson*, 71 Ill. 209; 22 Am. Rep. 98; *Williams v. Gunnells*, 66 Ga. 521; *Polston v. See*, 54 Mo. 291; *overruled* by *Edwards v. Knapp*, 97 Mo. 432; *Merk v. Gelzhaeuser*, 50 Cal. 631; *Burckhalter v. Coward*, 16 S. Car. 435; *Coulter v. Stuart*, 2 Yerg. (Tenn.) 225; probably *overruled* by *Hills v. Goodyear*, 4 Lea (Tenn.) 233; 40 Am. Rep. 5.

In *Illinois* it is now provided by statute that a plea of justification in libel or slander may be established by a preponderance of evidence. *Tunnell v. Ferguson*, 17 Ill. App. 76; *Scott v. Fleming*, 17 Ill. App. 561.

In *Pennsylvania* the cases of *Steinman v. McWilliams*, 6 Pa. St. 170, and *German v. Sutton*, 32 Pa. St. 247, hold where the defendant's justification imputes a crime to the plaintiff, that the crime must be proved by the same degree of evidence as would be required in a criminal prosecution; but it is impossible to reconcile them with the later case of *Somerset Co. Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 80; 56 Am. Rep. 307.

Fraud.—So where fraud is imputed in a civil action it need not be proved beyond a reasonable doubt. **FRAUD**, vol. 8, p. 656; *Sparks v. Dawson*, 47 Tex. 138; *Hough v. Dickinson*, 58 Mich. 89; *Jones v. Greaves*, 26 Ohio St. 2; 20 Am. Rep. 752; *Adams v. Thornton*, 78 Ala. 489; 56 Am. Rep. 49.

Actions for Penalties.—See **PENALTIES**, vol. 18, p. 280; *Chaffee etc. Co. v.*

But it must be remembered that a party is entitled to the presumption of innocence in civil as well as in criminal cases, and there cannot be said to be a preponderance of evidence establishing a crime unless such evidence outweighs the presumption of innocence as well as the opposing evidence.¹

REASONABLE TIME.—The term "reasonable time" is a relative one, and its meaning depends entirely upon the attendant circumstances. No attempt, therefore, is made to define it, but in the note a review of the authorities on the subject is presented.²

U. S., 18 Wall. (U. S.) 516; *Roberge v. Burnham*, 124 Mass. 277.

Usury.—It is sufficient to sustain the defense of usury if the weight of the evidence be in its favor. *Chew v. Ferrari*, 29 N. J. Eq. 382. See also **USURY**.

1. *Somerset Co. Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 90; 56 Am. Rep. 307. "The law in all cases, civil or criminal, presumes innocence. Obviously, therefore, to create a preponderance of evidence in a civil case, where crime is imputed to one party, the other party assumes the burden of not only overcoming the evidence of his opponent, by a preponderance, but of overcoming also the presumption of law in favor of the innocence of his adversary. In other words, there is no preponderance on the side of the charge of guilt, unless the evidence is sufficient to overbalance the opposing presumption as well as the opposing evidence, including evidence of character. *Knowels v. Scribner*, 57 Me. 497; *Ellis v. Buzzell*, 60 Me. 209; 11 Am. Rep. 204; *Bradish v. Bliss*, 35 Vt. 326. The difficulty has been in so wording a charge as to give the party implicated the benefit of the law without breaking down the distinction between civil and criminal cases, there being clearly no intermediate rule between the general rule in the one class and the general rule in the other. *Bradish v. Bliss*, 35 Vt. 326." *Hills v. Goodyear*, 4 Lea (Tenn.) 233; 40 Am. Rep. 5.

In *Decker v. Somerest etc. Ins. Co.*, 66 Me. 408, the court by Walton, J., said: "To create a preponderance of evidence, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence. Presumptions, like probabilities, are of different degrees of strength. To overcome a strong presumption requires more evidence than to overcome a weak one. To fasten upon a man a

very heinous or repulsive act requires stronger proof than to fasten upon him an indifferent act, or one in accordance with his known inclinations. To fasten upon a man the act of willfully and maliciously setting fire to his own buildings should certainly require more evidence than to establish the fact of payment of a note, or the truth of an account in set-off; because the improbability or presumption to be overcome in the one case is much stronger than it is in the other. Hence, it can never be improper to call the attention of the jury to the character of the issue, and to remind them that more evidence should be required to establish grave charges than to establish trifling or indifferent ones. Such an instruction does not violate the rule that in civil suits a preponderance of evidence is all that is required to maintain the affirmative of the issue; for, as already stated, to create a preponderance of evidence, it must be sufficient to overcome the opposing presumptions as well as the opposing evidence."

In *Jones v. Greaves*, 26 Ohio St. 2; 20 Am. Rep. 752, the court by McIlvaine, C. J., said: "Where the facts charged involve moral turpitude, there is a presumption of innocence which stands as evidence in favor of the party charged; and the more heinous the offense, the stronger the presumption. It is only where the testimony, when considered in connection with the presumptions of law arising in the case, preponderates in favor of the charge that its truth should be found; but when so found by discreet and reasonable triers, the issue should be determined in accordance with the preponderance, although it may not be said that the proof has removed all reasonable doubts."

2. **Checks.**—For the doctrine in the *United States*, as to what is a reasonable time within which a check should

be presented, see CHECKS, vol. 3, pp. 213, 214; DEMAND, vol. 5, p. 528.⁶¹

In *England* six years has been held to be a reasonable time within which to present a check for payment, unless loss has been occasioned by unnecessary delay. *Robinson v. Hawksford*, 9 Q. B. 52; 58 E. C. L. 51; *Laws v. Rand*, 30 L. T., O. S. 286; *In re Bethell*, 34 Ch. Div. 566. But in these cases the rule laid down was that no length of time is unreasonable unless, during the delay, the fund on which the check was drawn is lost. Compare *Hare v. Henty*, 30 L. J., C. P. 302; *Donn v. Halling*, 4 B. & C. 330; 10 E. C. L. 347.

Bills and Notes.—As to "reasonable time" in connection with the presentment of bills or notes for payment, see DEMAND, vol. 5, pp. 528.⁶¹, 528.⁶⁰—528.⁶⁰. See also *Robson v. Oliver*, 10 Q. B. 704; 59 E. C. L. 704.

In connection with notice of Dishonor, see DEMAND, vol. 5, p. 528.⁶⁰.

Contracts.—Where a contract is to be performed within a reasonable time, such time must be determined according to the circumstances of the case and with particular reference to the means and ability of the person by whom the contract is to be performed. *Toms v. Wilson*, 32 L. J., Q. B. 382; 4 B. & S. 455; 116 E. C. L. 455; *Atwood v. Emery*, 26 L. J. C. P. 73; 1 C. B., N. S. 110; 87 E. C. L. 110; *Brighty v. Norton*, 32 L. J., Q. B. 38; 3 B. & S. 305; 113 E. C. L. 305; *Hales v. London etc. R. Co.*, 32 L. J., Q. B. 292; 4 B. & S. 66; 116 E. C. L. 66; *Briddon v. Great Northern R. Co.*, 28 L. J. Exch. 51.

But where a contract imposes on a party a duty not purely personal, as, for example, to deliver a quantity of lumber within a reasonable time, his inability by reason of accident, want of means, insolvency, or other cause, does not excuse non-performance. *Jones v. Anderson*, 82 Ala. 302; citing 2 Wharton on Contracts, § 323; *Reid v. Edwards*, 7 Port. (Ala.) 508; 31 Am. Dec. 720.

In an action on a contract to convey land, there must have been a demand of a deed and a tender of payment by the purchaser within a reasonable time—two years held to be unreasonable in *Force v. Dutcher*, 18 N. J. Eq. 401.

An obligation to perform a contract within "a reasonable time" does not require so speedy a fulfillment as one

to be performed "directly" or "as soon as possible." Addison on Contracts 1188.

"Forthwith," when strictly construed, means "without any delay" and sooner than "within a reasonable time." *Maxwell v. Scarfe*, 18 Ont. Rep. 529.

But even where a covenant provides for the payment of money "immediately upon demand" the party owing is entitled to a reasonable time to get the money and pay it over. *Toms v. Wilson*, 4 B. & S. 455; 116 E. C. L. 455.

When no time is set within which a contract must be performed or a duty discharged, performance must be made within a reasonable time. What amount of time constitutes such reasonable time depends upon the facts and circumstances of the case, not upon mere opinion or expectation. *Bryant v. Sailing*, 4 Mo. 522; *Stange v. Wilson*, 17 Mich. 342 (parol evidence inadmissible to alter this implication); *Abell v. Munson*, 18 Mich. 306; 100 Am. Dec. 165; *Byram v. Gordon*, 11 Mich. 531; *Bolton v. Riddle*, 35 Mich. 13; *Grant v. Merchants' etc. Bank*, 35 Mich. 515; *Youmans v. Heartt*, 34 Mich. 397; *Cocker v. Franklin etc. Mfg. Co.*, 3 Sumn. (U. S.) 530; *Morse v. Bellows*, 7 N. H. 566; *Atchison etc. R. Co. v. Burlingame Township*, 36 Kan. 634; 59 Am. Rep. 578; *Dennis v. Stoughton*, 55 Vt. 376; *Chitty on Contracts* 730; 2 Parsons on Contr. 47, 173.

In pursuance of this principle an agreement to forbear to sue a third person who is plaintiff's debtor, is a sufficient consideration for defendant's promise to pay; and no definite time being named, a count on an agreement to forbear for a reasonable time is good. *Calkins v. Chandler*, 36 Mich. 320; 24 Am. Rep. 593; *Howe v. Taggart*, 133 Mass. 284.

A contract for the sale of hay dated Sept. 25, stipulated that it was to be delivered within a reasonable time after being pressed. The purchasers, who were to press it, did not call for the hay to press it until November 22. The vendor refused it, and in an action on the contract it was held that the plaintiff's delay was unreasonable. *Coon v. Spaulding*, 47 Mich. 163.

In a contract to sell and deliver ten tons of oil "within the last fourteen days of March," the plaintiff tendered it at half-past eight on the evening of the last day of March. It was found that the tender had been made in time to give the defendant full opportunity to

weigh, examine, and receive the oil, but the defendant who was present declined to receive it on the ground that the tender was made at an unreasonable time; but it was held that the tender had been made in time, *Blackb. 225*; *Startup v. Macdonald*, 6 M. & G. 593; 12 L. J. Ex. 477; 46 E. C. L. 591. In that case Parke, B., said: "Where a thing is to be done anywhere, a tender a convenient time before midnight is sufficient; where the thing is to be done at a particular place, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time before sunset."

In the case of *Roberts v. Mazeppa Mill Co.*, 30 Minn. 415, it is said that the question of reasonable time is determined by a view of all the circumstances of the case—by placing the court and jury in the same situation as the contracting parties were at the time they made the contract; that is, by placing before them all the circumstances known to both parties at the time. *Ellis v. Thompson*, 3 M. & W. 445; *Cocker v. Franklin etc. Mfg. Co.*, 3 Sumn. (U. S.) 530. And for that purpose it has been held that evidence of the conversations of the parties may be admitted to show the circumstances under which the contract was made, and what they thought was a reasonable time. *Cocker v. Franklin etc. Mfg. Co.*, 3 Sumn. (U. S.) 530; *Coates v. Sangston*, 5 Md. 121.

Institution of Suits.—The assignor of a promissory note is liable unless the debt was lost by the negligence of the assignee. The assignee must use due diligence and sue within a reasonable time. In such a case two years is beyond reasonable time unless the delay arose from the conduct of the assignor. *Mehelm v. Barnet*, 1 N. J. L. 86.

Performance of Duties.—The rule laid down as to the performance of contracts applies also in the discharge of duties. *Goodwyn v. Chevely*, 28 N. J. Exch. 298; 4 H. & N. 631.

In *McCoury v. Leek*, 14 N. J. Eq. 70, a testator provided in his will: "I order and direct my executors to sell and dispose of my lands and give deeds for the same, as I might do if living, etc." It was held that the executors were entitled to a reasonable time in the exercise of their discretion for making sale of the land, and that one year was a reasonable time.

An executor directed to convert an estate into money, may exercise his discretion as to when he will do so, and there is no rigid or arbitrary standard by which to measure the reasonable time within which he may do so and beyond which he may not delay in complying with the direction. What is such time must depend upon the circumstances of each case. It seems, however, where no special modifying facts are shown, to shorten or lengthen the reasonable time, the period allowed before the executor can be compelled to account, that is eighteen months, may serve as a just standard. *In re Weston*, 91 N. Y. 502.

Notice.—As to reasonable time in giving notice and proof of loss in fire insurance cases, see *FIRE INSURANCE*, vol. 7, p. 1049.

A person on trial under a commission of alleged lunacy is entitled to a reasonable notice. A notice on Saturday of the execution of commission on Tuesday following is held insufficient. *In re Vanauken*, 10 N. J. Eq. 186.

What is reasonable time where notice is required to be published for a reasonable time, see *Clark v. Mowyer*, 5 Mich. 472 (depends upon character of the locality of the paper and other circumstances).

Reasonable notice of the taking of depositions must be such as to give the opposite party not only reasonable time to appear but also to secure the attendance of counsel. *Kimpton v. Glover*, 41 Vt. 283.

As in performing contracts so in giving notice, when no time is specified the notice must be given a reasonable time beforehand. *Hough v. Lawrence*, 5 Vt. 299 (notice of taking depositions).

Sales.—As to what is a reasonable time within which a buyer may object to the terms of a conditional sale, see *CONDITIONAL SALES*, vol. 3, p. 434.

Optional Contracts.—"In every case of a right to disaffirm, the party holding it is required . . . to act upon it within a reasonable time." See *INFANTS*, vol. 10, p. 651, where the subject is discussed; *CONDITIONAL SALES*, vol. 3, p. 434; *Cookingham v. Dusa*, 41 Kan. 229; *Aultman etc. Co. v. Mickey*, 41 Kan. 349; *Sims v. Everhardt*, 102 U. S. 300; *Minnesota Linseed Oil Co. v. Montague*, 59 Iowa 448 (principal entitled to a reasonable time within which to repudiate agent's unauthorized contract).

Definition.**REASONABLE TIME.****Definition.**

A purchaser of land has a right to a reasonable time within which to examine the title deed and ascertain the grantor's title to the premises conveyed, before he can be considered as fully accepting the deed. *Earle v. Earle*, 16 N. J. L. 273.

Baggage or Goods in Possession of Carrier.—It is a well settled rule that the liability of a carrier as insurer, for goods carried or for baggage, continues after their arrival at their destination until the owner has had reasonable time and opportunity to call for them and remove them. *Wood v. Crocker*, 18 Wis. 345; 86 Am. Dec. 773; *Parker v. Milwaukee etc. R. Co.*, 30 Wis. 689; *Nudd v. Wells*, 11 Wis. 426; **CARRIERS OF GOODS**, vol. 2, p. 891-4; **RAILROADS**.

Where goods arrived at their destination at 11 A. M., were unloaded between 1 and 3 P. M., and were ready for delivery to consignee at about 4 P. M., and were destroyed by fire before business hours next morning, *held*, that reasonable time and opportunity to remove the goods had not been afforded to the consignee, and the carrier was liable as an insurer for their loss. *Parker v. Milwaukee etc. R. Co.*, 30 Wis. 689.

Generally.—Demand in replevin or in similar action must be within a reasonable time. See **DEMAND**, vol. 5, pp. 528e, 528n.

As to reasonable time within which a person may apply for a reissue of a patent, see **PATENT LAW**, vol. 18, pp. 47-8.

In connection with demurrage, see **DEMURRAGE**, vol. 5, p. 546, note 2.

In connection with service of process, see **SERVICE OF PROCESS**. See also *Rex v. Smith*, L. R., 10 Q. B. 604 (summons to be served a "reasonable time" before hearing).

A defendant in a capital case who is guilty of no laches is entitled to a reasonable time to prepare his defense. Three hours is not such time. *State v. Boyd*, 37 La. Ann. 781; *People v. Fuller*, 2 Park. Cr. Cas. (N. Y.) 16.

An ordinance allowed lot owners to lay or construct sidewalks or crosswalks in front of their property "provided they do the same within a reasonable time to be fixed by said board." *Held*, that two years was more than a reasonable time. *Morris v. Mayor etc. of Bayonne*, 25 N. J. Eq. 348.

A bill of exceptions was presented five years after judgment was pro-

nounced and satisfied. *Held*, not to have been presented within reasonable time. *State v. Holmes*, 36 N. J. L. 65.

Performance of covenants. See *Gerzebek v. Lord*, 33 N. J. L. 243.

Where, in case of property sold under a deed of trust, the debtor is promised a reconveyance thereof upon a payment of the money owing thereunder "within a reasonable time," special circumstances, the situation of the parties, and the character of the property, must be taken into account in fixing the standard. *McNew v. Booth*, 42 Mo. 189.

An officer has no right to use the tenement of any person for the storage of attached goods for a longer time than is reasonably necessary to remove them. *Rowley v. Rice*, 11 Met. (Mass.) 337. Five hours of daylight is more than a reasonable time to remove from a broker's office the desk and books of an attorney, worth not more than two hundred dollars. *Williams v. Powell*, 101 Mass. 469; 30 Am. Rep. 396.

A power to grant mining leases for such term as to the donee shall seem reasonable and proper, may authorize a lease for 99 years. *Taylor v. Nustym*, 52 L. J., Ch. 848; 23 Ch. Div. 583; 48 L. T. 715.

Question of Law or Fact.—Whether the determination of what is reasonable time is a question of law for the court or of fact for the jury is a matter upon which there is much conflict of authority. See the subject discussed in **QUESTIONS OF LAW AND FACT**, vol. 19, p. 598; **DEMAND**, vol. 5, p. 528z⁹⁰.

See also *Patterson v. Hitchcock*, 3 Colo. 540; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129; *Morgan v. McKee*, 77 Pa. St. 228; *Druse v. Wheeler*, 26 Mich. 189.

When It Begins to Run.—"Reasonable time does not begin to run until some one interested in the matter calls for something to be done respecting it," *Graham v. Van Dieman's Land Co.*, 30 Eng. L. & Eq. 579; *Cameron v. Wells*, 30 Vt. 633.

Infants are allowed a reasonable time within which to repudiate voidable contracts made during infancy. If any disability exists, as, for example, coverture, the reasonable time does not begin to run until after coverture is ended. *Sims v. Everhardt*, 102 U. S. 300.

Reasonable Time for a Notice of Suit to a Surety.—See **SURETYSHIP**

REBUTTAL—REBUTTING EVIDENCE.—Rebuttal is a briefer expression for “rebutting evidence.”¹

REBUTTER—(See generally PLEADING).—In common-law pleading the name of defendant's answer to plaintiff's surrejoinder.

RECAPTION.—(See also DETINUE, vol. 5, p. 651; REPLEVIN; TROVER, and cross-references in the body of this analysis, and in the notes.)

- I. Definition, 1093.
- II. Recaption of Persons (See also ARREST, vol. 1, p. 719; ASSAULT, vol. 1, p. 778). 1094.
- III. Recaption of Property, 1095.
 1. *Personal Property*, 1095.
 - a. *Recaption as Affected by Condition of Goods* (See also ACCESSION; CONFUSION OF GOODS, vol. 1, p. 50), 1098.
 - (1) *Recaption as Affected by Admixture*, 1098.
 - (2) *Recaption as Affected by Accession*, 1100.
 - (3) *Recaption as Affected by Specification* (See also CONVERSION, vol. 4, p. 104; LIEN, vol. 13, p. 574; MECHANICS' LIEN, vol. 15, p. 1), 1100.
 - b. *Recaption as Affected by the Whereabouts of Goods*, 1102.
 - (1) *General Rule as to Entry for Recaption*, 1102.
 - (2) *Recaption from Land of Innocent Receiver from Tort-feasor*, 1103.
 - (3) *Right of Entry on Land of Another for Recaption of Goods Taken by Third Person*, 1103.
 - (4) *Entry by Tenant; Tenants in Common; Implied License*, 1104.
 - (5) *Entry by Successor in Government Office, upon Land of Predecessor, to Recover Government Property*, 1105.
 - (6) *License to Enter Implied in Sale of Goods Without Delivery—Mortgaged Goods*, 1105.
 - (7) *Entry of Vendor to Retake Goods Fraudulently Purchased*, 1106.
 - (8) *Recaption as Applied to Stoppage of Goods in Transitu* (See also LIEN, vol. 13, p. 574; STOPPAGE IN TRANSITU), 1107.
 2. *Real Property* (See also ENTRY, WRIT OF, vol. 6, p. 651), 1107.
- IV. Defense of Possessions (See also SELF-DEFENSE), 1109.

I. DEFINITION.—Recaption (a retaking, or taking back—termed also “reprisal”) is a species of remedy by the mere act of the party injured, which happens when anyone has deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant, in which case the owner of the goods, and the husband, parent, or master may lawfully claim

1. Rebutting Evidence.—(See also WITNESSES.) The word “rebutting” has a twofold signification, both in common and legal parlance. It sometimes means contradictory evidence only; at other times conclusive or overcoming testimony. *Killiam v. Killiam*, 25 Ga. 186.

Rebutting evidence is defined to be that which is given to explain, repel, counteract or disprove facts

given in evidence by the adverse party. It is a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other side. *People v. Page*, 1 Idaho 195; *Bouv. L. Dict.*

The term is more particularly applied to that evidence given by the plaintiff to explain or repel the evidence given by the defendant. *Bouvier's L. Dict.*

and retake, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace, or injury to a third person, who has not been party to the wrong, and so that he favor not the thief.¹

Recaption is the taking a second distress of one formerly distrained, during the plea grounded on the former distress; it is a writ to recover damages for him whose goods, being distrained for rent, service, etc., are distrained again for the same cause, pending the plea in the County Court or before the justices.²

Recaption is also applied to an arrest of a person who has been before arrested for the same cause, but has escaped.³

II. RECAPTION OF PERSONS.—The right of recaption of persons, as above defined, extends to a husband retaking his wife; a parent his child of whom he has the custody; a master his apprentice;⁴ and, according to Blackstone, a master his servant, but this

1. Black's L. Dict.; Wharton's L. Lex. (Lely, 7 ed.); Bouv. L. Dict. (Rawle's ed.); 3 Bouv. Inst. 134; 3 Bl. Com. (Sharswood's ed.) * p. 4; 3 Steph. Com. (11 Eng. ed.) p. 358; 2 Rolle, Abr. 565.

The reason for this is obvious; since it may frequently happen if this right were not allowed by law, that the owner would have this only opportunity of doing himself justice; his goods may be afterwards conveyed away or destroyed and his wife, children, or servants, concealed or carried out of his reach, if he had no speedier remedy than the ordinary process of the law. If, therefore, he can so contrive it as to regain possession without force or terror, the law favors and will justify his proceeding. But as the public peace is a superior consideration, this natural right of recaption may not be exercised, where the exercise of it would occasion strife and bodily contention, or would endanger the peace of society. 3 Bl. Com. (Sharswood's ed.) * p. 4; 3 Steph. Com. (11 Eng. ed.) 258; Cubitt v. Porter, 8 B. & C. 260; 15 E. C. L. 211.

2. F. N. B. 71: Wharton's L. Lex. (Lely 7 ed.).

3. Abbott's L. Dict. See also, ARREST (CIVIL CASES), vol. 1, p. 719; ARREST (CRIMINAL CASES), vol. 1, p. 730.

Recaption may take place after a negligent, but not after a voluntary escape. If the prisoner wrongfully escape he may be retaken at any time, and is not protected by the statute 29

Car. II. ch. 7, § 6, which forbids an original arrest on Sunday. Atkinson v. Jameson, 5 T. R. 25.

If a person, called to assist an officer, attempt recaption after an illegal arrest, and is killed by the one he is attempting to retake, it will not be murder but manslaughter only, where the killing was done to prevent recapture. 1 Russell on Crimes (9 Am. ed.) * p. 805; Rex v. Curvan, 1 M. C. C. 132.

4. 3 Bl. Com. (Sharswood's ed.) * p. 4; 3 Steph. Com. (11 Eng. ed.) p. 256. If recaption be forcibly resisted, the proper remedy is by recourse to a court or judge for a *habeas corpus* on behalf of the husband. Rex v. Doherty, 13 East. 173; Rex v. Middleton, 1 Chit. R. 654, 18 Eng. Com. Law Reps. 192; parent or guardian, *In re Pearson*, 4 Moore 366; 16 E. C. L. 379; Rex v. Hopkins, 7 East 579; or on behalf of the apprentice. *Ex parte Lansdown*, 5 East 38; or for the chief justice's warrant, Rex v. Edwards, 7 T. R. 745; or recourse may be had to a court of equity to compel the return of a child or ward to his studies or to an appointed place. Duke of Beaufort v. Berty, 1 P. Wms. 703; Eyre v. Countess of Shaftesbury, 2 P. Wms. 102; *Ex parte Warner*, 4 Bro. C. C. 101; Tremaine's Case, 1 Stra. 167; Hall v. Hall, 3 Atk. 721; Storke v. Storke, 3 P. Wms. 51. And if a wife elope with an adulterer or another, the husband may legally with force retake her; and if they escape to France, their separation may by the local law be enforced, and the adulterer be imprisoned for a year. 1 Chit. Gen. Prac. 640.

must be confined to the case of a servant who consents to recaption.¹

In these cases, the party injured may at once, without demand being first made, enter the house of the wrong-doer, the outer door being open, and lawfully claim and carry away the person wrongfully detained. He may also peaceably enter the house of a person harboring, who was not concerned in the original abduction; but in this case, it seems that there must be a demand and refusal before a legal entry into the house of such person can be made.² Such recaption must not be effected in a riotous manner or be attended with a breach of the peace. Should the injured party enter forcibly, he may be liable to indictment for such breach of the peace; but, in the absence of injury to the property or person of the wrong-doer, the latter cannot sustain a civil action in damages for the forcible retaking of the wife, child, apprentice, or servant.³

The proper remedy where recaption of a person is resisted is by application for a writ of *habeas corpus*.⁴

III. RECAPTION OF PROPERTY extends to property both personal and real.

1. Recaption of Personal Property.—The rules regulating the recaption of persons apply also, for the most part, in the recaption of personal property, which is the right of the owner of goods and chattels, wrongfully taken or detained from him, lawfully to claim and retake them wherever he happens to find them;⁵ using

1. If the apprentice or servant depart from the master's service, and the master afterwards lay hold of him, yet the master may not beat or forcibly compel him against his will to return or remain in his service, but either he must complain to the justices of his departure, or he may have an action of covenant against these persons who covenanted for his faithful services. 1 Chit. Gen. Prac. 641; Dalt. J., ch. 121, pp. 281, 282; Burns J., Apprentice VI. (b); and see *Rex v. Reynolds*, 6 T. R. 497; *Rex v. Edwards*, 7 T. R. 745; *Ex parte Lansdown*, 5 East 38. But this does not extend to menial servants over whom the magistrate has no control.

2. When, after demand and refusal, immediate entry is made into the house of a person harboring, a plea justifying such immediate entry must state specially the facts rendering it legal. *Anthony v. Haney*, 8 Bing. 186; 21 E. C. L. 265; 1 Chit. Gen. Prac. 640.

3. 1 Addison on Torts (6 Am. ed.), *p. 381; *Davison v. Wilson*, 11 Q. B. 890; 17 L. J. Q. B. 196; *Pollen v. Brewer*, 7 C. B., N. S. 373; 97 E. C. L.

370; *Parsons v. Brown*, 15 Barb. (N. Y.) 590; *Sampson v. Henry*, 11 Pick. (Mass.) 387; 13 Pick. (Mass.) 36; *Moore v. Shenk*, 3 Pa. St. 13; 45 Am. Dec. 618; *Chambers v. Bedell*, 2 W. & S. (Pa.) 225; 37 Am. Dec. 508; *Byrne v. Lowry*, 19 Ga. 27.

4. See *supra*, this title, note 4, p. 1094.

5. Cooley on Torts (2d ed.), *p. 50; 2 Addison on Torts (6th Am. ed.), *p. 517; *Patrick v. Colerick*, 3 M. & W. 483; *Chapman v. Tumblethorp*, Cro. Eliz. 329; *Webb v. Beavan*, 6 M. & G. 1055; *Richardson v. Anthony*, 12 Vt. 273; *White v. Twitchell*, 25 Vt. 620; 60 Am. Dec. 294; *Burris v. Johnson*, 1 J. J. Marsh. (Ky.) 196; *Allen v. Feiland*, 10 B. Mon. (Ky.) 306; *State v. Elliot*, 11 N. H. 540; *Sterling v. Warden*, 51 N. H. 228; 12 Am. Rep. 80; *Spencer v. McGowen*, 13 Wend. (N. Y.) 256; *Newkirk v. Sabler*, 9 Barb. (N. Y.) 656; *Chambers v. Bedell*, 2 W. & S. (Pa.) 225; 37 Am. Dec. 508.

The owner of a chattel wrongfully taken from him may, without subjecting himself even to nominal damages, enter upon the land of the taker for the purpose of retaking it. *Chambers v.*

as much force as may be necessary to take them without committing a breach of the peace.¹

Bedell, 2 W. & S. (Pa.) 225; 37 Am. Dec. 508.

357 But in this recaption, care must be observed to avoid any personal injury, or any forcible entry or breach of the peace, and if either be anticipated, then the owner of the goods should replevy or resort to an action rather than subject himself to a proceeding for personal injury, or an indictment for breach of the peace. *Rex v. Wilson*, 8 T. R. 364; *Weaver v. Bush*, 8 T. R. 78; *Gregory v. Hill*, 8 T. R. 299.

The owner of a slave, from whom he has been wrongfully taken, may recapture him if he can do so without a breach of the peace, or a trespass on the close of the wrongful taker. *Collomb v. Taylor*, 9 Humph. (Tenn.) 689. If such recaption is accompanied by a breach of the peace, or a trespass on the close of the wrongful taker, the owner of the slave is liable for the injury to the person or property of such taker, but not for the value of the slave. *Collomb v. Taylor*. 9 Humph. (Tenn.) 689.

To a count for assaulting the plaintiff, the defendants pleaded that the plaintiff had wrongfully in his possession dead rabbits belonging to the Marquis of E., and was about wrongfully and unlawfully to carry away and convert them to his own use, whereupon the defendants, as the servants of the Marquis, and by his command, requested the plaintiff to refrain from carrying away and converting the rabbits, which he refused to do, whereupon they, as the servants of the Marquis, and by his command, *molliter manus imposuerunt*, using no more force than was necessary to take the rabbits from him,—held a good plea. *Blades v. Higgs*, 10 C. B., N. S. 712; 100 E. C. L. 713.

1. 3 Steph. Com. (11th Eng. ed.) 258; *Higgins v. Andrews*, 2 Roll. R. 55, 56; *Masters v. Pearks*, 2 Roll. R. 141; *Chilton v. Carrington*, 15 C. B. 730; 80 E. C. L. 730; and see 17 & 18 Vict., ch. 125, as to power of the court to order the delivery up of a specific chattel.

If A has the actual possession of a chattel and B takes it from him against his will, A or his servants acting by his command, may use as much force as is necessary to defend his right and

enable him to retake the chattel; and if a chattel has been seized and carried away by a person who has no color of title to it, and the owner comes and demands it, and the trespasser refuses to give it up, the owner may use force sufficient to enable him to retake his property, no unnecessary violence being used. *Blades v. Higgs*, 10 C. B., N. S. 713; 100 E. C. L. 713; 34 L. J., C. P. 286; 2 Addison on Torts (6th Am. ed.) * p. 517; *Rex v. Mitton*, 3 C. & P. 31; 14 E. C. L. 196; *Davis v. Whitridge*, 2 Strobh. (S. Car.) 232.

If a party be wrongfully dispossessed of his personal property, he may in general justify the retaking of it from the house and custody of the wrongdoer, even without a request to deliver it; for the violence which happens through the resistance of the wrongful taker being attributable to his own original tortious act, deprives him of any right to complain. *Anonymous*, 3 Salk. 169; 3 Bl. Comm. 404, 405, n. 12; *Weaver v. Bush*, 8 T. R. 78; *Higgins v. Andrews*, 2 Roll. R. 56; *Masters v. Pollie*, 2 Roll. R. 141; *Anonymous*, 2 Leo. 202; *Selwyn N. P. tit. Assault and Battery*.

"As the public peace is a superior consideration to any one man's private property, and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable or entering on the grounds of a third person to take him, unless he be feloniously stolen; but must have recourse to an action at law."

"This passage from Blackstone," says Parke, B., "as to the right of recaption, applies to the case where the goods are placed on the grounds of a third party. All the old authorities say that where a party places the goods upon his own close, he gives to the owner of them an implied license to enter for the purpose of recaption. There are many

authorities to that effect in Viner's Abridgment. Thus, in tit. Trespass, (1) *a*, it is said: 'If a man takes my goods and carries them into his own land, I may justify my entry into the said land to take my goods again; for they came there by his own act.' The reason of the judgment of the court of common pleas is, that it was not shown who placed the goods there; and that the mere fact of the defendant's goods being on the plaintiff's land is no justification of the entry unless it be shown that they came by the plaintiff's act." Patrick v. Colerick, 3 M. & W. 483, 485.

Between tenants in common and joint tenants of both personal and real property, there are cases of injuries where the only remedy is to retake the property. Per Littledale, J., Cubitt v. Porter, 8 B. & C. 268; 15 E. C. L. 215; Heath v. Hubbard, 4 East 117; Co. Litt. 200a; Martyn v. Knowllys, 8 T. R. 145.

The purchaser of a specific chattel, who has paid for, or tendered the price of, the same, may take it with force, in case the vendor or a third person should refuse to deliver it; but in general, by a contract to sell or to make and deliver an article, which a vendor might satisfy by delivering any article of the same description and value, no property passes in any specific article until actually set apart or marked, and consequently the purchaser, although he may have paid the full price, cannot take the article though making for him, or any one of like value. Mucklow v. Manges, 1 Taunt. 218; White v. Wilket, 5 Taunt. 176; 1 E. C. L. 64; Sheple v. Davis, 5 Taunt. 617; 1 E. C. L. 211; Busk v. Davis, 2 M. & S. 397; Zagury v. Funnell, 2 Campb. 240; Woods & Russell, 5 B. & Ald. 942; 7 E. C. L. 10.

Excise officers went with a search warrant, and, at the desire of the party, gave it to him for his perusal, when he refused to return it. Held, that they had a right to take it from him, and even to coerce his person to obtain the possession of it, provided they used no more violence than was necessary. Rex v. Milton, 3 C. & P. 31, 14 E. C. L. 196.

The rescission of an exchange of horses on terms that each may have his own again by giving back what he has received, is complete by the act of tender; after which a forcible recaption, though it may subject the party to an action of trespass, will not preclude him

from setting up his original title in an action for the property. Moore v. Shenk, 3 Pa. St. 13; 45 Am. Dec. 618.

The owner of a horse, which another's servant has harnessed in his team, and is driving violently away, may stop the team, using no more force than necessary and retake his horse. Hite v. Long, 6 Rand. (Va.) 457; 18 Am. Dec. 719.

In an action of trespass for the forcible taking of a cow, it appeared that the plaintiff had sold the cow, and the defendant purchased the animal from the vendee, and at the time of the taking she was in the possession of a third party, and the plaintiff told the defendant he had sold her and that he might take her. Held, there was no trespass, although the defendant in taking his property, used such violence as amounted to a breach of the peace. Mills v. Wooters, 59 Ill. 234.

It is not a sufficient plea to an action for assault and battery on the plaintiff in his dwelling-house, that the defendant was the owner of the dwelling-house, and that the possession was unlawfully withheld from him, and that he used no more force than was necessary to overcome the plaintiff's resistance. The law does not allow any one to break the peace and forcibly to redress his private wrongs. He may make use of force to defend his lawful possession; but being dispossessed, he has no right to recover possession by force and a breach of the peace. This is no defense to a personal action. Sampson v. Henry, 11 Pick. (Mass.) 387; 13 Pick. (Mass.) 36; Hyatt v. Wood, 3 Johns. (N. Y.) 239; Beecher v. Parmelee, 9 Ver. 356; Andre v. Johnson, 6 Blackf. (Ind.) 375. And see Ellis v. Paige, 1 Pick. (Mass.) 43; Moore v. Boyd, 24 Me. 247.

In an action for assault the defendant cannot justify on the ground that he had an irrevocable license to enter upon the plaintiff's land for the purpose of removing his personal property therefrom, and that the plaintiff withstood his entry. Churchill v. Hulbert, 110 Mass. 42; 14 Am. Rep. 578; Sampson v. Henry, 13 Pick. (Mass.) 36; Comm. v. Haley, 4 Allen (Mass.) 318.

A mere right of property will not justify an assault and battery to regain possession wrongfully withheld. Bliss v. Johnson, 73 N. Y. 529; nor where the title is disputed. Harris v. Marco, 16 S. Car. 575.

A person, therefore, who has been

The right of retaking personal property may be affected, first, by the condition to which the goods have been reduced by the wrongdoer; and, second, by their whereabouts.

a. RECAPTION AS AFFECTED BY CONDITION OF GOODS.—In the first case, the original form or condition of the goods may be so changed by admixture with goods of his own, or another person, that the right of recaption will operate to deprive the tortfeasor not only of the goods wrongfully taken from another, but of his own also. Or by accession and specification, the right to retake the specific chattel may be modified or defeated entirely, and the owner left to his remedy in damages for its value.¹

(1) *Recaption as Affected by Admixture*.—The right of recaption may, when the property of a person is inextricably confused by the wrongdoer with that of his own, be so exercised as to regain not only his own property but that of the wrongdoer also.²

robbed is entitled to retake the stolen property wherever he can find it, provided the person in possession of it has not acquired title to it by purchase in market overt, without notice of the robbery. He is not justified in committing an assault, or a breach of the peace, in order to possess himself of his property unless he finds it in the hands of the thief or the felonious receiver; but he must watch his opportunity for recovering possession, and, if he is unable peaceably to retake it, he must pursue his remedy by writ of restitution or by action. If there has been no alteration of the right of property in the things stolen, by sale in market overt, he may at once demand it from the person in possession of it; and, if the latter refuses to deliver it up to him on demand, he may bring his action. 2 Addison on Torts (6 Am. ed.) 541.

An assault and battery cannot be justified, excused, or extenuated, by evidence showing that the person assaulted had possession of the defendant's horse, which had been stolen, and refused to surrender it on demand. *Hendrix v. State*, 50 Ala. 148.

In some cases the entry will be excused by necessity. As if my tree be blown down and fall on the land of my neighbor, I may go and take it away. *Bro. Tres.*, pl. 213. And the same rule prevails where fruit falls on the land of another. *Millen v. Fawdry*, *Latch*. 120. But if the owner of a tree cut the lopings so that they fall on another's land, he cannot be excused for entering to take them away, on the ground of necessity, because he might have prevented it. *Bac. Abr.*, tit. *Trespass F*;

Newkirk v. Sabler, 9 Barb. (N. Y.) 655.

In trespass for taking a chattel, the plaintiff may recover both the value of the property and damages for the violence used. Therefore, where the plaintiff's team was stopped by the defendant and a horse taken therefrom, it was held that the plaintiff could not bring trover for the horse taken and trespass for stopping the team and delaying his journey, because it was all one act. *Hite v. Long*, 6 Rand. (Va.) 457; 18 Am. Dec. 720.

1. See ACCESSION, CONFUSION OF GOODS, vol. 1, p. 50; *Cooley on Torts* (2d ed.), *p. 55; 3 Bl. Comm. (Searswood's ed.), *p. 404, and note 10.

2. "For example, if one purposely or by negligence take a hundred bushels of his neighbor's wheat and commingle it with a hundred bushels of his own barley, so that a separation of the two becomes practically impossible, the law permits the owner of the wheat in retaking it, to take that which is inseparably commingled with it, since in no other way can he reclaim his own property. The inextricable confusion of his goods with the goods of another gives him this right, provided the intermixture was wrongful. But at his option he may refuse the whole and sue for the value of what has been taken from him.

"Suppose, however, that the grain, instead of being different in kind, had all been wheat of the same kind and quality owned severally by the two. In that case, as in the other, separation would have been impossible; but if each were to take from the mass a quantity equal to what he owned when

The inextricable confusion of his goods with those of another gives the latter this right, provided the intermixture was wrongful.¹ But it is only of necessity that the wrong-doer is to be deprived of his own property also, and when practical justice can in no other way be attained. The law, therefore, in these cases does justice between the parties as nearly as under the circumstances is practicable by dividing between them the commingled mass according to their respective proportions.² It is sufficient if the

the commingling took place he would receive not exactly his own, yet that which, for all practical purposes, is the equivalent. It would be equal in value, it could be used for the same purposes, and to the senses no difference would be perceptible. To give him back an equal quantity is therefore to do him justice, unless his having been deprived of it for the time has caused him a special injury, in which case he would be entitled to recover damages for that injury." Cooley on Torts (2d ed.), *p. 53; 2 Kent's Comm. *pp. 364, 365; Weil v. Silverstone, 6 Bush (Ky.) 698; Loomis v. Greene, 7 Me. 386; Wingate v. Smith, 20 Me. 287; Allen v. Adams, 44 Ala. 609; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62; Willard v. Rice, 11 Met. (Mass.) 493; 45 Am. Dec. 226; Beach v. Schmultz, 20 Ill. 185; Jenkins v. Steanka, 19 Wis. 126; 88 Am. Dec. 675.

But the general rule that governs cases of intermixture does not apply where the goods intermingled remain capable of identification, nor where they are of the same quality and value, as where guineas are mingled or grain of the same quality. Nor does the rule apply where the intermixture is by mistake or accidental, or even intentional, if it was not wrongful. The Idaho, 93 U. S. 575; Thome v. Colton, 27 Iowa 425.

There is no forfeiture in case of a fraudulent intermixture, when the goods intermixed are of equal value. Lupton v. White, 15 Ves. 432; Hesseltine v. Stockwell, 30 Me. 242. If of unequal value the application of the rule is more difficult. Ryder v. Hathaway, 21 Pick. (Mass.) 298.

1. But at his option he may refuse the whole and sue for the value of what has been taken from him. Cooley on Torts (2d ed.), *p. 53. Even if the commingling were malicious or fraudulent, a rule of law which would take from the wrong-doer the whole, when to restore to the other would do him

full justice, would be a rule wholly out of harmony with the general rules of civil remedy, not only because it would award to one party a redress beyond his loss, but also because it would compel the other to pay not damages but a penalty. The infliction of penalties by way of civil remedy is not favored in the law. Sanders v. Pope, 12 Ves. 282; Grigg v. Landis, 21 N. J. Eq. 494.

But the authorities agree, "that if a man artfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his proportion or any part, of the property, certainly not unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so if the wrongdoer confounds his own goods with goods which he expects may belong to another and does this with intent to mislead that other and embarrass him in obtaining his right the effect must be the same." The Idaho, 93 U. S. 575; Jewett v. Dringer, 30 N. J. Eq. 291.

And so where a person buys a stock of goods with fraudulent intent as against the vendor's creditors, and then purposely or negligently mingles other goods with them, he cannot recover against an officer who levies upon all the goods as the property of the fraudulent vendor. Stearns v. Herrick, 132 Mass. 114. And in such case, if the purchaser refuse to furnish the sheriff, seeking to levy an execution on them as the property of the seller, the information necessary to distinguish and separate the goods, he cannot claim any advantage from the confusion. Lehman v. Kelly, 68 Ala. 192.

2. Cooley on Torts (2d ed.), *p. 54; Spence v. Union M. Ins. Co., L. R., 3 C. P. 427; Lupton v. White, 15 Ves. 432; Ryder v. Hathaway, 21 Pick. (Mass.) 298; Robinson v. Holt, 39 N. H. 557; 75 Am. Dec. 223; Moore v. Bowman, 47 N. H. 494; Hesseltine v. Stockwell, 30 Me. 237; Bryant v.

commingled mass is practically the same as the separate constituents.¹

(2) *Recaption as Affected by Accession*.—Although it is a general rule that the owner of property wrongfully taken from him may retake it, either in its original, or a modified, or even a totally different form, as long as he can trace and identify his own, yet there are cases in which he is not thus permitted to reclaim his property even though the identification be complete. As for example where a timber or a stone belonging to one person is taken by another and so built into the latter's house that its removal would occasion damage to the building out of all proportion to the value of the timber or stone. In such case the timber or stone becomes, by accession, a part of the realty, and the law would not allow the original owner to retake it, but would leave him to his remedy in the recovery of damages.²

(3) *Recaption as Affected by Specification*.—It is a general rule that, where a wilful trespasser takes the property of another and by his own labor changes it in form or substance, thereby converting it into a new species, he acquires no title to the property so as to defeat the right of the original owner to retake it.³

Ware, 30 Me. 295; Holbrook v. Hyde, 1 Vt. 286; Willard v. Rice, 11 Met. (Mass.) 493; 45 Am. Dec. 226; Adams v. Myers, 1 Sawy. (U. S.) 306; Wilkinson v. Stewart, 85 Pa. St. 255; Chandler v. DeGraff, 25 Minn. 88; Stone v. Qual, 36 Minn. 46.

1. The commingled mass need not be exactly the same; it is sufficient that it is substantially or practically the same with the separate parcels; so that the separation of that which is equivalent in measure or quantity will give to the party whose property has been wrongfully taken that which is, in kind and value, a substantial equivalent. The rule has been applied to the case of quantities of sawlogs belonging to different parties, but commingled together. And it is held that to give the party whose logs are lost the option of taking from the mass an equivalent in quantity and quality, or of demanding the value, is all that in justice he can require. Ryder v. Hathaway, 21 Pick. (Mass.) 298; Stephenson v. Little, 10 Mich. 433; Hesseltine v. Stockwell, 30 Me. 237; Smith v. Morrill, 56 Me. 566; Jenkins v. Steanka, 19 Wis. 126; 88 Am. Dec. 675; M'Donald v. Lane, 7 Can. S. C. R. 462.

Confusion or commixture of goods in the legal sense does not, however, take place when logs plainly marked with certain initials are mingled in a boom with other logs not so marked.

Goff v. Brainerd, 58 Vt. 468. The owners of logs so intermingled become tenants in common of the mass when mingled, either by consent, Adams v. Meyers, 1 Sawy. (U. S.) 306; Low v. Martin, 18 Ill. 286; Hance v. Tittabawassee Boom Co., 70 Mich. 227; or by accident, Moore v. Erie R. Co., 7 Lans. (N. Y.) 39.

Where the only practical method of conducting the pork-packing business is to render to each bailor a quantity of the "product" equivalent in quality and kind to the hogs stored, not the animals *in specie*, the bailee may legally act according to such custom or method. Morningstar v. Cunningham, 110 Ind. 328; 59 Am. Rep. 211.

2. Cooley on Torts (2 ed.) p. 55; Worth v. Northam, 4 Ired. (N. Car.) 102, 104; Strubbe v. Cincinnati R. Co., 78 Ky. 485; and see ACCESSION—CONFUSION OF GOODS, vol. 1, p. 50, for a great variety of cases.

White v. Twitchell, 25 Vt. 620; 60 Am. Dec. 294. Where one person, in constructing a dock, took stone from the land of another without right, the latter upon lawfully removing the dock, may retake and appropriate the stone to his own use. Larson v. Furlong, 63 Wis. 323.

3. ACCESSION — CONFUSION OF GOODS, vol. 1, p. 52, *et seq.*; 2 Bl. Comm. (Sharwood's ed.), *p. 404 and notes; and see the able and

But where the taking of another's property was accidental, or unintentional through mistake of fact, and labor and expense has in good faith been bestowed upon such property so that it is thereby converted into something substantially different, or its identity is entirely lost, and the value of the original chattel is insignificant as compared with the value of the new product,¹ the title to the property in its converted form passes to the person by whose labor in good faith the change has been wrought—the original owner being permitted to recover the value of the article as it was before the conversion.² Property thus acquired

exhaustive brief of Nicholas Hill, Jr., in *Silsbury v. McCoon*, 3 N. Y. 380; 50 Am. Dec. 307.

1. This qualification of the general rule defining the owner's right of recaption has been objected to on the ground of the difficulty in applying a rule where the difference in the value of the property from its unimproved to its improved condition is to determine the right of recovery. *Strubbee v. Cincinnati R. Co.*, 78 Ky. 485.

2. This is thoroughly equitable doctrine; and its aim is so to adjust the rights of the parties as to save both, if possible, or as nearly as possible, from any loss. But where the identity of the article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at first blush. Perhaps no case has gone further than *Wetherbee v. Green*, 22 Mich. 311; 7 Am. Rep. 653, in which it was held that one who, by unintentional trespass, had taken from the land of another, young trees of the value of twenty-five dollars, and converted them into hoops worth seven hundred dollars, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established. *Isle Royale Min. Co. v. Hertin*, 37 Mich. 336; 26 Am. Rep. 520. In this case, one of the parties by a mistake as to the boundary of his land entered upon the land adjoining, cut the timber, and made it into cord-wood, and afterwards removed it and piled it on the banks of Portage Lake; it was held, that the owner was entitled to seize and hold it against any claim by an unintentional trespasser. The wood

on the bank of the lake was worth two dollars and eighty-seven cents per cord, and the value of the labor expended by the trespasser in cutting and placing it there, was one dollar and eighty-seven cents. The court by Cooley, C. J., said: "There is no such disparity in value between the standing trees and the cord-wood as was found to exist between the trees and hoops in *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653. The trees are not only susceptible of being traced and identified in the wood, but the difference in value between the two is not so great but that it is conceivable the owner may have preferred the trees standing to the wood cut. The cord-wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow. It cannot be assumed as a rule that a man prefers his trees cut into cord-wood rather than left standing, and if his right to leave them uncut is interfered with, even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake and not upon him."

Where a quantity of corn was taken from the owner by a willful trespasser and converted into whisky, it was held that the property was not changed and that the whisky belonged to the owner of the original material. *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307.

If a chattel wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs to the original owner; and this rule it seems, holds against an innocent purchaser from the wrongdoer, without regard to the increased value bestowed by him upon the chattel. (*Bronson, C. J. and Harris J., dissenting.*) *Silsbury*

is said to be by specification, as where grapes are converted into wine, or timber into shingles or railroad ties.¹

b. RECAPTION AS AFFECTED BY THE WHEREABOUTS OF GOODS.—In the second case, the place or whereabouts of a chattel, and the different circumstances under which it may be in the possession or on the lands of another, and the persons responsible for its being there, must be borne in mind in order to arrive at a correct understanding of the right of retaking personal property. Whether, for example, a chattel be on the land or in the possession of the wrongdoer, or of an innocent third party, and whether there with or without the consent of such persons, or by the negligence of the party seeking to retake, are all circumstances which may modify the owner's right of entry for recaption, or defeat it entirely, and leave him either to his action in damages for its value, or his possessory action of detinue, trover, or replevin.²

(1) *General Rule as to Entry for Recaption.*—It may be laid down as a general proposition, that where the property of one person is on the land of another, with either the express or implied consent of the latter, the former may enter peaceably to remove it.³ Such entry should, however, be subject to this

v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307.

If the chattel be converted by an innocent purchaser or holder into a thing of a different species, as where wheat is made into bread, olives into oil, or grapes into wine, the original owner cannot reclaim it. But there is no such distinction in favor of a wilful wrongdoer. He can acquire no property in the goods of another by any change wrought in them by his labor or skill, however great the change may be, provided it can be proved that the improved article was made from the original material. And there is no difference between the civil and the common law in this respect. *Sillsbury v. McCoon*, 3 N. Y. 380, 53 Am. Dec. 307.

1. For definition, see *ACCESSION—CONFUSION OF GOODS*, vol. 1, p. 51.

2. *ACCESSION—CONFUSION OF GOODS*, vol. 1, p. 50; *Cooley on Torts*, (2d ed.) *50.

3. See *supra*, this title, *Recaption of Persons*, note 2, p. 1095. *Sterling v. Warden*, 51 N. H. 217; 12 Am. Rep. 80; *White v. Elwell*, 48 Me. 360; 77 Am. Dec. 231; *Nettleton v. Sikes*, 8 Met. (Mass.) 34; *Schoonover v. Irwin*, 58 Ind. 287.

One whose goods are stolen, or otherwise taken from him, may pursue and

retake them wherever they may be found. No one can deprive him of this right, by wrongfully placing them upon his own close. *Patrick v. Colerick*, 3 M. & W. 483; *Webb v. Beavan*, 6 M. & G. 1055, and note; *Com. Dig. Trespass D*, citing *Rol. Abr.* 565, l. 54; *Bac. Abr. Trespass*, F 1.

But if they are deposited upon the land of another who is not a participant in the wrongful taking, the owner cannot enter upon his land to retake them, unless in case of theft, and fresh pursuit. 20 Vin. Abr. 506, *Trespass H*, a. 2, pl. 4, 5. So from the necessity of the case, one whose cattle escape upon the land of another may follow and drive them back, without being a trespasser, unless the escape was itself a trespass. *Com. Dig. Trespass D*, citing 2 *Rol. Abr.* 565, l. 35; and so if there is no evidence of how they came there. *Richardson v. Anthony*, 12 Vt. 273.

An executor or administrator may enter the house or land of the heir, to remove the personal estate of the deceased, after demand, and ought to remove the same within a reasonable time, or it may be distrained *damage feasant*. 1 Chit. Gen. Prac. 512, 643; *Went. Off.* (14th ed.) Ex. 81, 202; *Stodden v. Harvey*, Cro. J. 204; *Graysbrook v. Fox*, 1 Plowd. 280.

restriction: That notice should be given of the intention to do so, whenever, under the circumstances, it can reasonably be supposed that notice to the landowner may be important for the protection of his own rights. The time and the circumstances also ought to be suitable; one should not enter his neighbor's house unannounced, or in the night time, to take away an article left there by permission; nor, if the chattel is under lock, break open doors or fastenings, without first making demand for its restoration.¹

(2) *Recaption from Land of Innocent Receiver from Tortfeasor*.—The owner may enter to retake his goods from the possession of one who, though not himself purposely a wrongdoer, has received them from one whose possession was tortious, the tortfeasor being incapable of conferring any better right than he himself had.²

(3) *Right of Entry on Land of Another for Recaption of Goods Taken by Third Person*.—And where a third party shall take the chattels of one and place them upon the land of another, without the consent or co-operation of either, though the proprietor of the land might, perhaps, forbid the entry of the owner of the chattels to remove them, and hold him a trespasser should he persist in doing so, yet in that case he would on demand be obliged to

A person entitled to the immediate possession of property located upon the premises of another, without the fault of the party entitled to the possession of such property, may enter those premises after demand, without legal process, against the consent of the party in possession, and by force, and remove the property, provided no more force is employed than becomes necessary by the resistance interposed by the other party to prevent the entry and removal of the property. *Sterling v. Warden*, 51 N. H. 217, 19 Am. Rep. 80.

Where personal property is left in possession of a third person the owner may repossess himself of such property, though it be taken from such third person by virtue of a writ of replevin; and trespass cannot be maintained against him by the plaintiff in replevin. *Spencer v. McGowen*, 13 Wend. (N. Y.) 256.

One whose property is upon the premises of another has a right peaceably to enter and take it. That he entered with an officer who had a writ of replevin to take and deliver the property did not make it a trespass whether the writ was returned or not. No license to enter in such case is necessary, other than a failure to prohibit the en-

try. *Allen v. Feland*, 10 B. Mon. (Ky.) 308.

1. Cooley on Torts (2d ed.), *p. 52, *Blades v. Higgs*, 10 C. B., N. S. 713; 100 E. C. L. 713; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Drury v. Hervey*, 126 Mass. 519.

The fact that A has personal property within the inclosure of B does not authorize A to enter the inclosure of B for the purpose of taking his property. He should demand it of the owner of the land, and if he refused him permission to take it, such refusal would be evidence of a conversion, for which an action of trover would lie. *Roach v. Damron*, 2 Humph. (Tenn.) 425, *Parker v. Staniland*, 11 East 362.

2. Cooley on Torts (2d ed.), *p. 50; *McLeod v. Jones*, 105 Mass. 405; 7 Am. Rep. 539; *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795; *Parish v. Morey*, 40 Mich. 417.

Where one's property is disposed of without authority, by the person having it in charge, the owner may bring replevin therefor without a previous demand; and he may do this notwithstanding the property is in the hands of one who has bought in good faith, and without notice of the title of the real owner. *Trudo v. Anderson*, 10 Mich. 358.

restore the chattels, and the owner might, on his refusal, proceed by replevin to take them ¹

(4) *Entry by Tenant—Tenants in Common—Implied License.*—But where the owner of a chattel is himself a wrongdoer in leaving his property upon the land of another, as a tenant after the expiration of his term, he must take the consequences of his wrongful act, and cannot by an unlawful entry acquire a right to make a lawful one.²

1. In *Cooley on Torts* (2d ed.), note 2, *p. 52, the intimation made by Tindal, C. J., in *Anthony v. Haney*, 8 Bing. 187, 21 E. C. L. 265, that if the occupant of the freehold refused to deliver up the property, the owner might enter and take it, subject to the payment of any damages he might commit, is thus commented on: "But if he were liable in damages for the entry, it must be because the entry is unlawful; and in that case it might be resisted. There can be no such absurdity as a right of entry and a co-existent right to resist entry."

Chambers v. Bedell, 2 W. & S. (Pa.) 225, 37 Am. Dec. 508, seems to recognize the right of the owner, after demand and refusal, to enter and take away his property, if he can do so peaceably, repairing, however, any damage which may be occasioned by his entry. But in *Roach v. Damron*, 2 Humph. (Tenn.) 425, it is said that under such circumstances a refusal would be evidence of conversion for which an action of trover would lie.

The owner of land in removing chattels wrongfully placed thereon must not unreasonably injure the wrongdoer. *Burnham v. Jenness*, 54 Vt. 272.

2. *Anthony v. Haney*, 8 Bing. 187; 21 E. C. L. 265; *Roach v. Damron*, 2 Humph. (Tenn.) 425; *Blake v. Jerome*, 14 Johns. (N. Y.) 406; *Heermance v. Vernoy*, 6 Johns. (N. Y.) 5; *Crocker v. Carson*, 33 Me. 436; *Chess v. Kelly*, 3 Blackf. (Ind.) 438.

One of two tenants in common of a chattel has no right to break into the premises of the other to obtain it. *Hernndon v. Bartlett*, 4 Port. (Ala.) 481; *Crocker v. Carson*, 33 Me. 436. Also *Chase v. Jefferson*, 1 Houst. (Tex.) 257; *Allen v. Feland*, 10 B. Mon. (Ky.) 306; *Newkirk v. Sabler*, 9 Barb. (N. Y.) 656.

But where the occupier has been strictly a tenant at will, or sufferance, and another person has determined his

right to continue in possession, it should seem that he would not be a trespasser if he enter afterwards to remove his goods and continue only a reasonable time for that purpose. *Doe v. M'Kaeg*, 10 B. & C. 721; 21 E. C. L. 154.

Landlord and tenant are tenants in common of crops raised on shares, until a division is made. The tenant has a right after he has quit the possession, to a reasonable ingress upon the land, to remove his goods and utensils. Trespass does not lie against him by the landlord, though he carries away the crops of which they are cotenants. The entry to take away the goods was justifiable in itself, but when accompanied by violence to the owner of property, it became trespass from the first, and the action maintainable for all damage resulting from the tort to the real estate, and for the removal of the common property. *Daniels v. Brown*, 34 N. H. 454; 69 Am. Dec. 505.

A right or license to enter upon lands results, or may be inferred, from the contracts of the parties in relation to personalty. Permission to keep, or the right to have one's personal property upon the land of another, involves the right to enter for its removal. *Doty v. Gorham*, 5 Pick. (Mass.) 487; 16 Am. Dec. 417; *White v. Elwell*, 48 Me. 360; 77 Am. Dec. 231.

One who cuts the hay of another and puts it into the latter's barn under a verbal agreement by which the hay is to be divided, and one-half assigned to him for his services, has the rights of a tenant at will, and may enter within a reasonable time to remove the hay, and the owner could not revoke the license so as to prevent it. In such case, if the owner forbids the tenant entering to take away the hay, he may do it forcibly, at a reasonable time, and in a reasonable manner, doing no more injury than reasonably necessary to obtain and carry away his hay. *White v. Hutchinson*, 48 Me. 360.

(5) *Entry by Successor in Government Office upon Land of Predecessor, to Recover Government Property.*—Where one, upon his own land, has been rightfully in possession of property, but his right has terminated and been acquired by another, the latter may lawfully enter and remove such property; as in the case of a successor, in an office under the government, who may justify entering upon the premises of his predecessor to remove the public property there remaining.¹

(6) *License to Enter Implied in Sale of Goods Without Delivery—Mortgaged Goods.*—Where one sells goods which are in his present possession, and nothing in the contract of sale indicates that they are to be delivered elsewhere, the sale itself is an implied license to enter and take the goods away; and such license thus coupled with an interest cannot be revoked.² But, in the case of

1. Cooley on Torts (2d ed.) *p. 51; *Sterling v. Warden*, 52 N. H. 197; 12 Am. Rep. 80. See *Burridge v. Nicholetts*, 6 H. & N. 383.

Where a solicitor who was also the registrar of a county court, receiving a yearly sum from the treasury for the portion of his offices used for county court purposes, was served with a notice from the treasurer of the county court of his intention to audit the registrar's books on a Saturday, when by a rule of such court the office closed at one o'clock; and the treasurer, on going to the registrar's office after one o'clock, finding it locked, broke the locks of an inner door and a cupboard in which the books were kept, and, having taken away and audited, returned them to the office, it was held in an action of trespass against him by the registrar, that the treasurer was justified in so doing under the county court acts. *Burridge v. Nicholetts*, 6 H. & N. 383.

"This case," says Pollock, C. B., "goes beyond the question of a right to a personal chattel, to which the owner wishes to get access; it is the case of a superior officer desiring to have access to books which it was the duty of the inferior officer to produce for his inspection." Martin, B.: "It is true that he came to the plaintiff's office after one o'clock on Saturday, but the rule as to closing on that day applies to the public and not to the officers of the court." *Burridge v. Nicholetts*, 6 H. & N. 383.

2. Cooley on Torts (2 ed.), *p. 51; *Wood v. Manley*, 11 Ad. & El. 34, 39 E. C. L. 19; *Nettleton v. Sikes*, 8 Met. (Mass.) 34; *Giles v. Simonds*, 15 Gray (Mass.) 441; 77 Am. Dec. 373; *Miller v. State*, 39 Ind. 267; *Drake v. Wells*, 11

Allen (Mass.) 141; *McNeal v. Emerson*, 15 Gray (Mass.) 384.

The doctrine together with the restrictions on its application are thus stated by the court, by Wells, J., in *McLeod v. Jones*, 105 Mass. 406; 7 Am. Rep. 539. "A license is implied because it is necessary to carry the sale into complete effect, and is therefore presumed to have been in contemplation by the parties. It forms part of the contract of sale. The seller cannot deprive the purchaser of his property or drive him to an action for its recovery, by withdrawing his implied permission to come and take it. This proposition does not apply, of course, to a case where a severance from the realty is necessary to convert the subject of the sale into personalty, and the revocation is made before such severance. But there is no such inference to be drawn when the property at the time of the sale, is not upon the seller's premises, or when by the terms of the contract, it is to be delivered elsewhere. And when there is nothing executory or incomplete between the parties in respect to the property and there is no relation of contract between them respecting it, except what results from the facts of legal ownership in one and possession in the other, no inference of a license to enter upon lands, for the recovery of the property can be drawn from that relation alone." 20 Vin. Abr. tit. Trespass H., a. 2 Pl. 18, p. 508; *Williams v. Morris*, 8 M. & W. 488; *Anthony v. Haney*, 8 Bing. 186; 21 E. C. L. 265.

Goods which were upon plaintiff's land were sold to the defendant; by the conditions of sale, to which plaintiff

mortgaged goods, in the absence of license from the mortgagor to enter and take the mortgaged goods, such entry by the mortgagee will be a trespass.¹

(7) *Entry of Vendor to Retake Goods Fraudulently Purchased.*—The vendor of property fraudulently purchased may, by peaceable entry, reclaim the same from the fraudulent purchaser, who becomes a wrongdoer in respect to the possession as soon as the sale is rescinded for the fraud.²

was a party, the buyer was allowed to enter and take the goods. *Held* that, after the sale, plaintiff could not countermand the license. And defendant having pleaded leave and license and a peaceable entry to take, to which plaintiff replied *de injuria*, held that defendant was entitled to the verdict though it appeared that plaintiff had, between the sale and the entry, locked the gates and forbidden defendant to enter, and defendant had broken down the gates and entered to take the goods. *Wood v. Manley*, 11 Ad. & El. 34; 39 E. C. L. 19.

1. The plaintiff gave a bill of sale and a mortgage of furniture in his dwelling house to the defendant, but the furniture remained in plaintiff's custody, and he removed it to another dwelling house, and sometime afterwards went away, leaving the house locked with the furniture in it; and the defendant unlocked and entered the house and took away the furniture. *Held*, that in the absence of proof of any license from the plaintiff, express or implied, the entry was a trespass, although the defendant had reasonable cause to believe that the plaintiff did not mean to return. *McLeod v. Jones*, 105 Mass. 403; 7 Am. Rep. 539.

Under a power contained in a chattel mortgage authorizing the mortgagee, on default, to take possession of the mortgaged property without process of law, and to sell the same, the mortgagee has the right, after default, to enter upon the premises of the mortgagor, and, without his consent and against his will, to take possession of the property, provided he does so peaceably and without violence or other breach of the public peace; and such taking, being the exercise of a right, will not constitute him a trespasser. (*Stone, J., dissenting.*) *Street v. Sinclair*, 71 Ala. 110.

2. *Wheelden v. Lowell*, 50 Me. 499. See *Rea v. Sheward*, 2 M. & W. 426.

Where a pretended purchaser's con-

duct, in wrongfully obtaining goods under color of a contract, was so fraudulent as to avoid the contract, the vendor may retake or even rescue them by any stratagem, even when taken and in the hands of the sheriff under an execution at the suit of a creditor against the fraudulent purchaser. *Noble v. Adams*, 7 Taunt. 59; 2 E. C. L. 25; *Earl of Bristol v. Wilsmore*, 1 B. & C. 514; 8 E. C. L. 218; *Ferguson v. Carrington*, 9 B. & C. 59; 17 E. C. L. 330; *Stephenson v. Hart*, 4 Bing. 476, 482; 15 E. C. L. 47; 1 Chit. Gen. Prac. 130, 131.

If a party, by false and fraudulent misrepresentations, obtains the money of any other, the party deprived may forcibly reclaim possession without being guilty of a violation of the law. *Anderson v. State* (Tenn. 1875), 2 Cent. L. J. 159.

The purchaser of a chattel, such as growing corn, sold under an execution, may enter and remove the crop purchased, although the same is in possession of a third party, under an arrangement with the judgment debtor, made for the purpose of defrauding the latter's creditors. *Thompson v. Craigmyle*, 4 B. Mon. (Ky.) 391; 41 Am. Dec. 240; *Brittain v. McKay*, 1 Ired. (N. Car.) 265; 35 Am. Dec. 738; *Heard v. Fairbanks*, 5 Met. (Mass.) 111; 38 Am. Dec. 394.

A person purchasing property such as a stove by means of false and fraudulent representations as to his solvency and means of paying therefor, acquires no right, either of property or possession, and the vendor will be justified in pursuing him and retaking the property, using no more force than is necessary to accomplish this object, and the purchaser cannot maintain an action against him for assault and battery. If in resisting the retaking the property by the vendor, the purchaser draws his knife, he becomes the aggressor, and the vendor will be justified in using such additional force as will be necessary to accomplish

(8) *Recaption as Applied to Stoppage of Goods in Transitu.*—Recaption as applied to stoppage *in transitu* confines the vendor's right to retake such unpaid-for goods as may be in transit, or in the hands of his agent, shipper, carrier, or wharfinger, with the object and for the purpose of delivery to the vendee.¹

2. Recaption of Real Property.—As for injuries to the possession of personal property a remedy by recaption is in the party himself, so a similar remedy for the redress of injuries to the possession of real property is given to the owner of lands by entry thereon when another person has wrongfully deprived him of the possession thereof.²

the obtaining the property. *Hogeden v. Hubbard*, 18 Vt. 504; 46 Am. Dec. 167.

A purchased goods upon credit, fraudulently intending at the time of the contract not to pay for them. B, the vendor, brought assumpsit for the goods sold, before the time of the credit expired. *Held*, that this action was not maintainable, though the vendor might have treated the contract as a nullity, and brought trover immediately to recover the value of the goods. *Ferguson v. Carrington*, 9 B. & C. 59; 17 E. C. L. 330.

1. And also where goods have been purchased without such fraud, and before they reach their destination and come into the hands of the purchaser, the discovery is made that he is insolvent, they may be stopped *in transitu* by any means, short of force. *Lickbarrow v. Mason*, 2 T. R. 63; *In re Constantia*, 6 Robinson Rep. 324; *Hawes v. Watson*, 2 B. & C. 546; 9 E. C. L. 170. Though a part delivery will in general defeat the right to stop the residue. *Slubey v. Heyward*, 2 H. Bl. 504; *Scott v. Godwin*, 1 B. & P. 69; *Harvey v. Cooke*, 6 East 227; *Crawshay v. Eades*, 1 B. & C. 181; 8 E. C. L. 78. See generally STOPPAGE IN TRANSITU.

Although a factor could not formerly pledge goods delivered to him to sell, yet if the purchaser of goods, having received the bill of lading, pledged it *bona fide* to a third person as a security for money advanced, the vendor's right of stoppage *in transitu* was determined; and although the money advanced might not be equal to the value of the goods, yet the pawnee, holding the bill of lading, might in an action of trover against the vendor, who had attempted to stop the goods *in transitu*, recover their

full value. And so the taking of a bill or note which is still outstanding in the hands of a third person, will preclude the vendor from insisting on his lien. *Bunney v. Poyntz*, 1 N. & M. 229.

A court of equity will not lend its aid to the stoppage of goods *in transitu*: therefore when a person can do so legally he should immediately exercise the right to avoid loss. *Goodhart v. Lowe*, 2 Jac. & W. 349.

2. ENTRY, WRIT OF, vol. 6, p. 651; 3 Bl. Comm. (Sharswood's ed.), *p. 4; 3 Steph. Comm. (11 Eng. ed.), *p. 259; *Taunton v. Costar*, 7 T. R. 431; *Argent v. Durrant*, 8 T. R. 403; *Turner v. Meymott*, 1 Bing. 158; 8 E. C. L. 450; *Barnes v. Dean*, 5 Watts. (Pa.) 543; 30 Am. Dec. 346; *Thompson v. Craigmyle*, 4 B. Mon. (Ky.) 391; 41 Am. Dec. 240; *Sharon v. Wooldrick*, 18 Minn. 355.

Such notorious act of ownership is equivalent to a feudal investiture by the lord. 3 Steph. Comm. (11 Eng. ed.) p. 259.

Or he may enter on any part of the property, in the name of the whole; but if the estate lies in different counties, he must make different entries; for the notoriety of such entry or claim to the pares or freeholders of Westmoreland is not any notoriety to the pares of, or freeholders of, Sussex. Co. Litt. 252b; 3 Bl. Comm. *p. 175.

Also if there be two disseisors, the party disseised must make his entry on both; or if one disseisor has conveyed the lands with livery to two distinct feoffees, entry must be made on both. Co. Litt. 252; for, as their seisin is distinct, so also must be the act which divests that seisin. But no entry can in the nature of things be made on hereditaments incorporeal. 3 Bl. Comm. *p. 206.

The right of entry may exist in the owner either where another has gone into possession without right,¹ or where one having had an estate in or at least lawful possession of the lands has had his right terminated by operation of law or by act of the owner.²

The party entitled to this remedy must exercise it in a peaceable manner, using as much force as may be necessary without committing a breach of the peace.³

So the landlord is entitled to and may seize the growing crops as his own, unless they are strictly emblements, or were sown under a custom to have the away-going crop. *Davies v. Connop*, 1 Price R. 55; *Doe v. Witherwich*, 3 Bing. 11; 11 E. C. L. 8.

And a mortgagee may thus take possession from the mortgagor, or any person who became tenant after the mortgage, and who has not been acknowledged by him. *Doe v. Maisey*, 8 B. & C. 767; 15 E. C. L. 335.

And a person who has recovered in ejectment may, without any writ, thus take possession. *Badger v. Floid*, 12 Mod. 398; *Taylor v. Horde*, 1 Burr. 60; *Withers v. Harris*, 2 Ld. Raym. 806.

At common law, "if a man be dispossessed of any lands or tenements, he may, if he cannot prevail by fair means, legally regain the possession thereof by force, unless he were put to the necessity of bringing his action by having neglected to re-enter in due time, *i. e.*, within twenty years, for the violence which happens through the resistance of the wrongful possession being originally owing to the wrong-doer's own fault, gives him no just cause of complaint, inasmuch as he might have prevented it by doing as he ought. *Hawk.*, ch. 64, § 1; 3 Salk. 169.

A party having only the equitable interest in land, and not the legal, should not, pending his suit in equity to establish it, take possession in an improper manner, by turning out a party also beneficially entitled, in a forcible manner; for in that case, a court of equity would not assist him or interfere by injunction to stay proceedings against him at law in the name of the legal owner by ejectment. *Grafton v. Griffin*, 1 Russ. & M. 336.

1. Where a person is in possession of land under a void title, and another having a valid title thereto peaceably enters and takes possession, the latter is not a trespasser. *Sharon v. Wooldrick*, 18 Minn. 354.

2. Where a tenant holds over after a

regular notice to quit, the landlord in his absence may break open the door, and resume possession, though some articles of furniture remained. *Turner v. Meymott*, 1 Bing. 158; 8 E. C. L. 450.

If the landlord enters with a strong hand to dispossess the tenant by force, he may be indicted for forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term. *Taunton v. Costar*, 7 T. R. 431.

A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put upon the premises by way of taking possession. *Taunton v. Costar*, 7 T. R. 431.

3. 3 Bl. Comm. (Sharswood's ed.) *p. 4. "It has been decided that the owner of land entitled to the possession may enter thereon and use force sufficient to remove the wrongdoer therefrom. In respect of land, as well as chattels, the wrongdoers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action, lest the peace should be endangered if force was justified. But in respect of land that argument has been overruled in *Harvey v. Bridges*, 14 M. & W. 437, in which Parke, B., says: "'Where a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though in so doing a breach of the peace was committed.' In our opinion all that is so said of the right of property

IV. DEFENSE OF POSSESSIONS.—If one undertakes without force to possess himself of the lands or goods of another, the owner

in land, applies in principle to a right of property in a chattel. If the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury instead of redressing it.

"Upon a review of the cases, English and American, the weight of authority seems to be in favor of the common-law right of the owner of land to recover possession of his premises by force, of which another is wrongfully in possession, provided no more is employed than becomes necessary by the resistance interposed by the tenant to prevent his regaining possession peaceably, especially if his entry be peaceable." This is substantially as laid down by Baron Parke, in *Harvey v. Bridges*, 14 M. & W. 437.

It was the abuse of this summary power to right one's self by entry, where the right of entry existed, which gave rise to the numerous English statutes against forcible entry and detainer, of which our old act was substantially a copy, and in these acts and the common-law remedy by indictment are to be found the only protection of the party thus forcibly dispossessed. They punish criminally the force, and in some cases make restitution of the possession. *Jackson v. Farmer*, 9 Wend. (N.Y.) 202. In every case where this remedy is available, it must be pursued in a peaceable and easy manner and not with force or strong hand. *Newton v. Harland*, 1 M. & G. 958; *Harvey v. Bridges*, 14 M. & W. 437; for a forcible entry is an indictable offense. *Beddall v. Maitland*, 17 Ch. Div. 174; *Edwick v. Hawkes*, 18 Ch. Div. 199. And if one turns another out of possession forcibly, this amounts to a breach of the peace and is punished accordingly. *Rex v. Wilson*, 3 A. & E. 817; *Reg. v. Harland*, 8 A. & E. 826; 35 E. C. L. 536; *Lows v. Telford*, 1 App. Cas. 414. See **FORCIBLE ENTRY AND DETAINER**, vol. 8, p. 101.

An indictment at common law, charging the defendants, twelve in number, with having unlawfully and with a strong hand entered the prosecutor's mill and expelled him from the possession, is good. *Rex v. Wilson*, 8 T. R. 357.

A plea of *moniter manus imposuit* in order to turn the plaintiff out of the defendant's house where she continued against his will is no answer to a charge against the defendant for striking the plaintiff repeated blows and with great force and violence several times knocking her down. *Gregory v. Hill*, 8 T. R. 299; Say. Rep. 138.

A person having the legal right of entry on land may enter by force, and though indictable for a breach of the peace at common law, or under the statute for a forcible entry and detainer, he is not liable to a private action of trespass for damages at the suit of the person in possession without right and who is thus turned out of possession. This position, apparently harsh and tending to the public disturbance and individual conflict, is abundantly supported by authority, and must be considered the law of the land. *Jackson v. Farmer*, 9 Wend. (N. Y.) 201.

In trespass for breaking and entering the plaintiff's house and expelling him therefrom, the breaking and entering are the gist of the action, and the expulsion is merely aggravation. Therefore a justification as to the breaking and entering will cover the whole declaration. *Taylor v. Cole*, 3 T. R. 292.

It has been held in several cases that trespass *quare clausum fregit* will not lie against the real owner of land for a forcible entry and dispossession of a tenant holding over, or other person in unlawful possession. The plea of *liberum tenementum* is an absolute bar to the action; and evidence of soil and freehold may be given under the general issue. The landlord as owner, may be liable for the public wrong in an indictment for forcible entry, but he is not so as respects any supposed injury to the land, nor is the possession which he thus acquires by force, therefore, an unlawful one. *Argent v. Durrant*, 8 T. R. 403; *Hyatt v. Wood*, 4 Johns. (N. Y.) 150; 4 Am. Dec. 258; *Sampson v. Henry*, 13 Pick. (Mass.) 36; *Ives v. Ives*, 13 Johns. (N. Y.) 235; *Meador v. Stone*, 7 Met. (Mass.) 147; *Beecher v. Parmele*, 9 Vt. 356; *Overdeer v. Lewis*, 1 W. & S. (Pa.) 90; 37 Am. Dec. 440; *Kellam v. Janson*, 17 Pa. St. 467; *Zell v. Ream*, 31 Pa. St. 304.

must first request him to depart, and, if he refuses, may then use force sufficient to eject him; but the occupant may not assault the intruder in the first instance.¹

On the other hand, if the entry, or the attempt to take another's chattels be made with violence, the owner may, in the first instance, use such force as may be necessary to subdue the violence of the aggressor. But in neither case must the force employed be excessive.²

Where there is a manifest intention by violence or surprise to commit a known felony upon a man's person (as to rob), or upon a man's property or habitation (as burglary or arson), the person

1. Cooley on Torts (2d ed.), *p. 167; 3 Lawson Rights, Remedies and Practice, § 1056; Scribner v. Beach, 4 Den. (N. Y.) 448; 47 Am. Dec. 265; Harrison v. Harrison, 43 Vt. 417; Drew v. Comstock, 57 Mich. 176; Churchill v. Hulbert, 110 Mass. 42; 14 Am. Rep. 578; Sampson v. Henry, 11 Pick. (Mass.) 387; Gregory v. Hill, 8 T. R. 209; Hyatt v. Wood, 3 Johns. (N. Y.) 239.

When an assault is attempted to be justified on the ground of self-defense, or the defense of one's property, the force used must not exceed what is necessary for mere defense, as where the plaintiff took hold of a rake in the defendant's hands, in order to take it from him, upon which the defendant immediately knocked the plaintiff down with his fist, and the plaintiff again attempted on rising to possess himself of the rake, was struck a blow with it by the defendant which broke his arm, it was held that the defendant was not justified. Scribner v. Beach, 4 Den. (N. Y.) 448; 47 Am. Dec. 265.

The same rule as to the degree of force that may be used in defense of personal property applies in the case of an officer showing a search warrant to the occupier of a house. If the latter refuse to return the property, the officer will be justified in using just so much violence as may be necessary to take it, and no more; and whether the officer used more force than was necessary will be a question for the jury; if he did, then such excess of force might be legally repelled. Rex v. Mitton, 1 M. & M. 107; 3 Car. & P. 31; 14 E. C. L. 106.

The rule is, that to justify an entry into the house or land of another to retake personal property, it must be shown that it was improperly taken away, or received, or detained, and

placed by the wrongdoer in his house or land, in which case an entry may be made, without previous request, or an instant seizure. But in other cases, in order to retake, the owner can only justify *molliter manus*; nor can he without leave enter the house of a third person, not privy to the wrongful detainer, to take his goods therefrom, if they get there through his own default. Crawford v. Hunter, 8 T. R. 18; Higgins v. Andrews, 2 Rol. R. 55; Masters v. Pollie, 2 Rol. R. 141; Anonymous, 2 Leo. 202; Selw. N. P., tit. Assault and Battery; Anthony v. Haney, 8 Bing. 186; 21 E. C. L. 265.

2. Cooley on Torts (2d ed.) *p. 167; Green v. Goddard, 2 Salk. 641; Scribner v. Beach, 4 Den. (N. Y.) 448; 47 Am. Dec. 265; Abt v. Burgheim, 80 Ill. 92; Johnson v. Perry, 56 Vt. 703; 48 Am. Dec. 826; Ayres v. Birtch, 55 Mich. 501; Fosbinder v. Svitak, 16 Neb. 499. It is only when the battery becomes necessary in defense of his property that the owner of land is justifiable in beating a trespasser. Stachlin v. Destrehan, 2 La. Ann. 1019. accordingly the owner may not strike an unarmed trespasser with a stick until he has failed in removing by gently laying hands on him. State v. Burke, 82 N. Car. 551. Ordinarily, in defense of possession an assault and battery are justifiable, but a wounding is not; in defending an assault, by the intruder, however, a wounding is justifiable. Shain v. Markham, 4 J. J. Marsh. (Ky.) 578; 20 Am. Dec. 232.

But in defending property against a trespasser who draws a deadly weapon, if one is in reasonable apprehension of danger, his use of a deadly weapon may be justifiable. State v. Taylor, 82 N. Car. 554; People v. Dann, 53 Mich. 490; 51 Am. Rep. 151.

assaulted may repel force by force; and even his servant, then attendant on him, or any other person present, may interpose for preventing mischief; and in the latter case, the owner, or any part of his family, or even a lodger with him, may kill the assailant in order to prevent mischief.¹

RECAPTURE.—See CAPTURE, vol. 2, p. 730; INTERNATIONAL LAW, vol. 11, p. 483.

RECEIPTOR.—(See also ATTACHMENT, vol. 1, p. 922; FORTHCOMING BOND, vol. 8, p. 565; SHERIFFS).—A person, other than the execution debtor, who gives a receipt for property attached, engaging, as surety to the officer who makes the levy, that the property will be forthcoming to answer any final judgment the plaintiff may recover.²

RECEIPTS.—(See also ACCORD AND SATISFACTION, vol. 1, p. 94; ACCOUNTABLE RECEIPTS, vol. 1, p. 135; ACQUITTANCE, vol. 1, p. 171; BILL OF LADING, vol. 2, p. 223; CARRIERS OF GOODS, vol. 2, p. 770; ESTOPPEL, vol. 7, p. 1; EXPRESS COMPANIES, vol. 7, p. 539; PAROL EVIDENCE, vol. 17, p. 419; WAREHOUSEMEN.)

I. Definitions, 1112.

II. Nature of a Receipt, 1112.

III. Form and Scope, 1113.

IV. Debtor's Right to Receipt, 1114.

V. How Affected by Parol Evidence, 1115.

1. Acknowledgment of Mere Payment, 1115.

2. To Show Purpose, 1118.

3. Where the Receipt is Part of a Contract, 1118.

4. Where the Receipt is Evidence of a Contract, 1118.

VI. Does Not Preclude Other Proof, 1119.

VII. Effect of a Receipt, 1120.

VIII. Conclusiveness of a Receipt, 1121.

1. In Cases of Fraud, 1121.

2. When Unexplained, 1122.

3. Receipt in Full, 1122.

4. Conclusiveness of Receipt in a Contract, 1123.

a. As to Terms of Such Contract, 1123.

b. Purpose for Which Payment is Made, 1124.

c. To Support the Contract, 1125.

(1) Deed, 1125.

(2) Fire and Life Insurance, 1126.

(3) Marine Insurance, 1126.

5. By Way of Estoppel, 1128.

IX. Receipt of Third Parties, 1128.

X. Value as Evidence, 1128.

XI. Miscellaneous Provisions, 1129.

1. Statute of Frauds, 1129.

2. Statute of Limitations, 1130.

3. Ancient Documents, 1130.

1. Foster's Crown Law 273; Scribner v. Beach, 4 Den. (N. Y.) 448.

A man assaulted in his dwelling may defend his possession to the last extremity; he is not obliged to retreat. Pitford v. Armstrong, Wright (Ohio) 94; Pond v. People, 8 Mich. 150. He may kill a burglar breaking in. McPherson v. State, 22 Ga. 478; Thompson v. State, 55 Ga. 47; Wall v. State, 51 Ind. 453; Palmore v. State, 29 Ark. 248; State v. Stockton, 61 Mo. 382;

State v. Burwell, 63 N. Car. 661; State v. Abbott, 8 W. Va. 741.

Where one evidently intends by force or surprise to commit a felony upon a man's person or property, the other party may resist the force by force on his part, and may even kill the assailant if it be necessary to prevent the injury. Scribner v. Beach, 4 Den. (N. Y.) 448; 47 Am. Dec. 265.

2. Anderson's L. Dict., citing Story's Bail. § 124; Stevens v. Bailey, 58 N.

I. DEFINITIONS.—Receipt is taking or accepting a thing delivered, usually money, but may be any personalty.¹ Receipt is an acknowledgment of payment or delivery.² A receipt is a written acknowledgment of the receipt of money or a thing of value.³

The purpose of this article is to treat of receipts for the payment of money only. Warehouse receipts, bills of lading, certificates of deposit, and the actual receipt of goods sold, within the provisions of the Statute of Frauds, are more appropriately treated elsewhere.⁴

II. NATURE OF A RECEIPT.—A receipt is executed by the person to whom the delivery or payment is made, and may be used as evidence against him, on the general principle which allows the admission or declaration of a party to be given in evidence against him.⁵ When in writing, it must be delivered to the debtor,⁶ for a memorandum of payment made by a creditor in his own books, is no receipt.⁷ It is also essential that it acknowledge the payment or delivery referred to.⁸ A certificate of deposit issued by a bank is an evidence of debt in the nature of a receipt,⁹ and a bill of lading is at once a receipt and a contract.¹⁰ A receipt may thus contain a contract to do something in relation to the thing delivered.¹¹ The receipt of warehousemen and carriers is of this nature. Where a receipt for money contains a promise of repayment, it partakes of the nature of a negotiable instrument,¹² and a document on

H. 564; *Hunter v. Peaks*, 74 Me. 363.

1. *Anderson's Law Dict.*

2. *The Missouri v. Webb*, 9 Mo. 194.

3. *Krutz v. Craig*, 53 Ind. 561.

A receipt is such a written acknowledgment, by one person, of his having received money from another, as will be *prima facie* evidence of that fact in a court of law. *Kegg v. State*, 10 Ohio 79. A receipt is the evidence of the performance of a contract. *Hildreth v. O'Brien*, 10 Allen (Mass.) 104.

4. For actual receipt see **FRAUDS, STATUTE OF**, vol. 8, p. 729. For receipt in cases of levy and execution see **FORTHCOMING BOND**, vol. 8, p. 565, and **SHERIFFS**. See also **BANKS AND BANKING**, vol. 2, p. 104; **BILL OF LADING**, vol. 2, p. 224, 228; **WAREHOUSEMEN**.

5. *Bouv. Law Dict.*

6. *Burtch v. Thorn*, 7 Ind. 508.

A receipt is not evidence of the payment of money unless it is in the possession of the party making the payment. *Nelson v. Boland*, 37 Mo. 432.

7. 2 B. & Ald. 501, n. 1; *Hunter v. Campbell*, 1 Spears (S. Car.) 53; *Rex v. Harvey*, R. & R. C. C. 227.

8. *Russ. & R.* 227; *Reg. v. Martin*, 7 C. & P. 549; 32 E. C. L. 626.

9. *Hotchkiss v. Mosher*, 48 N. Y. 478; *Payne v. Gardiner*, 29 N. Y. 146; *State Bank v. Kain*, 1 Ill. 75. See **BANKS AND BANKING**, vol. 2, p. 104.

10. *Pollard v. Vinton*, 115 U. S. 7; *Wayland v. Moseley*, 5 Ala. 430; 39 Am. Dec. 335; *O'Brien v. Gilchrist*, 34 Me. 554; 56 Am. Dec. 676; *Babcock v. May*, 4 Ohio 335; **BILL OF LADING**, vol. 2, pp. 224, 228.

11. *Greenl. on Ev.*, § 305. See also *Phillips v. Swank*, 120 Pa. St. 76.

12. *Randolph on Com. Paper*, § 90.

Thus "Received of A. B. £100 which I promise to pay" has been held a good note. *Ashly v. Ashly*, 3 M. & P. 186. So a receipt for money "To be returned when called for." *Woodfolk v. Leslie*, 2 N. & M. 585; *Mihill's Com. Law*, § 135.

By statute in *Alabama*, cotton receipts are negotiable like inland bills of exchange. *Winston v. Moseley*, 2 Stew. (Ala.) 137.

its face not a receipt, may be shown to be such by extrinsic evidence.¹

The distinction between a release and a receipt is that the former extinguishes a pre-existing right, while the latter is merely evidence of a fact.²

III. FORM AND SCOPE.—Receipt may be acknowledged by parol, but is generally in the form of writing. It may also be under

See generally *NEGOTIABLE INSTRUMENTS*, vol. 16, p. 481; *WAREHOUSE-MEN*.

1. *Reg. v. Overton*, Dears. C. C. 308.

Instances.—A receipt duly signed, in form: "\$1,100. Received this fifteenth day of August, 1882, eleven hundred on asylum contract of fifty-five thousand dollars," is a receipt for \$1,100. *Butler v. Bohn*, 31 Minn. 325. A paper writing, in these words: "Received of J. D. his book account in full. J. L.," is a receipt for money within the act of *North Carolina* of 1801, ch. 6, it being proved that, at the date of it, J. D. was indebted to J. L. in a sum of money on open account. *State v. Dalton*, 1 Hawks (N. Car.) 3.

A writing dated and reciting that the party signing it received a certain sum of money in orders, taken at eighty cents on the dollar, in full, is not a contract in the ordinary sense of the term, but simply a receipt. *Pauley v. Weisart*, 59 Ind. 241.

A writing reciting that A has received from B a stated sum in full settlement of the within contract and in full of all demands, and that, in consideration of said payment, such persons and others named are released from all claims, actions or causes of actions which have arisen, or may or can arise to the maker against any or either of them, by reason of any connection the latter may have had with them heretofore, is a receipt and not a contract. *Price v. Treat* (Neb. 1890), 45 N. W. Rep. 790. "Received, Salem, Marion Co., Ill., April 20th, of Minerva Merrell the sum of three hundred dollars, to be credited on the mortgage notes of N. C. Merrell, deceased, and if not redeemed, the above amount is not to be repaid to claimants of said estate. April 20th, 1861. William White," is a receipt, and not a contract. *White v. Merrell*, 32 Ill. 511. See also *McKinney v. Harvie*, 38 Minn. 18. "Received this day of A B the sum of fifty dollars in settlement for horse to

this day. C. D. (Seal.)," is a mere receipt, and not a release of the remainder of the debt. *Gross v. Diller*, 33 Minn. 424.

An indorsement on a note in the handwriting of the maker without any signature, but in the presence, with the concurrence and by the direction of the payee, is a receipt. *Kegg v. State*, 10 Ohio 75. An indorsement on a promissory note: "Interest paid to November 20, 1876," even though it be proved that a new note was at that date given for the interest, is in the nature of receipt, and not a contract. *Sears v. Wempner*, 27 Minn. 351. The indorsement of a payment upon a note, whether of interest or principal, constitutes, when made upon it, in itself, no part of the note. It is a mere admission or evidence of payment, and stands upon the same ground as a receipt executed by the holder to the maker of the note for the sum received. *McDaniels v. Lapham*, 21 Vt. 222; *Gilpatrick v. Foster*, 12 Ill. 355.

An acknowledgment of having received the acceptance of a bill of exchange is a receipt for money. *Scholey v. Welsby*, Peake 24.

The merchant's bill of sale of goods is, in substance, a mere receipt for the purchase money, and not a contract in writing such as to exclude parol evidence of the actual agreement. *Terry v. Wheeler*, 25 N. Y. 520. See also *Grant v. Frost*, 80 Me. 202.

A paper signed by a clerk stating that at a previous time he had received certain goods, is not admissible as a receipt. *Glazier v. Reno*, 6 S. & R. (Pa.) 206.

A copy of a receipt found among the papers of the payee after his decease, is evidence against his personal representatives. *Kirkpatrick's Estate*, 26 Pitts. L. J. 101.

2. *McCrea v. Purmort*, 16 Wend. (N.Y.) 460; 30 Am. Dec. 103; *Stearns v. Tappin*, 5 Duer (N.Y.) 297; *Hitt v. Holliday*, 2 Litt. (Ky.) 335; *Devlin on Deeds*, § 830.

seal. The acknowledgment in a deed stating receipt of the consideration is such a receipt.¹ The receipt may be an acknowledgment in full,² on account,³ *pro tanto*, a simple receipt,⁴ one for a particular purpose, or in payment on a particular debt. The fact that a receipt is acknowledged before a notary adds no weight to it,⁵ nor is a simple receipt, though official, conclusive.⁶

IV. DEBTOR'S RIGHT TO RECEIPT.—It seems doubtful whether the debtor had at common law a right to demand a receipt on payment excepting from the king's receiver.⁷ A collector's

1. Leake on Contracts, 904; Jackson v. M'Chesney, 7 Cow. (N.Y.) 360; 17 Am. Dec. 521; Daniels v. Moses, 12 S. Car. 130; Baker v. Dewey, 1 B. & C. 704; 8 E. C. L. 297. For further illustrations see *infra*, this title, under *Conclusiveness of a Receipt in a Deed*.

2. Receipt in full is a payment of money, or a delivery of other property, in complete discharge of a demand. Anderson's Law Dict.

In the absence of any proof to the contrary, a writing, "Received of S. \$100 commission on purchase of mill," duly signed, is a receipt in full. Elting v. Sturtevant, 41 Conn. 176.

The words "in full" in a receipt at the end of a specification for several demands, are not necessarily confined to the demand last mentioned, but may extend to others. Bogart v. Van Velsor, 4 Edw. Ch. (N.Y.) 718.

Where a defendant having entered into a joint and several bond with a third person, to pay the damages in a suit, receives from the plaintiff in the case a receipt, naming such defendant as principal, for one-half of the amount of the judgment recovered, in full of the defendant's part thereof, it must be construed a receipt of one-half in full of the whole. Brown v. Ayer, 24 Ga. 288.

3. Receipt on account is a payment of money or other property in part fulfillment of a contract. Anderson's Law Dict. Fickett v. Cohn, 16 N. Y. St. Rep. 709.

4. A bare acknowledgment of the payment of money or the delivery of personal property of any kind to the person who signs the receipt, is a simple receipt. Anderson's Law Dict.

5. Brannan v. Mesick, 10 Cal. 95. A receipt is not conclusive, even when sworn to by the subscribing witness, and it is always open to explanation by parol. Cole v. Taylor, 22 N. J. L. 59.

6. Johnson v. U. S., 5 Mason (U. S.)

425; Lewis v. Webber, 116 Mass. 450; U. S. v. Williams, 1 Ware (U. S.) 175.

7. In Richardson v. Jackson, 8 M. & W. 298, the court held that a creditor could not object to the tender on the ground that a receipt was asked, because at the time of the offer he only refused it on the ground that a larger sum was due him. Alderson & Rolfe, B. B., were careful in guarding themselves against countenancing the rule that a man who pays money is not entitled to demand a receipt. Rolfe, B., saying: "I should be sorry to hold this to be a bad tender on account of the receipt having been mentioned. I should wish to encourage all prudent people to take receipts, for if they do not, in case of death, the representatives may be deprived of all evidence of the payment." Benjamin on Sales (4th Am. ed.), § 726.

The reason for the conflicting opinions upon the question of whether a receipt is legally demandable arises from the fact that a tender to be valid must be unconditional. In many cases the circumstances under which a receipt was demanded indicated that the tender was not unconditional, and it is from such decisions that the doubt on this question has arisen.

Benj. on Sales (4th Am. ed.), § 726; 2 Parsons on Contracts, *644; Pomeroy, Smith, Mercantile Law, § 633, and authorities cited; Thayer v. Brackett, 12 Mass. 450; Loring v. Cooke, 3 Pick. (Mass.) 48; Richmond v. Boston Chemical Laboratory, 9 Met. (Mass.) 42; Wood v. Hitchcock, 20 Wend. (N.Y.) 47; Sanford v. Bulkley, 30 Conn. 344; Storey v. Krewson, 55 Ind. 397.

The question involved in all these cases was the validity of the tender. To demand a receipt upon tender of payment, so the authorities cited hold, makes the tender conditional and it is therefore not a good tender. From such cases arises the doubt whether the

receipt for taxes is an official paper, however, which the law requires him to give, so that its delivery may be enforced.¹

V. HOW AFFECTED BY PAROL EVIDENCE—(See also under PAROL EVIDENCE, vol. 17, p. 432)—1. **Acknowledgment of Mere Payment.**—Receipts form a well established exception to the rule that a written instrument cannot be varied or contradicted by parol evidence; one may thus contradict his own receipt.² The acknowledgment of mere payment in a receipt is *prima facie* evidence only,³ and may be rebutted by parol evidence showing that the consideration is different in kind⁴ or amount⁵ from that named, or that notes⁶ or checks⁷ were taken in payment; that it was paid

debtor has a right to demand a receipt. See TENDER.

1. Blackwell on Tax Titles, § 833 (5th ed.).

Delivery of tax receipt may be enforced by *mandamus*. Perry v. Washburn, 20 Cal. 318. Law v. People, 84 Ill. 142.

2. Bell v. Bell, 12 Pa. St. 235.

3. 2 Parsons on Contracts, *555; Taylor on Ev., § 1134; U. S. v. Hunt, 115 U. S. 183; Piehl v. Balchen, Olc. Adm. 24; McCreeliss v. Hinkle, 17 Ala. 459; Abrams v. Taylor, 21 Ill. 102; Chandler v. Schoonover, 14 Ind. 324; Whittemore v. Stout, 3 Dana (Ky.) 427; Gulick v. Conover, 15 N. J. L. 420; Dean v. Dean, 9 N. J. Eq. 425; Danziger v. Hoyt, 46 Hun (N. Y.) 270; Wells v. Patterson, 7 How. (Miss.) 32; Cluggage v. Swan, 4 Binn (Pa.) 150; Whitherup v. Hill, 9 S. & R. (Pa.) 11; Lehn v. Lehn, 9 S. & R. (Pa.) 57; Barclay v. Morrison, 16 S. & R. (Pa.) 129; Harris v. Hey, 111 Pa. St. 562; Sparhawk v. Buell, 9 Vt. 41; Paige v. Perno, 10 Vt. 491.

Receipt of payment on the bill itself is presumptive evidence of payment by acceptor or maker, but this is only so where it is in the handwriting of the holder, who was entitled to receive payment. Randolph on Com. Paper, § 1477; Byles, 233; 2 Parsons on Cont. 221; Pfiel v. Vanbatenburg, 2 Campb. 439; Curry v. Kurtz, 33 Miss. 29.

Under § 3807 of the Georgia Code, providing that receipts for money are only *prima facie* evidence of payment, one may show that he received less on certain notes made by him than the receipt shows. New England Mortgage Sec. Co. v. Gay, 33 Fed. Rep. 636.

A receipt for the purchase money on the bottom of a written contract is evidence on the money counts, al-

though there is a variance between the contract and the special count. Jamieson v. Alexander, 1 Cranch (C. C.) 6.

Where the complainants put in the defendant's receipt for his share of an estate, and the defendant then offered a copy thereof with a memorandum on it going to show that a less amount was received, it was not admitted. Brown v. Sockwell, 26 Ga. 380.

In an action by D against H to recover a sum of money paid by him as surety for H, the defendant offered in evidence a receipt as follows. "I have this day received of H a sum of money, and also an assignment of his, H's interest, to a claim against Erie Railroad to secure me in the sum of \$269, which is in full of all claims and accounts against said H to date," signed by D and dated. There was no evidence that the assigned claim had been collected. Held, that the assignment and receipt did not, as a matter of law, import payment. Dudgeon v. Haggart, 17 Mich. 273.

4. Battle v. Rochester City Bank, 3 N. Y. 88; White v. Parker, 8 Barb. (N. Y.) 48; Caldwell v. Harlan, 3 T. B. Mon. (Ky.) 352; Reading v. Traver, 83 Ill. 372.

5. Reed v. Phillips, 5 Ill. 39; Ryan v. Ward, 48 N. Y. 204; 8 Am. Rep. 539.

6. Wildrick v. Swain, 34 N. J. Eq. 167; Dorman v. Wilson, 39 N. J. L. 474; Swain v. Frazier, 35 N. J. Eq. 326; Bartholomew v. Bartholomew, 24 Ill. 109; Tobey v. Barber, 5 Johns. (N. Y.) 68; Putnam v. Lewis, 8 Johns. (N. Y.) 389; Johnson v. Weed, 9 Johns. (N. Y.) 310; 60 Am. Dec. 279; Higby v. New York etc. R. Co., 3 Bosw. (N. Y.) 497; Buswell v. Poineer, 37 N. Y. 312; Street v. Hall, 29 Vt. 165; Moore v. Newbury, 6 McLean (U. S.) 472.

7. Weed v. Snow, 3 McLean (U. S.) 265; Reading v. Traver, 83 Ill. 372.

only in part,¹ or not at all,² or that the consideration which did pass was illegal.³ In most of the States this may be shown, though the receipt be in full of all demands,⁴ or embodied in the

1. *Winans v. Hassey*, 48 Cal. 634; *Carr v. Miner*, 42 Ill. 179; *Bridge v. Gray*, 14 Pick. (Mass.) 55; 25 Am. Dec. 358; *Nelson v. Weeks*, 111 Mass. 223; *Harper v. Doll*, 92 N. Car. 394; *Jones v. Ennis*, 18 Hun (N. Y.) 452; *Union Bank v. Sollee*, 2 Strobb. (S. Car.) 390; *Burk v. Galveston Co.*, 76 Tex. 267.

2. *Strange v. Watson*, 11 Ala. 324; *Winans v. Hassey*, 48 Cal. 634; *Ditch v. Vollhardt*, 82 Ill. 134; *Shropshire v. Long*, 68 Iowa 537; *Corlies v. Howe*, 11 Gray (Mass.) 125; *Weddigen v. Boston Elastic Fabric Co.*, 100 Mass. 422; *Middlesex v. Thomas*, 20 N. J. Eq. 39; *Battle v. Rochester City Bank*, 3 N. Y. 88; *Dick v. Milligan* (Pa. 1886), 6 Atl. Rep. 720; *Mt. Olivet Cemetery Co. v. Shubert*, 2 Head (Tenn.) 116; *Burnap v. Partridge*, 3 Vt. 144.

3. *Forshner v. Whitcomb*, 44 N. H. 14.

4. Such receipts may be shown to be payment in part only. *The Galloway C. Morris*, 2 Abb. (U. S.) 164. And where but part of a debt is paid, and a receipt in full is given by an agent under "a power, coupled with an interest" and "irrevocable" in terms, even though the power expressly authorized the agent to settle and compromise, it gains nothing thereby. *Pratt v. U. S.*, 3 Ct. of Cl. 105. *Pate's Case*, 4 Ct. of Cl. 523; *Murdoch v. District of Columbia*, 22 Ct. of Cl. 464; *Tucker v. Baldwin*, 13 Conn. 136; 33 Am. Dec. 384; *Walrath v. Norton*, 10 Ill. 437; *Frink v. Bolton*, 15 Ill. 344; *Fitzsimmons v. Allen*, 39 Ill. 440; *American Bridge Co. v. Murphy*, 13 Kan. 35; *St. Louis etc. R. Co. v. Davis*, 35 Kan. 464; *Jones v. Ricketts*, 7 Md. 108; *Tucker v. Maxwell*, 11 Mass. 143; *Tyler v. Odd Fellows Mut. etc. Assoc.*, 145 Mass. 134; *Gibson v. Hanna*, 12 Mo. 162; *Cole Co. v. Dallmeyer*, 101 Mo. 57; *Powell v. Powell*, 52 Mich. 432; *Letts v. Letts*, 73 Mich. 138; *Gleason v. Sawyer*, 22 N. H. 85; *Burnham v. Ayer*, 35 N. H. 351; *Elliott v. Logan*, Phil. Eq. (N. Car.) 163; *Ryan v. Ward*, 48 N. Y. 204; 8 Am. Rep. 539; *Colburn v. Lansing*, 46 Barb. (N. Y.) 37; *Joslyn v. Capron*, 64 Barb. (N. Y.) 598; *Hendrickson v. Beers*, 6 Bosw. (N. Y.) 639; *Churchill v. Bradley*, 43 N. Y. Super. Ct. 170; *Patterson v. Ackerson*, 2 Edw. Ch. (N. Y.) 427;

Horton's Appeal, 38 Pa. St. 294; *Ingram v. Lukens* (S. Car. 1889), 9 S. E. Rep. 348; *Pinchback v. McCraven*, 1 Hill Eq. (S. Car.) 307; *Dolan v. Freiberg*, 4 W. Va. 101; *Smith v. Schulenberg*, 34 Wis. 41.

It may be shown that no payment has been made. *Morris v. St. Paul etc. R. Co.*, 21 Minn. 91; *Bird v. Davis*, 14 N. J. Eq. 467; *Harris v. Ely*, 25 N. Y. 138; *Foster v. Newbrough*, 58 N. Y. 481; *Rollins v. Dyer*, 16 Me. 475; *Sparhawk v. Buell*, 9 Vt. 41; or that there was no consideration; *Lewis v. Matlock*, 3 Ind. 120; *Robiness v. Wilson*, 33 Md. 179; *Corlies v. Howe*, 11 Gray (Mass.) 125; 71 Am. Dec. 693; *Kenny v. Kane*, 50 N. J. L. 562; *Houston v. Shindler*, 11 Barb. (N. Y.) 36.

See also *Wallace v. Kelsall*, 7 M. & W. 264, per Parke, B., explaining *Skaife v. Jackson*, 3 B. & C. 421; 10 E. C. L. 137; and *Farrar v. Hutchinson*, 9 A. & E. 641; 36 E. C. L. 227; *Graves v. Key*, 3 B. & Ad. 313; 23 E. C. L. 79. A receipt in full of all claims due, *prima facie* includes all that are due. *Scruggs v. Bibb*, 33 Ala. 481. *Walters v. Odorn*, 53 Ga. 286; *Beedle v. State*, 62 Ind. 26; *Ellicott v. Barnes*, 31 Kan. 170; *Beeler v. Hill*, 5 Dana (Ky.) 37; *Gails v. The Osceola*, 14 La. Ann. 54; *Draughan v. White*, 21 La. Ann. 175; *Stackpole v. Arnold*, 11 Mass. 27; *Bard v. Wood*, 3 Met. (Mass.) 74; *Shotwell v. Hamblin*, 23 Miss. 156; 55 Am. Dec. 83; *Bercier v. McInnis*, 57 Miss. 279; *Dudgeon v. Haggart*, 17 Mich. 273; *Buswell v. Poineer*, 37 N. Y. 312; *Catow v. Catow*, (S. Car. 1890), 10 S. E. Rep. 1078; *Pool v. Chase*, 46 Tex. 207; *Cliff v. Wade*, 51 Tex. 14; *Bennett v. Flanagan*, 54 Vt. 549; *Chitty on Contracts* (11 Am. ed.), vol. 1, p. 150, n. e.

Seamen's Receipts.—A receipt given in full by a seaman for his wages is not conclusive in admiralty. *Harden v. Gordon*, 2 Mason (U. S.) 541; *The Mary Paulina*, 1 Sprague (U. S.) 45; *Whiteman v. The Neptune*, 1 Pet. Adm. 180; *Leak v. Isaacson*, Abb. Adm. 41; *The Commerce*, 1 Sprague (U. S.) 34; *Jackson v. White*, 1 Pet. Adm. 179; *Whitney v. Eager*, *Crabbe* (U. S.) 422; *The Galloway C. Morris*, 1 Abb. (U. S.) 164; *Payne v. Allen*, 1 Sprague (U. S.) 304; *Savin v. The*

consideration clause of an instrument under seal.¹ And a receipt may be so varied although the signer is dead.²

A tax receipt is open to explanatory evidence like other receipts,³ and the same is also true in regard to a discharge written upon an execution,⁴ or a receipt given in satisfaction of a judgment.⁵

Juno, 1 Wood (U. S.) 300, but in most of the above citations the receipt in full was not conclusive because the position of seamen was peculiarly open to the exercise of undue influence and duress. See also SEAMEN.

1. The acknowledgment of a receipt under seal is nothing more than a receipt, for the seal gives it no additional solemnity. *Rex v. Scammonden*, 3 T. R. 474.

The receipt of the consideration is not conclusive between the parties but may be explained, enlarged, or disputed. It may thus be shown that the consideration was not paid or was not paid in money as therein expressed but in some other way. *Bigelow on Estoppel*, 4th ed. 372; *Shepard v. Little*, 14 Johns. (N. Y.) 210; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460; 30 Am. Dec. 103 and note. See also PAROL EVIDENCE, vol. 17, p. 438; *DEEDS*, vol. 5, p. 436; *Lawson, Rights, Remedies and Prac.*, vol. 5, § 2543; 2 Whart. on Ev., § 1042 and cases cited; *Taylor on Ev.*, § 96; *Devlin on Deeds*, § 830; *Elder v. Hood*, 38 Ill. 533; *Swisher v. Swisher*, *Wright* (Ohio) 755; *Steele v. Worthington*, 2 Ohio 182; *Mitchell v. Ryan*, 3 Ohio St. 377; *Davis v. Coffield*, 6 West L. J. (Ohio) 318; *Brown v. Cahalin*, 3 Oregon 45; *Bridges v. Russell*, 30 Mo. App. 258; *Adams v. Hull*, 2 Den. (N. Y.) 306; *Jackson v. M'Chesney*, 7 Cow. (N. Y.) 360; 17 Am. Dec. 521; *Hamilton v. McGuire*, 3 S. & R. (Pa.) 355; *Weigley v. Weir*, 7 S. & R. (Pa.) 309; *Watson v. Blaine*, 12 S. & R. (Pa.) 131; *Strawbridge v. Cartledge*, 7 W. & S. (Pa.) 394; *Byers v. Mullen*, 9 Watts (Pa.) 266; *Baum v. Tomkin*, 110 Pa. St. 569; *Lazell v. Lazell*, 12 Vt. 443; 36 Am. Dec. 352.

2. *Brice v. Hamilton*, 12 S. Car. 32. 3. *Elston v. Kennicott*, 46 Ill. 187; *Rand v. Scofield*, 43 Ill. 167. So where county tax receipts were in evidence it was not error to allow county treasurer to state the amount of a certain tax thereby shown to be receipted for. *Vaughan v. Stone*, 54 Iowa 376, and upon the question on

whose account and for whom payment of taxes has been paid the receipt is susceptible to explanation. It has thus been held that although an agent has paid the taxes in his own name instead of that of his principal, tax receipts thus given may be explained. *Rand v. Scofield*, 43 Ill. 167; *Rawson v. Fox*, 65 Ill. 200; *Hardin v. Gouverneur*, 69 Ill. 140; *Vigus v. O'Bannon*, 118 Ill. 334, where the receipt was one in full; and it may also be shown that it was paid by another person than the one named in the receipt. *Gage v. Hampston*, 127 Ill. 87. The description of land being clearly defective in the receipt, the objection may be overcome by showing with reasonable certainty that the payment for which it was given was in fact made on the land in controversy. *Paris v. Lewis*, 85 Ill. 597. The tax receipt does not estop the collector from showing that a check given in payment was not paid. *Kahl v. Love*, 37 N. J. L. 5.

4. *Edgerly v. Emerson*, 23 N. H. 555; 55 Am. Dec. 207.

A receipt given by a constable to a defendant in execution in full thereof is not conclusive against him, but he may show that he did not receive the money, and could not make it, by reason of the debtor's insolvency. *Warlick v. Barnett*, 1 Jones (N. Car.) 539; 62 Am. Dec. 188.

5. Entry of satisfaction indorsed on a judgment is in the nature of a receipt and may be explained, controlled, qualified, or contradicted by parol. *Stewart v. Armel*, 62 Ind. 593; *Lewis v. Matlock*, 3 Ind. 120; *Lapping v. Duffy*, 65 Ind. 229; *Lash v. Rendell*, 72 Ind. 475; *Brown v. South Boston Sav. Bank*, 148 Mass. 300. Such receipts are admissible on the ground of declarations against interest, *Sherman v. Crosby*, 11 Johns. (N. Y.) 70; and to prove receipt the judgment record or a transcript thereof must be produced, if the receipt be on record; if on a separate paper and delivered to the opposite party, notice must be given him to produce it before second-

2. To Show Purpose.—Parol evidence is also admissible to show the purpose for which the receipt was given¹ or to what demand it was applicable.²

3. Where the Receipt is Part of a Contract.—A receipt remains open to explanation by parol evidence, though it contain a contract or be embodied in another instrument.³

4. Where the Receipt is Evidence of a Contract.—A receipt may also be controlled, varied, or contradicted by parol evidence to the extent that other writings are subject to such explanation.⁴

any evidence is admissible. *Williams v. Jones*, 12 Ind. 561. But compare *Lothrop v. Blake*, 3 Pa. St. 483.

1. *Bishop v. Perkins*, 19 Conn. 300.

So it may be shown that a receipt executed by A to B stating that he had received from her, as his guardian, the sum of \$571.64, being his distributive share of his father's personal estate, was intended to operate as a payment of so much money upon lands he had agreed to purchase. *Shepherd v. Bevin*, 9 Gill (Md.) 32. *Ellicott v. Barnes*, 31 Kan. 170; *Furbush v. Goodwin*, 25 N. H. 425; *King v. Hutchins*, 28 N. H. 561; *Colburn v. Lansing*, 46 Barb. (N. Y.) 37; *Robinson v. Frost*, 14 Barb. (N. Y.) 536; *Trull v. Barkley*, 11 Hun (N. Y.) 644. And where an attorney gave a receipt for a promissory note, without expressing the purpose for which he received it, it was held that the presumption, confirmed also by other circumstances, was, that he received it to be collected. *Batdorf v. Albert*, 59 Pa. St. 59. *Peters v. Lawson*, 66 Tex. 336.

A receipt "in full for taxes, interest, and costs of the within certificate" being indorsed on a tax certificate, which was indorsed in blank, it was held that it might be shown by parol whether the money was received for an assignment of the certificate or for the purpose of redemption. *Woodman v. Clapp*, 21 Wis. 350.

But where a mortgage is satisfied by payment, and the receipt is indorsed upon the back, parol evidence tending to show that the parties intended the receipt to have a different effect from what it must have, according to its legal effect, is not admissible. *In re Dunham*, 9 Phil. 471.

2. Parol evidence may be admitted to show that the comprehensive term "all accounts" in a receipt in full was designed to include a firm as well as a personal indebtedness. *Hawley v. Bader*, 15 Cal. 44; and that the receipt

was not intended to embrace a particular subject. *Packer v. Packer*, 24 Iowa 20; *Brooks v. White*, 2 Met. (Mass.) 283; 37 Am. Dec. 95. A receipt for a sum of money to account for on demand with interest is not an undertaking to pay that sum absolutely; and, in an action upon it, the defendant may show by parol evidence how the money was to have been applied. *Blanchard v. Putnam*, 16 N. H. 48.

Where a receipt is given to an executor in his individual name, parol evidence is admissible to show that it was for property belonging to him as executor, and not to himself in his own right; and to show that the signers of the receipt so understood it at the time of signing the same. *Wadsworth v. Alcott*, 6 N. Y. 64. *Colburn v. Lansing*, 46 Barb. (N. Y.) 37; *Eylar v. Read*, 60 Tex. 387.

3. *Wayland v. Mosely*, 5 Ala. 430; 39 Am. Dec. 335; *Sherry v. Picken*, 10 Ind. 375; *Lowe v. Young*, 59 Iowa 364.

A receipt which is embodied in a promissory note is open to explanation by parol the same as if it were a separate instrument. *Smith v. Halland*, 61 N. Y. 635; *Wilson v. Derr*, 69 N. Car. 137; *Davison v. Davis*, 125 U. S. 90.

Fire and Life Insurance Policy.—The receipt of premium in such a policy may be explained by parol. *Reyner v. Hall*, 4 Taunt. 725; *Luckie v. Bushley*, 13 C. B. 864. Also where receipt "to be binding until policy received." *Scurry v. Cotton State L. Ins.*, 51 Ga. 624. For a review of cases, see *Sheldon v. Atlantic etc. Ins. Co.*, 26 N. Y. 460; 84 Am. Dec. 231; *Ferebee v. North Carolina etc. Ins. Co.*, 68 N. Car. 11; *Insurance Co. v. Smith*, 3 Whart. (Pa.) 520; *Texas Mut. L. Ins. Co. v. Davidge*, 51 Tex. 244.

4. A receipt is always subject to explanation and to have its general terms narrowed down by proof *aliunde*. *Van*

VI. DOES NOT PRECLUDE OTHER PROOF.—It is a well settled principle that a receipt is but evidence of payment. It is not the only evidence, and when the fact can be established without it,

Rensselaer v. Morris, 1 Paige (N. Y.) 13; and in a purely legal point of view, a receipt is of no higher order or character of testimony than ordinary parol evidence, and is always subject to explanation. There is no presumption of law that a receipt properly and fully expresses the intention and understanding of the parties; the only presumptions that could arise from the contents of the writing are presumptions of fact. *Herkimer v. Nigh*, 10 Ill. App. 372. A receipt indorsed on a note if ambiguous may be explained. *Baugh v. Brasfield*, 5 J. J. Marsh. (Ky.) 79; the circumstances how it was given may also be shown. *Richardson v. Beede*, 43 Me. 161, and the terms made use of in the receipt explained. *McLane v. Johnson*, 59 Vt. 237.

Receipt of payment indorsed on a bill may be explained by parol. *Chitty* 478; 2 Daniel 258; 2 Edwards, § 786; *Randolph* on Com. Paper, § 1477; *Scholey v. Walsby*, Peake 24; *Swain v. Frazier*, 35 N. J. Eq. 326.

A receipt is merely evidence of a fact, and any generality of expression contained therein may be restrained by other evidence, showing that it was intended to be less extensive in its operation than the words import. *Hitt v. Holliday*, 2 Litt. (Ky.) 333. So where a receipt contains vague and general expressions and is not definitely descriptive of what is intended to be affected by it, it may be explained. *Raymond v. Roberts*, 2 Aik. (Vt.) 204. A receipt for a sum paid in satisfaction of a judgment of the county court may be explained to mean circuit court. *Stallworth v. Preslai*, 34 Ala. 505. A receipt in these words: "Received of W. R., one of the executors of W. W., two notes of hand on W. G. & J. McN., amounting to \$1,750, due first of January, 1838, which we are to collect, or return the same to said R. with interest from the date it was due," is open to explanation to show whether the words "with interest, etc.," are intended to refer to the return of the money, by the signers, or to the amount which is to be collected from the notes. *Hogan v. Reynolds*, 8 Ala. 59. The words "in payment of," "in satisfaction of," "in full discharge of," and numerous other similar expressions, when contained in

receipts and other instruments in reference to antecedent and liquidated obligations, operate to discharge them, or the contrary, just as the circumstances in which they are used indicate intention, and as justice demands. It is a mere matter of interpretation, in each instance controlled by the circumstances in which the agreement is made. *In re Hurst*, 1 Flip. (U. S.) 462; 13 Nat. Bank. Reg. 455.

Evidence is admissible to show that a receipt is conditional. *House v. Low*, 2 Johns. (N. Y.) 378; *Perkins v. Hodge*, 38 Iowa 284; and the terms upon which a receipt is given may be shown by parol. *Weed v. Snow*, 3 McLean (U. S.) 265.

Where a receipt in full is for certain promissory notes, and in full of all demands, the general words, though they do not enlarge the particular words as to what transpired at the time, may be used to prove that the party giving the receipt had at the time no other demands against the person securing the receipt. *Allen v. Woodson*, 50 Ga. 53. Where, upon the face of a receipted account, it is doubtful whether the money was paid by the partnership or by one of the partners individually, the party offering it may explain it by other evidence. *Grier v. Huston*, 8 S. & R. (Pa.) 402; 11 Am. Dec. 627. A receipt acknowledging that A had received a lot of land does not prevent the contrary from being shown. *Bowen v. Humphreys*, 24 S. Car. 452. The words in a receipt "notes I hold against A," may be shown by parol to refer to notes in which the holder has no interest other than having possession of them as agent of payee. *Dodge v. Billings*, 2 D. Chip. (Vt.) 34. A writing in this form: "Received of A \$500 due on demand" is open to parol explanation as to its consideration to show that it was intended as a mere receipt. *DeLavallette v. Wendt*, 75 N. Y. 579; 31 Am. Rep. 494.

See also *Swope v. Forney*, 17 Ind. 385; *Beedle v. State*, 62 Ind. 26; *Cox v. Garber*, 6 Iowa 211; *Cramer v. Shriner*, 18 Md. 140; *King v. Hutchings*, 28 N. H. 561; *Furbush v. Goodwin*, 25 N. H. 425; *Caldwell v. National Mohawk Valley Bank*, 64 Barb. (N. Y.) 333; *Dutton v. Tilden*, 13 Pa.

it is not at all necessary, and taking a receipt does not preclude other proof of payment.¹

VII. EFFECT OF A RECEIPT.—A receipt is evidence of some fact. It is admissible in evidence upon the principle that declarations and admissions of a party may be used against him as evidence. Like all evidence, its effect must be as varied as the facts of which it is the evidence are different. It will thus, in many instances, have but the weight of *prima facie* evidence; in others, by reason either of its particular form, the nature of its contents, or the peculiar relations of the parties, it is conclusive as to a part, or as to all that it alleges. A more definite rule cannot be laid down.

Primarily the operation of a receipt is confined to that for which it is given.² But a receipt is often used as evidence of facts collateral to those stated in it. It is *prima facie* evidence of payment,³ and whatever inference may legally be drawn from the fact of the payment described will be supported by the receipt.⁴ It may, however, have all the effect of a

St. 46; *Phelps v. Postwick*, 22 Barb. (N. Y.) 314; *Haddock v. Kelsey*, 3 Barb. (N. Y.) 100; *Kirkpatrick v. Smith*, 10 Humph. (Tenn.) 188.

1. *Jacob v. Lindsay*, 1 East 460; *Rambert v. Cohen*, 4 Esp. 213; *Meade v. Keane*, 3 Cranch (C. C.) 51; *Johnson v. Cunningham*, 1 Ala. 249; *Peterson v. Gresham*, 25 Ark. 380; *Williamantic School Soc. v. First School Soc.*, 14 Conn. 468; *Bryant v. Dana*, 8 Ill. 343; *Wolf v. Foster*, 13 Kan. 116; *Spears v. Chrisman*, 4 J. J. Marsh. (Ky.) 47; *Berry v. Berry*, 17 N. J. L. 440; *Chambers v. Hunt*, 22 N. J. L. 552; *Johnson v. Stackhouse*, 1 Cow. (N. Y.) 122; *Southwick v. Hayden*, 7 Cow. (N. Y.) 334.

Payment of taxes may be proved by parol, whether a receipt was taken for it at the time or not. *Hammond v. Hannin*, 21 Mich. 374; 4 Am. Rep. 490; *Elston v. Kennicott*, 52 Ill. 270. But it has been held that charges in an administration account for the payment of taxes by the administrator, cannot be proved by the testimony of witnesses, but must be proved by the receipt of the collector. *Hall v. Hall*, 1 Mass. 101.

The manner of signing a receipt and the contents of it cannot be given in evidence; the receipt must be produced. *Romayne v. Duane*, 3 Wash. (U. S.) 246.

2. *Kerchner v. U. S.*, 7 Ct. of Cl. 579.

3. *Bishop on Contracts*, § 176 (Enl. ed.); *Pomeroy, Smith, Mercantile*

Law, § 633; *Taylor on Ev.* § 1134. A tax receipt is admissible to show payment of taxes, though it does not show who paid the money. *Denman v. McMahan*, 37 Ind. 241; and see *Johnstone v. Scott*, 11 Mich. 232; *Williams v. Fitzpatrick*, 20 Ala. 791. But a receipt for a certain sum of money paid for specific articles furnishes no presumption of a general settlement between the parties. *Hannum v. Curtis*, 13 Ind. 206.

The principle that a receipt is only *prima facie* evidence of payment is so well embedded in the law governing receipts that most of the cases cited throughout this article will be found authorities on this point.

4. *Rent*.—Thus the law presumes that previous rent has been paid where a receipt for subsequent rent is given, unless the contrary is made to appear. *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Patterson v. O'Hara*, 2 E. D. Smith (N. Y.) 58; *Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Jenkins v. Calvert*, 3 Cranch (C. C.) 216; *Saving Fund v. Marks*, 3 Phila. (Pa.) 278; *Gear, Landlord and Tenant*, § 138; *Gilb. Ev.* 157 (4th ed.); *Best Ev.*, § 406.

The receipt of rent is also *prima facie* evidence of the existence of the tenancy. *Taylor, Landlord and Tenant*, § 23 (8th ed.).

Corporations.—A receipt issued in the name of the defendant corporation and signed by a party who owns all the stock is admissible to prove plain-

written contract and will then become conclusive between the parties.¹

VIII. CONCLUSIVENESS OF A RECEIPT—1. In Cases of Fraud.—A receipt is never conclusive where mistake,² misrepresentation,³ fraud,⁴ or undue influence⁵ can be alleged against it.

tiff's claim that defendant was doing business at the time receipt was signed where defendant claims it was not *Orr Water Ditch Co. v. Reno Water Co.*, 19 Nev. 60.

Taxes.—But a tax collector's receipt is not sufficient proof of validity of taxes paid. *Seale v. Doane*, 17 Cal. 476.

Attorney's Receipt.—The receipt of an attorney at law, acknowledging that he had received certain securities for the payment of money, which he was to sue for in the United States circuit court, collect and account for, is *prima facie* evidence of the genuineness and justness of the securities described in the receipt. *Hair v. Glover*, 14 Ala. 500.

1. See *infra*, this title, *Receipt in a Contract*.

2. *Show v. Thompson*, Olc. Adm. 144; *Kane v. Morehouse*, 46 Conn. 305; *Dodd v. Mayson*, 39 Ga. 605; *Markel v. Spittler*, 28 Ind. 488; *State v. Waldo Bank*, 20 Me. 471; *Hart v. Gould*, 62 Mich. 262; *Elwell v. Lesley*, 7 N. J. L. 349; *Ensign v. Webster*, 1 Johns. Cas. (N. Y.) 145; 1 Am. Dec. 108; *McDougall v. Cooper*, 31 N. Y. 498; *Boardman v. Gaillard*, 60 N. Y. 614; *Gue v. Kline*, 13 Pa. St. 50; *Russell v. Church*, 65 Pa. St. 59; *Schoemaker v. Stiles*, 102 Pa. St. 549.

Where a party accepts a deed in payment of a debt, and receipts the same in ignorance of the fact that the deed is a nullity, there being no such property in existence as it assumes to convey, he is not concluded by his receipt. *Anderson v. Armstead*, 69 Ill. 452.

See also under **MISTAKE**, vol. 15, p. 671.

3. *Trisler v. Williamson*, 4 Har. & M. (Md.) 219; 1 Am. Dec. 396; *Berryghill's Appeal*, 35 Pa. St. 245; *McGrann v. Pittsburgh etc. R. Co.*, 111 Pa. St. 171.

4. *Skaife v. Jackson*, 3 B. & C. 421; 10 E. C. L. 137; *Pratt v. U. S.*, 3 Ct. of Cl. 105; *Livingston v. U. S.*, 3 Ct. of Cl. 131; *Phelan v. Crosby*, 2 Gill (Md.) 462; *Clapp v. Tirrell*, 20 Pick. (Mass.) 247; *Snyder v. Findley*, 1 N. J. L. 48; *Cole v. Taylor*, 22 N. J. L. 59;

King v. Leighton, 100 N. Y. 386; *Van Nest v. Talmage*, 17 Abb. Pr. (N. Y.) 99; *Hogg v. Brown*, 2 Brev. (S. Car.) 223.

See also *Hamsher v. Kline*, 57 Pa. St. 397; *Moore v. Com.*, 8 Pa. St. 260; *Thompson v. Faussat*, Pet. (C. C.) 172; *Bell v. Bell*, 2 Jones (N. Car.) 235; *Benson v. Bennett*, 1 Campb. 394, n.

If a receipt be altered by the party holding it or by procurement of such party, it vitiates the receipt as an instrument of evidence. *Aliter* if done by a stranger. *Goodfellow v. Inslee*, 12 N. J. Eq. 355.

5. *Mitchell v. Pratt*, Taney (U. S.) 448; *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. (C. C.) 66; *Michoud v. Girod*, 4 How. (U. S.) 503; *Tarver v. Rankin*, 3 Ga. 210. And where a person did not read the receipt, and had no reasonable opportunity so to do, he cannot be bound by the contents thereof. *Solomon R. Co. v. Jones*, 34 Kan. 443. And in *Fairmaner v. Budd*, 7 Bing. 574; 20 E. C. L. 246; 20 Serg. & L. 246, it was held that where the signer of the receipt was illiterate, proof might be received to show that it was not drawn according to authority. *Lyme v. Beall*, 7 Dana (Ky.) 420; *Nelson v. Weeks*, 111 Mass. 223; *McAllister v. Engle*, 52 Mich. 56; *Garcia y Perea v. Barela* (N. Mex. 1890), 23 Pac. Rep. 766; *Rourke v. Story*, 4 E. D. Smith (N. Y.) 54; *Thomas v. M'Daniel*, 14 Johns. (N. Y.) 185; *Parmentier v. Pater*, 13 Oregon 121; *Clarke v. Deveau*, 1 S. Car. 172.

The receipt given by a ward upon termination of the wardship is peculiarly susceptible to the scrutiny of a court. A receipt obtained by a guardian without accounting is of little weight. *Bennett v. Hanfin*, 87 Ill. 31; and see *Beedle v. State*, 62 Ind. 26; *Brewer v. Vanarsdale*, 6 Dana (Ky.) 207; *Nicholson v. McGuire*, 4 Cranch (C. C.) 194; *Succession of Celeste Croizet*, 12 La. Ann. 401.

For the receipt of seamen given under undue influence, see *supra*, this title, *How Affected by Parol Evidence*, note, *Seaman's Receipts*.

2. **When Unexplained.**—The effect of *prima facie* evidence, in the absence of rebutting proof, is to establish the fact which it tends to prove;¹ it follows, therefore, that a receipt, which remains unexplained, is conclusive, and it is for the party against whom it is produced to establish its true character if he wishes to avoid its effect.²

3. **Receipt in Full.**—In general a receipt in full is conclusive when given with a knowledge of all the circumstances, and when a party giving it cannot complain of any misapprehension as to the compromise he was making.³ In *Connecticut*, a receipt in full will operate as a discharge to defeat any further claims, unless executed under such circumstances of mistake, accident or surprise, or unless it be procured by such fraud as will authorize a court of equity to set it aside.⁴ By statute in *Alabama*, receipts, if made in good faith, are valid and operate according to the intention of the parties,⁵ and in *Georgia* have the effect of *prima facie* evidence only.⁶ In most of the States a receipt in full is of

1. *Lyons v. Williams*, 15 Ill. App. 27.

2. *Moore v. The Fashion*, 1 Newb. Adm. 49; *Palmer v. Priest*, 1 Sprague (U. S.) 512; *Smith v. Hoffman*, 2 Cranch (C. C.) 651; *Goodale v. West*, 5 Cal. 339; *Spear v. Ward*, 20 Cal. 659; *Marston v. Wilcox*, 2 Ill. 270; *Levi v. Karrick*, 13 Iowa 344; *Whitmore v. Stout*, 3 Dana (Ky.) 429; *Beeler v. Hill*, 5 Dana (Ky.) 37; *Cunningham v. Batchelder*, 32 Me. 316; so a receipt in full of all demands, though purporting to be for a sum merely nominal, will, if unexplained, discharge all debts then existing even such as are not payable until a subsequent day. *Cash v. Freeman*, 35 Me. 483. *Carroll v. Quinn*, 13 Md. 379; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Lambert v. Seely*, 17 How. Pr. (N. Y.) 432; *Hunt v. Westervelt*, 4 E. D. Smith (N. Y.) 225; *McDowell v. Lemaitre*, 2 McCord (S. Car.) 320; *Stachely v. Peirce*, 28 Tex. 328.

On the question of a good discharge for certain notes against an executor for which he held a receipt signed by his testator containing certain altered words and figures, the jury are warranted in finding the receipt valid in the absence of any evidence that the alterations were made previously to the signing. *Thrasher v. Anderson*, 45 Ga. 539.

But a receipt denied, and of whose execution no evidence has been given, is not evidence to go to a jury. *Neil v. Miller*, 2 Root (Conn.) 117.

3. *Bristow v. Eastman*, 1 Esp. 173; *Alner v. George*, 1 Camp. 393; *Thomp-*

son v. Faussat, Pet. (C. C.) 182; *Guldager v. Rockwell*, 14 Colo. 459; *Bull v. Bull*, 43 Conn. 455; *Freeman v. Tucker*, 20 Ga. 6; thus a receipt in full, given by a brakeman who had been injured through the fault of the company employing him, and not shown to have been procured by false representations, is a sufficient release of a cause of action. *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183; 4 Am. Rep. 593. *O'Neil v. Lake Superior Iron Co.*, 63 Mich. 690; *Henderson v. Stokes*, 42 N. J. Eq. 586; *Vedder v. Vedder*, 1 Den. (N. Y.) 257; *Holbrook v. Blodget*, 5 Vt. 520.

4. *Fuller v. Crittenden*, 9 Conn. 401; 23 Am. Dec. 364; *Tucker v. Baldwin*, 13 Conn. 136; 33 Am. Dec. 384; *Hurd v. Blackman*, 19 Conn. 177; *Bean v. Barnum*, 21 Conn. 200; *Bonnell v. Chamberlin*, 26 Conn. 487; *Rose v. Persse etc. Paper Works*, 29 Conn. 267; *Aborn v. Rathbone*, 54 Conn. 444.

5. Under the *Alabama Code*, §§ 3039-40, receipts whether under seal or not, if made in good faith, are valid and operate according to the intention of the parties, but may be shown to have been given under a mistake of fact or obtained by surprise, undue influence or misrepresentation or concealment, or avoided for any cause sufficient in equity to invalidate and set aside a contract. *Cleere v. Cleere*, 52 Ala. 581.

6. § 3807 of the *Georgia Code* provides that receipts for money are only *prima facie* evidence of payment.

itself a complete and perfect *prima facie* defense,¹ and the effect of a receipt, or of a receipt in full, is a question of intention for the jury to determine.² Receipts may thus, under circumstances, operate as the evidence of an accord and satisfaction,³ or a compromise and settlement⁴ between the parties, or by way of discharge⁵ or release⁶ of a particular claim or cause of action, and they must then come within the particular provisions relating to such agreements.

4. Conclusiveness of Receipt in a Contract—*a*. AS TO TERMS OF SUCH CONTRACT.—Where the writing is both a receipt and a contract, the receipt is open to explanation, but the contract does not merge in the receipt and cannot be contradicted or varied by parol evidence, except as other contracts may be. The receipt is, therefore, in so far as it is the evidence of a contractual obligation, conclusive between the parties.⁷

1. Guyette v. Bolton, 46 Vt. 228.

2. Randolph on Com. Paper, § 1519; The Charlotte v. Hammond, 9 Mo. 59; Sutton v. The Albatross, 2 Wall. Jr. (C. C.) 327. But where there is reason to believe that the party receiving the money and giving the receipt understood it in one way, and the party paying the money and taking the receipt understood it in another way, the language being ambiguous, it ought to be construed as understood by the party taking it, especially if the circumstances will justify the inference that the other party knew that he so understood it. Elting v. Sturtevant, 41 Conn. 182.

3. Where a party makes an offer of a certain sum to settle a claim where the sum in controversy is open and unliquidated and attaches to his offer the condition that the same if taken at all must be received in full, or in satisfaction of the claim in dispute, and the other party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction, even though the party at the time of receiving the money, declare that he will not receive it in that manner, but only in part satisfaction of his debt so far as it will extend. McDaniel v. Lapham, 21 Vt. 222. Vedder v. Vedder, 1 Deh. (N. Y.) 257; a receipt in full of all demands, is no bar to a subsequent action, if given without any consideration. If given upon an actual part payment, it would show an accord and satisfaction. Riley v. White, 6 N. Y. Leg. Obs. 272.

4. A charge that if a receipt for services, not under seal, was a settlement, and so intended, plaintiff could not go

behind it, was held correct. Ashley v. Hendee, 56 Vt. 209; Ruby v. Railroad Co., 8 W. Va. 269; Whiteman v. The Neptune, 1 Pet. Adm. 180.

5. A receipt in full of all damages containing an agreement upon a compromise or settlement of disputed claims or unliquidated damages, that the one party is to receive or accept a certain sum in full acquittance and discharge of such claims, is a contract and is not liable to be contradicted by parol, and is conclusive upon the parties in the absence of fraud or mistake. Cummings v. Baars, 36 Minn. 350.

6. A receipt acknowledging the payment of a sum of money in full, for damages resulting from an injury for which the person paying it was responsible, is not a simple receipt which can be varied by parol, but is in effect, a release from all liability occasioned by the injury unless shown to have been obtained by fraud. Coon v. Knapp, 8 N. Y. 402.

A writing "In consideration of \$2,500 to me paid by M. Goodwin, executrix of said will, I hereby waive all right to contest said will or the parol thereof, and all claim I have or might have as heir of said deceased. E. Goodwin," partakes of the character both of a receipt and a contract and may be varied by evidence so far as it is a receipt; but the contract has one distinct meaning in reference to the circumstances of the case, and evidence that the signer intended to express some other meaning is not admissible in absence of fraud. Goodwin v. Goodwin, 59 N. H. 548.

7. Wayland v. Mosely, 5 Ala. 430; 39 Am. Dec. 335; Annan v. Merritt, 13

b. PURPOSE FOR WHICH PAYMENT IS MADE.—A receipt given for a specific purpose cannot be used for a different purpose, in violation of the object for which it was given.¹ A receipt containing in its terms an expression of the intention of the parties, is to such an extent a written contract, which cannot be varied by parol evidence.² Where the purpose for which it

Conn. 478; *Henry v. Henry*, 11 Ind. 236; *Dale v. Evans*, 14 Ind. 288; *McKernan v. Mayhew*, 21 Ind. 291; *Kurtz v. Craig*, 53 Ind. 561; *Alcorn v. Morgan*, 77 Ind. 184; *Stapleton v. King*, 33 Iowa 28; 11 Am. Rep. 109; *Thompson v. Williams*, 30 Kan. 114. A receipt given for a note for collection does not amount to a covenant to pay over the sum due thereon when collected. *Wenzell v. Breckenridge*, 3 Dana (Ky.) 482; but the law implies an agreement to pay over in a reasonable time after it is collected, on which *indebitatus assumpsit* will lie. *Atchison v. Talbott*, 5 Dana (Ky.) 325. *Bursley v. Hamilton*, 15 Pick. (Mass.) 40; 25 Am. Dec. 423. Where the payee of a promissory note, not negotiable, for \$120, delivered it to a third person and took the following writing: "Received of A a note (describing it) for which I am to collect and account to the said A the sum of \$110, when the above note is collected, or return said note back to A if I choose," it was decided that parol evidence, which was offered to show that the note was held on different or other terms, is not admissible. *Langdon v. Langdon*, 4 Gray (Mass.) 186. *James v. Bligh*, 11 Allen (Mass.) 4; *Fay v. Gray*, 124 Mass. 500. "Received of J W \$425, in American gold, to be loaned out, we to account to him for the principal and interest, less our charges, not to exceed 2½ per cent. *per annum*," is a receipt which fixes the relation of the parties, and cannot be varied by parol. *Wykoff v. Irvine*, 6 Minn. 496. *Sencerbox v. McGrade*, 6 Minn. 484; *Knoblauch v. Kronschnabel*, 18 Minn. 300; *Morris v. St. Paul etc. R. Co.*, 21 Minn. 91; *Carpenter v. Jamison*, 75 Mo. 285. A writing stating that a note was received "on account without recourse," is not within the rule allowing parol evidence to vary or explain a receipt, which is limited to a technical receipt, in the strict sense, and not to a clause in the nature of a contract. *Graves v. Friend*, 5 Sandf. (N. Y.) 568. *Townsend v. Fisher*, 2 Hilt. (N. Y.) 47; *Green v. Rochester Iron Mfg. Co.*, 1 Thomp. & C. (N. Y.) 5;

Wilson v. Derr, 69 N. Car. 137; *Stone v. Vance*, 6 Ohio 246; *Bird v. Hueston*, 10 Ohio St. 418; *Davison v. Davis*, 125 U. S. 90; *Tuley v. Barton*, 79 Va. 387; *McGregor v. Bugbee*, 15 Vt. 734; *Harrison v. Juneau Bank*, 17 Wis. 351; *Schultz v. Coon*, 51 Wis. 416.

See also *Jones on Com. & Trade Contr.*, § 187; *Greenl. on Ev.*, § 305.

1. *Tucker v. Baldwin*, 13 Conn. 136; 33 Am. Dec. 384; *Bishop v. Perkins*, 19 Conn. 300. A receipt given in full satisfaction of a certain judgment, therein specified, and also of "all claims and demands," will not avail against another suit, pending between the same parties, and not intended by them to be included in the receipt. *Grumley v. Webb*, 44 Mo. 444; 100 Am. Dec. 304.

2. A writing stating that the money received is to be applied to the account of the person from whom it was received, partakes of the double nature of a receipt and a contract. *Ashley v. Vischer*, 24 Cal. 322; 85 Am. Dec. 65.

A receipt for a sum of money received "on a decree" specified does not purport to be for the principal or any part of the interest, but simply for so much on the decree. It speaks for itself; and parol evidence of what it was intended to cover is not admissible. *Hull v. Butler*, 7 Ind. 267.

In the following writing: "Rec'd Vincennes, Sept. 14th, 1822, of P. Tisloe, 200 dollars for safekeeping," the defendant could not introduce parol testimony to prove that the money was not deposited for safekeeping, but was paid in discharge of a debt. *Tisloe v. Graeter*, 1 Blackf. (Ind.) 353.

Where the receipt is to be construed as an agreement that the money was received in satisfaction of plaintiff's claim for damages, it is more than a mere receipt and is conclusive between the parties. *Brown v. Cambridge*, 3 Allen (Mass.) 474.

In the following writing: "Received from B his 90-day note for \$300," on the question whether the note was appropriated on a joint or on a several account, an instruction that the receipt

was given is not thus inserted it may be proved by evidence *aliunde*.¹

c. TO SUPPORT THE CONTRACT—(1) *Deed*.—Where a deed contains a receipt, parol evidence is not admissible to contradict the receipt in any form of action where the effort is to avoid the deed.² The same principle does not apply to an action by the grantor for purchase money which it is claimed was never paid,

was silent and had no legitimate bearing one way or the other, was held not to be erroneous. *Hunt v. Brewer*, 68 Me. 262.

Where the receipt expresses in terms the manner in which the money is to be appropriated, it cannot on principle and authority be contradicted in that respect. *Egleston v. Knickerbacker*, 6 Barb. (N. Y.) 458.

"Received of G the following orders or demands for collection, and to be paid over to G or his order, on the first day of November, or as soon thereafter as collected," is more than a mere receipt. It is an agreement by which the receipt of the demand for collection is admitted and a stipulation given that the avails shall when collected be paid over to the plaintiff's assignor or to his order. The parties had the right to make this arrangement in regard to these demands, and the defendant having entered into it cannot contradict or vary it by parol, and show that he received them, not for the purpose expressed, but for some other entirely different one. *Wood v. Whiting*, 21 Barb. (N. Y.) 190.

A receipt for \$500, "in full of all matters between us from the beginning of the world to this date," is not to be limited to any particular claims unless, in addition to the general words, a particular claim is specified. *Randall v. Reynolds*, 52 N. Y. Super. Ct. 145.

Where the plaintiffs acknowledge by indorsement on the note that on a compromise with the defendants, they received the security "for the full payment of their note," it is something more than a receipt. Had it been intended as nothing more than a technical receipt for so much paid, or secured to be paid, the language would have been different. "As a compromise for the full payment of this note" is language altogether inconsistent with such an intent, and is too plain and explicit to be misunderstood. The admission of parol evidence to vary or contradict a receipt must not be extended beyond the

spirit of the terms in which it is expressed, and must be confined to the case of a receipt in the strict sense of the term. *Kellogg v. Richards*, 14 Wend. (N. Y.) 116. (But compare with this case *Horton's Appeal*, 38 Pa. St. 294.) *Kirkpatrick v. Smith*, 10 Humph. (Tenn.) 188.

1. See *supra*, this title, *How Affected by Parol Evidence*.

2. See under DEEDS, vol. 5, p. 436. "Receipt in the body of the deed was not, before 1882, conclusive in equity, but was before the Supreme Court of Judicature Act, 1873, came into operation, conclusive at law, that the purchase money was paid. But the receipt in the body of, or indorsed on a deed made since 1881, is conclusive in favor of a subsequent purchaser without notice. See the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., ch. 41, § 55)." *Elphinstone Interpret. of Deeds* 150, and cases. *Harding v. Hamblar*, 3 M. & W. 279; *Rowntree v. Jacob*, 2 Taunt. 141; *Baker v. Dewey*, 1 B. & C. 704; *Coppin v. Coppin*, 2 P. W. 291; *Hawkins v. Gardiner*, 2 Sm. & G. 441; *Winter v. Lord Anson*, 3 Russ. 488; *Wilson v. Keating*, 27 Beav. 121; *Morgan's Pat. Anchor Co. v. Morgan*, 35 L.T., N. S. 811; *Meakings v. Cromwell*, 2 Sandf. (N. Y.) 512; *Merriam v. Harsen*, 2 Barb. Ch. (N. Y.) 232; *Childs v. Barnum*, 11 Barb. (N. Y.) 14; *Gout v. Townsend*, 2 Den. (N. Y.) 336; *Stackpole v. Robbins*, 48 N. Y. 665. "It seems that in *England*, if a deed of conveyance distinctly states in the operative part that the consideration money has been received, and the estoppel is properly pleaded, the fact of payment, and the amount paid, are conclusively presumed, although a receipt indorsed upon the deed will not of itself amount to an estoppel. In *America*, though the party is estopped from denying the conveyance, and that it was for a valuable consideration, the weight of authority is in favor of treating the statement in the deed as only *prima facie* evidence of the amount

or only paid in part; nor to an action by the grantee to recover back the consideration.¹

(2) *Fire and Life Insurance*.—In accordance with the principle just referred to in its application to deeds, the receipt of an insurance company acknowledging the payment of premium is so conclusive against the company as to prevent it from averring or showing non-payment for the purpose of denying that the contract ever had any legal existence. A delivery of the insurance policy with such a receipt, is conclusive upon the insurer in an action to enforce the policy.² In an action for the premium, however, or to recover it, the receipt contained in the policy is open to explanation by parol evidence.³

(3) *Marine Insurance*.—An acknowledgment by an agent of the receipt of the premium in a policy of marine insurance is ordina-

paid, in an action of covenant by the grantee to recover back the consideration, or in an action by the grantor to recover the price which is yet unpaid." Taylor on Ev. § 96.

1. See *supra*, this title, *How Affected by Parol Evidence*.

2. In *Basch v. Humbolt Mutual F. & M. Ins. Co.*, 35 N. J. L. 429, the court by Beasley, C. J., said: "The policy of insurance executed by the president and secretary of the company, contains a formal acknowledgment of the payment of the premium in question, and, in my opinion, this should prevent the defendants from averring or showing non-payment for the purpose of denying that the contract ever had any legal existence. What does this receipt, in its connection with the delivery of the instrument, import, if it does not mean that the payment of the premium is conclusively admitted to the extent that such payment is necessary to give vitality to the contract? Unless this be its meaning, it serves no legal office, for it does not mean that the money has been actually received. It is true that there is an express declaration that the policy is to have no effect, until the premium shall have been paid; but in this same instrument is an equally express statement that the act on which the contract is to become efficacious, has been done. Such an acknowledgment appears to be analogous, and equivalent to the acknowledgment of the receipt of a valuable consideration in a conveyance operative by force of the Statute of Uses, such acknowledgment being always considered conclusive for the purpose of giving a legal

force to the transaction. The usual legal rule is, that a receipt is only *prima facie* evidence of payment, and may be explained; but this rule does not apply when a question involved is not only as to the fact of payment, but as to the existence of rights springing out of the contract. With a view to defeating such rights the party giving the receipt cannot contradict it. An acknowledgment of an act done contained in a written contract, which act is requisite to put it in force, is as conclusive against the party making it as is any part of the contract; it cannot be contradicted or varied by parol."

See also *Miller v. Life Ins. Co.*, 12 Wall. (U. S.) 285; *Fellowes v. Madison Ins. Co.*, 2 Disney (Ohio) 128; *Hemmenway v. Bradford*, 14 Mass. 121; *Goit v. National Prot. Ins. Co.*, 25 Barb. (N. Y.) 189.

In *Illinois* the court decided that insurance companies, on the ground of public policy, will be estopped to prove for the purpose of avoiding the contract of insurance, that the premium acknowledged in the policy to have been paid, was not in fact paid. *Illinois Central Ins. Co. v. Wolf*, 37 Ill. 354; *Providence Ins. Co. v. Fennell*, 49 Ill. 180; *Teutonia Ins. Co. v. Anderson*, 77 Ill. 384.

The question of receipt of payment as acknowledged in the insurance contract is more generally involved in the question whether payment of premium has been waived. For this see under *INSURANCE*, vol. II, p. 308.

3. Authorities in point will be found *supra*, this title, *Where the Receipt is a Part of a Contract*.

rily conclusive of the fact stated,¹ but not as between underwriter and broker.² The rule arises from the method of keeping accounts between the broker and the assured.³

1. Bigelow on Estoppel (4th ed.) 540; Arnould on Ins. (4th ed.) 180, 181; 2 Wharton Ev., § 1065 (3d ed.); 3 Kent's Com. 260.

2. *Dalgell v. Moir*, 1 Camp. 532 per Lord Ellenborough; *Anderson v. Thornton*, 8 Exch. 428, per Parke, B.; *Fry v. Bell*, 3 Taunt. 493.

3. Arnould on Ins. (4th ed.) 179.

Insurances on vessels are often, if not ordinarily, effected by brokers, for and on account of the owners; and these brokers have accounts and a course of dealing, both with the underwriters and the assured. In *Dalgell v. Moir*, 1 Campb. 532, the defendant had underwritten a policy by one Reid, a broker, on account of the plaintiff. The plaintiff received the policy, thus underwritten, in payment of a debt due him from Reid, and without advancing any money for it. Reid had a running account with the defendant, and had not paid him any of the premium. The action was for a return of the premium. Lord Ellenborough said at the trial: "If a man acknowledges that he has received a sum of money from a broker, referring to the receipt in the policy, and accredits him with his principal, to that amount, he shall not afterward, as between himself and the principal, be allowed to say that the broker never paid him." That rests upon the law of principal and agent and the effect of the dealings with the agent. *Fry v. Bell*, 3 Taunt. 493, and *Mavor v. Simeon*, 3 Taunt. 497, were also cases growing out of transactions with brokers. The latter case was compromised and not decided, but the former was taken out of the general rule, by fraud perpetrated or attempted by the insured through the broker upon the insurers. *De Gaminde v. Pigon*, 4 Taunt. 246, was a case which shows the special circumstances upon which the rule is founded, and to which it is applicable. That was an action on a marine policy for a loss of one vessel, and for return premium on another. The plaintiff, who lived at Alicante, was not known to the defendant as being concerned in the insurance, which was effected by the plaintiff's factors in London. They obtained the insurance of one Wagstaff, an insurance broker, who debited the plaintiff's correspondence in account,

and they in like manner debited him. Wagstaff then credited the defendant in his accounts, but no money had passed between any of these parties, and both plaintiffs, London agents, and Wagstaff had failed. The court held that as between the plaintiff and defendant, the premium was paid, and the defendant must look to the broker, Wagstaff. Heath, J., said: "When the assured is admitted to have paid the premiums, it is, as between the assured and the underwriters, actually paid. The admission of the receipt of the premium is an admission that it shall be allowed by the underwriter in account, and how that account stands between these parties we do not know, for it is not stated in this case, but it must be allowed in account by the broker to the underwriter." It will be seen that all these cases turn on a different principle from that which they are sometimes invoked to sustain. When the contract is made by the insured, in his own name, directly with the underwriters or insurance company, through their agent or officer, I am unable to see why an acknowledgment of the receipt of the premium contained in the policy or contract of insurance is governed by any different rule from other receipts. If the insurance company have been credited with it in account by their agent, or if it has, in fact, been paid to him, no doubt it is a sufficient payment to them. In any case the delivery and possession of a policy containing a receipt for the premium afford evidence of its payment, or of a waiver of its prepayment, but it is not conclusive, nor does it operate as an estoppel either in favor or against the insurers. *Sheldon v. Atlantic Ins. Co.*, 26 N. Y. 640, to some purposes a premium is considered paid although there has been only a promise to pay it, for instance, to enable the insured to recover it back, when the underwriter has no right to retain it, this is because the underwriter has the right to compel the payment of it upon the note; and has in his possession the evidence of the promise to pay, which may exist after a judgment to the prejudice of the assured, the underwriters are prevented, in such cases, from saying they have not received the premium; their acknowl-

5. Binding by Way of Estoppel.—A receipt may, when acted upon without knowledge of the facts by third parties, estop the party who gave it from denying its purport.¹ Under circumstances which would create an estoppel by conduct a receipt may become binding between the parties.²

IX. RECEIPT OF THIRD PARTIES.—Although a receipt acknowledging payment is evidence of such payment against the maker of it, it is not such evidence as against other persons.³

X. VALUE AS EVIDENCE.—A receipt is evidence of the most satisfactory kind. To do away with its force the testimony should be

edgment of that fact operating *quasi* an estoppel. *Russell v. De Grand*, 15 Mass. 35.

1. *Bigelow on Estoppel* (4th ed.) 540; *Wharton on Ev.* (3rd ed.), § 1066.

Receipts for purchase money may bind the party receipting as to purchasers without notice, and yet be open to explanation between the parties. *Leake* (2d ed.) 905.

Where A mortgaged goods to B for £250, acknowledging receipt of that sum in the mortgage deed, and signing a receipt therefor indorsed upon the mortgage and soon thereafter B transferred the mortgage to C for the full value of £250, C taking the same without notice that A had in fact not received the amount named, it was held that A could not claim against C that he had not received £250 from B. *Bickerton v. Walker*, 31 Ch. Div. 151. *Kennedy v. Green*, 3 M. & K. 609; *Hunter v. Walters*, L. R., 7 Ch. 75; *Knight v. Wiffen*, L. R., 5 Q. B. 666; *Wyatt v. Hertford*, 3 East 147; *Jenkins v. Power*, 6 M. & S. 287; *Turner v. Flinn*, 72 Ala. 532; *Carr v. Miner*, 42 Ill. 179; *Miller v. Sullivan*, 26 Ohio St. 639. A party accepting a receipt for money paid, which he knew he had not paid, cannot set it up as an estoppel against the party giving it. *Brown v. Massachusetts Mut. L. Ins. Co.*, 59 N. H. 298; 47 Am. Rep. 205. *Armour v. Michigan etc. R. Co.*, 65 N. Y. 111; 22 Am. Dec. 603.

Where a party gives a receipt or writing, and knows, at the time he is giving it, that the same is untrue (as in the case of a receipt expressed to be for cash when notes were given instead), he gives it with the understanding that it may be acted upon and used against him by third persons without notice, as if it were true. *Baker v. Union L. Ins. Co.*, 37 How. Pr. (N. Y.) 126.

The receipt of a public officer may in the like manner be an estoppel as against vendees with notice. *Halsey v. Blood*, 29 Pa. St. 319.

But that money receipted was not in fact, paid, may be shown, even against an innocent third person who relied upon the receipt without inquiry. *Traveler's Ins. Co. v. Chappelow*, 83 Ind. 429. And the fact that the grantor of land has a receipt from the city treasurer for the taxes assessed thereon in a certain year will not estop the city from asserting that a portion of the taxes for that year were unpaid, as against the grantee who did not know of such receipt when he purchased the land. *Marco v. Fond du Lac Co.*, 63 Wis. 212.

2. *Oregonian R. Co. v. Oregon R. etc. Co.*, 10 Sawy. (U. S.) 464; *Bleven v. Freer*, 10 Cal. 172; *Dresbach v. Minnis*, 45 Cal. 223; *Gaff v. Harding*, 66 Ill. 61.

In the case of a receipt given to an attaching officer, with knowledge, for goods attached as the property of a third person, whereby the officer is prevented from levying upon other goods and induced to leave those attached in the possession of the receiptor. *Sewey v. Field*, 4 Neb. 381. *Rice v. Crow*, 6 Heisk. (Tenn.) 28; *Wharton on Ev.*, § 1066 (3d ed.).

3. A receipt offered to prove that a certain sum of money paid to the plaintiff by a third person was paid on account of the defendant cannot be admitted for this purpose when the third party is alive and may be examined. *Jordan v. Wilkins*, 3 Wash. (U. S.) 110.

The giver of a receipt should be personally a witness. *Davidson v. Berthoud*, 1 A. K. Marsh. (Ky.) 354; it cannot be admitted upon proof of handwriting. *Roll v. Maxwell*, 5 N. J. L. 493. See also *Ford v. Smith*, 5 Cal.

clear and convincing;¹ and the burden of proof rests upon the party attempting the explanation.² Where the evidence of each side is entitled to the same amount of weight, the receipt will stand,³ but what the explanation does prove in the end is a question for the jury to decide and not for the court.⁴

XI. MISCELLANEOUS PROVISIONS—1. Statute of Frauds.—All that is required of the Statute of Frauds is some memorandum in writing signed by the party to be charged or affected. A receipt may be such a memorandum.⁵

314. (But compare *Locke v. Porter G. & S. Min.*, 41 Cal. 305; *Davis v. Shreve*, 3 Litt. (Ky.) 260; *Leatherbury v. Bennett*, 4 Har. & M. (Md.) 392; *Cutbush v. Gilbert*, 4 S. & R. (Pa.) 551; *English v. Hannah*, 4 Watts (Pa.) 424.

1. The bare allegation of a party that he never received the goods without any further explanation tending to explain how he came to make a formal admission of their receipt will not set the receipt aside. *Chapman v. Railroad Co.*, 7 Phila. (Pa.) 204; and where the receipt is attacked on ground of mistake, plaintiff ought to be able to show in what the mistake consists. *Nicholson v. Frazier*, 4 Harr. (Del.) 206; so after a lapse of years a receipt should only be set aside for weighty reasons. *Harris v. Hay*, 111 Pa. St. 562. A receipt stating money to have been received under a certain contract is *prima facie* evidence that it was received under the contract mentioned. The party contradicting the receipt must show the contrary, but he is not bound to show how the misstatement occurred. *U. S. v. Jones*, 8 Pet. (U.S.) 399. See also *Harden v. Gordon*, 2 Mason (U.S.) 561; *Winchester v. Grosvenor*, 44 Ill. 425; *Rosenmueller v. Lampe*, 89 Ill. 212; 31 Am. Rep. 74; *Vigus v. O'Bannon*, 118 Ill. 334; and in a receipt in the following form: "Received in various payments at this date" the burden of proof is on the plaintiff to show that it meant "up to" that date. *Moore v. Korty*, 11 Ind. 341. *Chandler v. Schoonover*, 14 Ind. 324; *Levi v. Karrick*, 13 Iowa 344; *Lee v. Fraternal Mut. Ins. Co.*, 1 Handy (Ohio) 217; *Gleason v. Sawyer*, 22 N.H. 85; *Gibson v. Potter*, 30 N. J. Eq. 204; *Danziger v. Hoyt*, 120 N. Y. 190; *McDowall v. Lemaitre*, 2 McCord (S. Car.) 320.

2. *Jackson v. Sacramento etc. R. Co.*, 23 Cal. 269; *Winchester v. Grosvenor*, 44 Ill. 425; *Moore v. Korty*, 11 Ind.

341; *Gray v. Lonsdale*, 10 La. Ann. 749; *Guyette v. Bolton*, 46 Vt. 228; *Lyons v. Williams*, 15 Ill. App. 27; *Lawrence v. Schuylkill Nav. Co.*, 4 Wash. (U. S.) 562.

3. *Borden v. Hope*, 21 La. Ann. 581.

A receipt in full can only be overcome by a preponderance of evidence. *Neal v. Handley*, 116 Ill. 418.

4. *Taylor on Ev.*, § 859; *Burton v. Merrick*, 21 Ark. 357; *City Bank v. Kent*, 57 Ga. 283; *Herkimer v. Nigh*, 10 Ill. App. 372; *Smith v. Cedar Falls etc. R. Co.*, 30 Iowa 244; *McGrann v. Pittsburgh etc. R. Co.*, 111 Pa. St. 171; *Bell v. McDonald*, 9 Tex. 378; and the court should set aside a verdict for the plaintiff when the jury awarded him the full amount claimed in disregard of his own receipt for part of the sum. *New Jersey Flax etc. Co. v. Mills*, 26 N. J. L. 60; *Brooks v. White*, 2 Met. (Mass.) 283; 37 Am. Dec. 95.

It is for the jury to decide what is meant by "teety-seven dollars" in a tax receipt containing also a column headed "total tax" which footed up in figures "\$27." *Daniels v. Burso*, 40 Ill. 307. *Orton v. Noonan*, 25 Wis. 672.

The court cannot undertake to say that a paper, purporting to be a receipt, may not bear marks, or evidence on its face, conclusive to show that it is not a genuine receipt, although the signature attached to it may be in the handwriting of him whose receipt it purports to be. *Aday v. Echols*, 18 Ala. 353; 52 Am. Dec. 225.

5. *Grumley v. Webb*, 48 Mo. 562; *Browne Stat. of Frauds*, § 346; *Wood Stat. of Frauds*, § 362; *Blegden v. Beadbear*, 12 Ves. 466; *Emmerson v. Heelis*, 2 Taunt. 38; *Gobell v. Archer*, 2 A. & E. 500; 29 E. C. L. 129; *Evans v. Prothern*, 1 DeG. M. & G. 572.

A receipt for purchase-money of real estate may be sufficient agreement under Statute of Frauds, provided it show on its face, or by reference to

2. Statute of Limitations.—A receipt containing a promise to apply proceeds to account of holder, is a contract in writing within four years' limitation; but a receipt for money paid, is not a contract in writing, and an action for such money is barred in two years.¹

3. Ancient Documents.—The law also recognizes a conclusive presumption in favor of the due execution of ancient receipts. When these instruments are thirty years old and are unblemished by any alterations, they are said to prove themselves. Their bare production is sufficient.²

For other miscellaneous cases see note 3.

some other instrument, every material part of a valid contract on the subject; not otherwise. *Barickman v. Kuykendall*, 6 Blackf. (Ind.) 21.

In *Williams v. Morris*, 95 U. S. 444, the receipt was not sufficient to operate as such memorandum. See also *Ellis v. Deadman*, 4 Bibb (Ky.) 466.

A simple receipt, not under seal, for the purchase-money of land, is not sufficient, under the Statute of Frauds, to divest the interest of the vendor. *Mason v. Ammon*, 117 Pa. St. 127.

1. *Ashley v. Vischer*, 24 Cal. 322; 85 Am. Dec. 65.

A written receipt for "\$1,600 received on deposit in national currency" implies a promise to pay, and an action thereon is not limited to six years. *Long v. Strauss*, 107 Ind. 94; 57 Am. Rep. 87.

Receipts on a note are presumptive evidence of payments; it is for the jury to decide whether they were indorsed in order to take the debt out of the Statute of Limitations. *Gibson v. Peebles*, 2 McCord (S. Car.) 418.

2. *Taylor on Ev.* §§ 87, 88; *Bertie v. Beaumont*, 2 Price 308; *Settle v. Alison*, 8 Ga. 201; 52 Am. Dec. 393.

Receipts for taxes over thirty years old are admissible in evidence without proof of execution. *Blackwell on Tax Titles*, § 836 (5th ed.); *McReynolds v. Longenberger*, 57 Pa. St. 13.

A receipt on account of a bond for the exact amount due, cannot be lightly questioned by circumstantial evidence, after the lapse of more than twenty years. *Robert v. Garnie*, 3 Cal. (N. Y.) 14. See also ANCIENT DOCUMENTS, vol. I, p. 565.

3. If the contents or mode of signature of a receipt are to be proved, it must be produced or accounted for, so as to let in secondary evidence. *Romayne v. Duane*, 3 Wash. (U. S.) 246; *Van Ness v. Hadsell*, 54 Mich. 560; and

where a receipt is produced the whole document is in proof, and one part cannot be considered and the other part rejected. *Butler v. The Arrow*, 6 McLean (U. S.) 470.

Receipt for purchase money at foot of deed is evidence without further proof than the acknowledgment of deed. *Kelly v. Dunlap*, 3 P. & W. (Pa.) 136.

A conditional receipt is not admissible to support a plea of a positive settlement or payment. *Yeuren v. Smalley*, 3 Vt. 251.

The genuineness of receipts, offered to prove payment, by one plaintiff to another and similar instruments is to be presumed from the experience of human conduct in the common transactions of business. *Wooten v. Nall*, 18 Ga. 609. And where it was the general custom of a mill to give a receipt, in the absence of proof to the contrary there is a presumption that a receipt was given. *Ashe v. DeRosset*, 8 Jones (N. Car.) 240.

It is not necessary for a party to deny the execution of a receipt, under oath, before the party can contradict or vary it. *Ditch v. Vollhardt*, 82 Ill. 134.

A receipt, signed by a subscribing witness, may be proved by that witness. *Heckert v. Haine*, 6 Binn. (Pa.) 16.

Where a party offers a receipt in evidence as signed by a person who fails to establish the fact, he shall not be permitted to prove it to be the signature of another person. *Beake v. Birdsell*, 1 N. J. L. 12.

The receipts of persons without the commonwealth are admissible, on proof of their handwriting, as evidence of charges in a guardianship account of payments to such persons. *Shearman v. Akins*, 4 Pick. (Mass.) 283.

The natural inference from the fact that a receipt in full written across the

RECEIVE.—See note 1.

face of a note bears no date (unless a different occasion can be clearly assigned to it) that it took effect from the latest credit. *Chapman v. Smoot*, 66 Md. 8.

A brought his bill, alleging a purchase of a 100-acre entry from B, but exhibited no deed, but merely a receipt from B, acknowledging payment by A for 100-acre entry. It appearing that B had previously bought of A an entry of that description, and afterwards restored it. *Held*, that it should be inferred that the receipt was given on restoring that entry. *Kendal v. Baird*, 1 A. K. Marsh. (Ky.) 75.

The assignee by deed of a legacy by the legatee, brought suit to recover the same from the executors, who set up in defense in full for the legacy, made by the legatee, and prior in date to the assignment. *Held*, that the receipt was not evidence against the assignee, without proof that it was in fact executed before the deed and that the date of the receipt was not even *prima facie* evidence of the time of its execution. *Wilcox v. Pearman*, 9 Leigh (Va.) 144.

And if a tax receipt does not specify the year for which the taxes were paid such omission may be supplied by parol evidence. *Elston v. Kennicott*, 46 Ill. 187.

1. **Receive.**—"Receive," as used in a statute against fraudulent conveyances, which was worded as follows: "Any one suspected of having fraudulently received, etc., any of the money, goods, effects, or other estate," etc., was held to apply to the obtaining of real estate as well as personal property. *Harlow v. Tufts*, 4 Cush. (Mass.) 453.

A resolution of a county board of supervisors accepted the plans of an architect for a jail, upon condition that they should "receive" a bid from a reliable party, who would give sufficient bonds to erect the jail in conformity with the plans for a specified sum. It was held that "receive" in this connection was not equivalent to "accept," and that the condition was satisfied if the board found a reliable party who was willing to give the bond and do the work, although they refused his bid. *Hall v. Los Angeles Co.*, 74 Cal. 502.

The Statute of 4 Anne.—The statute (4 Anne, ch. 16, § 27) provides that

"actions of account shall and may be brought and maintained . . . by one joint tenant and tenant in common . . . against the other, as bailiff for receiving more than comes to his just share or proportion," etc.

In *West v. Meyer*, 46 Ohio St. 66, plaintiff in error contended that the statute did not authorize a recovery by the out-tenant against the tenant in possession for the value of the mere use and occupation of the joint estate. The court by Owens, C. J., said: "The leading English case which holds that mere use and occupation by a tenant in common did not create a liability against him to his co-tenant, is *Henderson v. Eason*, 17 Ad. & E., N. S. 718; 79 E. C. L. 717. The court says: 'It is to be observed that the statute does not mention lands or tenements or any particular subject. Every case in which a tenant in common receives more than his share is within the statute. An account will lie when he does receive, but not otherwise. It is to be observed also that the receipt of issues and profits is not mentioned, but simply the receipt of more than comes to his share; and, further, he is to account when he receives, not takes, more than comes to his just share.' . . . A different view was taken of the same question in *Thompson v. Bostick*, 1 McMull. Eq. (S. Car.) 75, where the court says that 'to cultivate and have use of lands is to receive the rents and profits, though the occupier is his own tenant,' etc. In *Early v. Friend*, 16 Gratt. (Va.) 47, the judge, speaking for the court, says: 'With all deference to the court of exchequer chamber, I think the construction they put upon the word "receiving" is too technical and narrow, at least for our country. . . . I do not see the force of the distinction drawn by the court between the words "receive" and "take" in this connection. I think the word "receiving," in the statute, literally means a receiving of profits as well by use and occupation as renting out the property.' This view is taken in *Shiels v. Stark*, 14 Ga. 435, and in a recent case in *Vermont*, *Hayden v. Merrill*, 44 Vt. 348." But the court held it unnecessary to decide upon the question as the statute of *Ohio* differs materially from the statute of *Anne*. See generally upon the question of the liability of a joint tenant or tenant in common to

account to his co-tenant for the use and occupation of the common property, *JOINT TENANTS*, vol. 11, p. 1098.

Effect of "Received" in a Contract.—

An instrument, signed by C, stated that C "received" of S certain trees, grape roots, etc., specifying the number and price of each kind, and the total value. It was delivered by C to S, who indorsed thereon the payment of part of such aggregate value. It was held, that the word "received" in such an instrument, fixing specifically the price of each article and the sum total of the whole, has the same legal effect as the word "bought," with the additional acknowledgment of a delivery of the property; that the instrument was not a mere receipt, but a contract of sale, the terms of which could not be varied by parol. *Schultz v. Coon*, 51 Wis. 418; 37 Am. Rep. 839. See generally *RECEIPTS*.

Received in the Sense of Approved.—

In *Gwynn v. Richardson* (Miss. 1888), 3 So. Rep. 579, a supervisors' vote ordered that the tax roll "be received, and the clerk will certify copies thereof to the auditor as the law directs." It was held that this order sufficiently shows an approval of the roll by the board. The court by Cooper, C. J., said: "The context clearly shows that the word 'receive' is not used to indicate only that the board has accepted the custody of the roll, but that its meaning is that the board adopted it, as corrected by them, as a completed, approved roll."

In a Charter-party.—Where a charter-party provides that the bills of lading shall be "conclusive evidence of the amount of cargo received," "received" means "shipped on board." *Lishman v. Christie*, 19 Q. B. Div. 333, which, as nearly as possible, overrules *Pyman v. Burt*, Cab. & El. 207.

INDEX.

Pre-emption. See Public Lands

Prescription, 7

Adverse user, 11

Distinction between and custom, 10

In corporate franchises, 29

In highway, 25

In light and air, 27

In miscellaneous easements, 29

In private way, 25

In right of way over railroad, 26

In right to water, 27

Lateral support, 28

Pleading and evidence, 30

Right of fishery, 25

Right of pasturage, 25

Theory of, 7

Title to office, 39

To what applicable, 24

When may not exist, 30

President, 32

Election, 32

Powers, 33

Presumptions, 36

Accumulative, 57

As between trustee and beneficiary,

55

Burden of proof, 61

Classification, 39

Conflicting presumptions, 40, 59

Definition, 38

Distinctions, 57

From adverse possession, 41

From alteration of testimony, 68

From fabrication of testimony, 72

From holding back proof, 70

From spoliation of documents, 69

General rules concerning, 39

In case of business transactions, 52

In case of foreign laws, 46

In favor of ancient documents, 55

In favor of official acts, 43

Mixed presumptions, 59

Of arrival of letters, 80

Of conduct, 78

Of continuance of life, 74

Of corporate existence, 52

Of correctness in dates, 50

Of coverture, 77

Of death, 46

Of easement, 54

Of fact, 56

Of formalities of documents, 51

Of grant, 42, 81

Of guilt, 73

Of infantile incapacity, 45

Of innocence, 45

Presumptions—*Continued*

Of legitimacy, 48

Of malice, 65

Of membership of profession, 52

Of negligence, 67

Of occupancy, 76

Of payment, 55

Of regularity of divorce, 48

Of regularity of marriage, 47

Of regularity of official appointment,

79

Of regularity of proceedings, 49

Of residence, 76

Of sanity, 45

Of solvency, 77

Of survivorship, 75

Of title, 53

Relative to mental states, 61

When conclusive, 41

Principal and Accessory. See Accessory

Principal and Agent. See Agency

Principal and surety. See Suretyship

Prisons, 85

Bonds and rules, 91

Convict labor system, 88

Power to maintain, 86

Support of convicts, 90

Private ways, 95

Acquisition by prescription, 103

Classification, 96

Creation by grant, 99

How lost or extinguished, 115

How revived when lost, 116

How used, 107

Obstructions in, 111

Of necessity, 96

Repairs of, 111

Right extra viam, 115

Rights in, 110

Right to locate, 105

Statutory, 118

When public, 106

Privileged communications, 121

Arbitrators testimony, 124

Between husband and wife, 152

Definition and classification, 122

Evidence offensive to public morals,

154

Judges' testimony, 124

Political matters, 123

Sources of information in criminal

prosecutions, 127

State secrets, 123

To attorneys, 127

To physicians, 147

- Privileged communications—*Contin'd*
 To priests and clergymen, 151
 Unprivileged communications, 155
- Probate and administration, 161
 Administration during absence, 216
 Administration during minority, 215
 Administration pendente lite, 216
 Administration with will annexed, 209
 Administrator de bonis non, 212
 Effect of decree, 206
 Effect of probate, 181
 Effect where intestate was alive, 184
 Intestacy essential to administration, 184
 Limitation of time, 187
 Nuncupative wills, 184
 Of what papers necessary, 174
 Partial probate, 183
 Probate jurisdiction, 162
 Probate in common form, 180
 Probate in solemn form, 180
 Procedure, 179
 Procedure on application for administration, 204
 Production of will, 178
 Proof of will, 183
 Public administration, 201
 Special administration, 218
 When administration may be dispensed with, 208
 Who entitled to administer, 188
- Process, 221
 Definition, 222
- Production of documents, 227
 At trial, 251
 Before trial, 227
 Corporate books, 231
 In hands of third persons, 257
 Non-judicial, 229
 Power of Congress to compel, 249
 Private, 242
 Semi-public, 231, 241
 Statutory regulations, 248
- Profanity. See Blasphemy
- Profits à prendre, 259
 Appurtenant, 260
 Definition, 259
 Distinguished from easement, 261
 How created, 262
 In gross, 260
- Prohibition, 263
 Against what courts or officers, 276
 Against whom issued, 275
 In what cases granted, 268
 Nature of writ, 263
 Procedure, 279
 Time of issue, 271
 What courts may issue, 266
 When refused, 273
- Promissory notes. See Bills and Notes
- Promoters. See Corporations
- Prosecuting attorney. See District Attorney; Public Officers
- Protest, 292
 As evidence, 296
 By whom made, 293
 Definition, 292
 Form, 293
 Waiver of, 297
 When necessary, 295
- Proxy. See Stockholders
- Public lands, 305
 Acquisition in general, 310
 Alienation before the issue of patent, 332
 Bounty lands, 330
 Cancellation of patents, 356
 Congressional control, 306
 Homestead, 323
 Land office, 340
 Mineral lands, 335
 Miscellaneous reservations, prohibitions and grants, 371
 Patents, 347
 Pre-emption, 312
 Public sale and private entry, 328
 Railroad land grants, 336
 School lands, 360
 Swamp lands, 367
 Timber lands, 331, 364
 Town sites, 362
- Public Officers, 378
 Abandonment of office, 562c
 Acceptance, 437
 Acceptance—knowledge of appointment, 438
 Accountability for property, 480
 Administrators, 514
 Appointing power, 418, 423
 Appointment, 417
 Appointment—condition precedent, 440
 Appointment—contracts to secure, 445
 Appointment—time, 440
 Attachment, 518
 Attorneys-at-law, 404
 Authority—in whose name exercised, 468
 Authority—ratification, 471
 Bond, 445
 Civil, 392
 Civil service examinations, 414
 Clerk of court, 562c
 Clerk of court—compensation, 562c
 Compensation, 525, 555
 Compensation of clerk of court, 562c
 Compensation—payable in what, 533
 Compensation—when payable, 534
 Conditional appointment, 428
 Confirmation of invalid appointment, 427
 Contracts, 510
 Corruption, 505

Public officers—*Continued*

County, 544
 County clerks, 547
De facto, 394, 493, 541
 Definition, 380
De jure, 394
 Delegation of authority, 461
 Deputy, 469
 Different departments, 451
 Disqualification, 406
 Disqualification—criminality, 409
 Disqualification to act, 470
 Duties, 477
 Duties—how performed, 478
 Eligibility, 397
 Eligibility—age, 402
 Eligibility—citizenship, 401
 Eligibility—color, 401
 Eligibility—mental capacity, 405
 Eligibility—property, 406
 Eligibility—residence, 402
 Eligibility—sex, 403
 Essential elements of various offices, 382
 Evidence of appointment, 435
 Executive, 391
 Executors, 514
 False imprisonment, 516
 Filling vacancies, 430
 Honorary offices, 393
 Indemnity, 540
 Injunction, 518
 Intruders, 396
 Irregular appointment, 428
 Joint authority, 465
 Judicial, 391, 486
 Kinds, 390
 Legislative, 391, 485
 Levy, 519
 Liabilities, 483
 Liabilities—burden of proof, 497
 Liabilities—compulsory deposit, 483
 Liabilities—criminal, 502
 Liabilities—default of private servants, 496
 Liabilities—funds, 499
 Liabilities—misfeasance, 495
 Liabilities—subordinates, 498
 Liability of public, 506, 557
 Mayor, 554
 Meaning of term, 380
 Military, 392
 Ministerial, 392, 490
 Municipal, 548
 Naval, 392
 Oath, 443
 Offices of profit, 393
 Offices of trust, 392
 Particular classes, 543
 Particular offenses, 504
 Police officers, 562
 Political offices, 391
 Power and authority, 448

Public officers—*Continued*

Power—how exercised, 455
 Preference to veterans, 412
 Presumptions, 459
 Procedure in actions, 562s*
 Ratification of authority, 471
 Reimbursement, 540
 Removal, 562a, 562f*
 Removal by judicial action, 562r
 Removal by legislative action, 562p*
 Resignation, 562r
 Resignation while insane, 562u
 Retroactive authorization, 422
 Rights, 523
 Right to hold office, 416
 Self-appointment, 423
 Sheriffs, 514
 Supervisors, 479
 Temporary absence, 420
 Termination of authority, 562o
 Term of office, 562k
 Torts, 514
 Traffic in office, 445
 Usurpers, 396
 Public prosecutor. See District Attorney; Public Officers
 Public records. See Records
 Purchase money mortgages, 574
 Chattel mortgages, 587
 Defense to foreclosure, 584
 Definition, 575, 583
 Priority, 575
 Statutes relating to, 589
 Purpresture. See Nuisances; Injunctions
 Quare clausum fregit. See Trespass
 Questions of law and fact, 598
 Acceptance of contract, 639
 Argument to jury upon law, 620
 Consideration of contract, 637
 Contracts, 635
 Customs, 635
 Delivery of Contract, 637
 Foreign laws, 635
 Intent, 657
 Interpretation and construction of written language, 646
 Laws and ordinances, 634
 Mixed questions of law and fact, 633
 Province of judge, 598
 Province of jury, 598
 Questions of fact, 625
 Reasonable time, 640
 Spoken words, 656
 Quia timet. See Bills Quia Timet
 Quietting title. See Bill to Remove Clouds.
 Qui tam actions. See Penalties
 Quo Warranto, 660
 Costs, 685
 Discretion of court, 665
 Fine, 684
 Judgment, 683

Quo Warranto—*Continued*

- Jurisdiction, 664
- Limitation; lapse of time, 667
- Municipal corporations, 674
- Nature of information, 661
- Nature of writ, 660
- New trial; review, 686
- Parties to proceeding, 675
- Pleading, 680
- Procedure, 678
- Public officers, 668
- Racing. See Gaming
- Railroad commissioners, 686
 - Appointment, 687
 - Compensation, 690
 - Powers and duties, 687
- Railroad pools, 691
 - Definition, 691
 - Equitable relief against, 693
 - When legal, 691
- Railroad securities, 694
 - Bonds, 719
 - By whom executed, 699
 - Construction, 702
 - Contracts of guaranty, 730
 - Definition, 694
 - Effect of reorganization of company, 762
 - Equitable mortgages, 697
 - Equities, 761
 - Foreclosure, 744
 - Foreclosure sales, 764
 - Form and construction, 696
 - Indorsement of bonds, 732
 - Payment of bonds, 741
 - Power to create, 694
 - Priorities, 714, 754, 763
 - Property covered by, 704
 - Ratification of execution, 701
 - Receivers' certificates, 752
 - Redemption, 743
 - Rights of purchasers at foreclosure sales, 771
 - Rolling stock, 716
 - Statutory liens, 698
 - Subrogation, 742
 - Trustees, 733
- Railroads, 775
 - Bridges, 870
 - Carriage, 903
 - Charters, 789
 - Citizenship and residence, 791
 - Construction and operation, 862
 - Construction, contracts, 872
 - Contracts between two companies, 818
 - Corporate contracts relating to stations, 817
 - Corporate existence, 798
 - Corporate power to contract, 815
 - Corporate powers as to stock, 810
 - Corporate powers generally, 803
 - Creation and organization, 785

Railroads—*Continued*

- Crimes against, 928
- Crossings, 867
- Crossings, signals, etc., 886
- Definition, 777
- Effect of legislative grant on liability for nuisance, 923
- Federal control, 894
- Highway crossings, 865
- Indictment, 926
- Leases, 895
- Legal status, 780
- Location, 826
- Miscellaneous powers, 823
- Nuisances, 921
- Right of way, 839
- Rolling stock, etc., 882
- Rules and regulations, 820
- Speed of trains, 885
- State regulation, 884
- Torts, 930
- Traffic arrangements, 812
- Rape, 946
 - Assault with intent to commit, 968
 - Civil action, 969
 - Definition, 946
 - Evidence, 958
 - Force, 950
 - Indictment, 953
 - Instructions to jury, 967
 - On whom committed, 948
 - Resistance and consent, 951
 - Who may commit, 947
- Real covenants, 973
 - Classification, 974
 - Definition, 973
 - Effect by way of estoppel, 1020
 - Further assurance, 984
 - Limitation, 1010
 - Measure of damages for breach, 1014
 - Notice to defend title, 1012
 - Parties liable upon, 1011
 - Quiet enjoyment, 982
 - Release, 1009
 - Right to convey, 981
 - Running with the land, 997
 - Seisin, 976
 - Title, 974
 - Warranty, 985
- Real property, 1028
 - Bargain and sale, 1072
 - Definition, 1029
 - Lease and release, 1075
 - Limitations, 1047
 - Modes of conveyance generally, 1070
 - Qualifications, 1043, 1056
 - Statute of Uses, 1060
 - Tenure, 1035
- Reasonable doubt, 1079
 - In civil actions, 1085
 - In criminal actions, 1079

Recaption, 1093
 Definition, 1093
 Of persons, 1094
 Of property, 1095
 Receipts, 1111
 As affected by parol evidence, 1115
 Conclusiveness, 1121
 Definition, 1112
 Effect by way of estoppel, 1128
 Effect generally, 1120, 1128
 Form and scope, 1113
 Nature, 1112
 Right to demand, 1114
 Words and phrases,
 Practicable, 1
 Practical, 1
 Practice, 1
 Precarious, 2
 Precept, 2
 Precincts, 2
 Precise, 3
 Predominant, 3
 Premises, 4
 Prerogative, 6
 Presentation, 32
 Presentment, 32
 Preside, 32
 Pretext, 82
 Prevailing party, 82
 Prevent, 82
 Previous, 82
 Price, 82
 Primage, 83
 Primary election, 83
 Prime, 83
 Principles, 83
 Print, 84
 Priority, 84
 Private, 94
 Privilege, 120
 Privity, 156
 Prize, 157
 Prize fight, 157
 Procedendo, 218
 Procedure, 219
 Proceeds, 221
 Processioning, 225
 Process verbal, 225
 Proclamation, 225
 Procure, 226
 Produce—Products, 226
 Profession, 257
 Profits, 257
 Promise, 282
 Prompt, 283
 Proof, 283
 Proper, 283
 Property, 283
 Proposal, 289
 Proprietary, 289
 Proprietor, 289
 Propriety, 290

Words and phrases—*Continued*

Pro rata, 290
 Prosecute, 290
 Prosecuting witness, 291
 Prosecution, 290
 Prostitute, 291
 Protect, 292
 Protestant, 298
 Protestation, 298
 Provided, 298
 Provisional, 299
 Provisions, 299
 Proviso, 298
 Proximate and remote cause, 300
 Prudential, 302
 Public, 302
 Publication, 567
 Public house, 305
 Public law, 377
 Public peace, 563
 Public place, 563
 Public policy, 565
 Publisher, 568
 Pueblo, 568
 Punishment, 569
 Purchase, 571
 Purchase money, 573
 Purport, 590
 Purposely, 591
 Pursuance, 591
 Qualification—Qualify, 592
 Quando acciderint, 593
 Quanti minoris, 593
 Quantum damnificatus, 593
 Quantum meruit, 593
 Quarantine, 594
 Quarrel, 595
 Quarry, 595
 Quash, 596
 Quasi, 596
 Quay, 597
 Question, 597
 Quota, 660
 Radius, 686
 Rank, 945
 Ransom, 946
 Rate, 970
 Ratification, 970
 Ravine, 970
 Read, 970
 Ready, 971
 Real, 971
 Real actions, 971
 Realize, 1027
 Rear, 1076
 Reasonable, 1077
 Reasonable care, 1078
 Reasonable time, 1089
 Rebuttal, 1093
 Rebutter, 1093
 Receiptor, 1111
 Receive, 1131

